

**Committee on the Better
Governance for Wales White Paper**

Report

September 2005

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Picture - Richard Rogers Partnership

Committee on the Better Governance for Wales White Paper

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BACKGROUND

- 1 The White Paper *Better Governance for Wales*¹ was published on 15 June 2005. The consultation period ends on 16 September. The Assembly appointed a special committee to consider the White Paper on 28 June. The Committee's terms of reference are to:
 - i. *Consider the proposals set out in the White Paper so far as they relate to the proposed new structure and its proposed legislative powers;*
 - ii. *Take evidence from organisations and individuals with a direct interest in the proposed new structure of the Assembly and its proposed legislative powers.*
- 2 The terms of reference exclude the issues in Chapter 4 of the White Paper (electoral matters), and this report does not therefore deal with them. The Committee is obliged to report by 19 September and will then cease to exist. Our Report is due to be considered in Plenary on 21 September.
- 3 Because of the timing of the summer recess, we had a very narrow window of opportunity to do our work. We undertook a heavy programme of oral evidence as follows:

Monday 4 July 9 to 11am

Mike German AM	Leader, Welsh Liberal Democrats
Sir Michael Wheeler-Booth KCB, Professor Laura McAllister	Former Richard Commissioners
Glyn Davies AM	Chair – Legislation Committee

Tuesday 5 July 5.30 to 7pm

Nick Bourne AM	Leader, Welsh Conservatives
Sir Christopher Jenkins KCB, QC	Former First Parliamentary Counsel

Wednesday 6 July 9am to 11am

¹ CM 6582

Dr John Marek AM	Chair - House Committee
Professor David Miers, David Lambert and Marie Navarro	Cardiff Law School
Paul Grice	Clerk and Chief Executive, Scottish Parliament (informally by video conference)

Thursday 7 July 10am to 1pm

John Osmond, Professor Keith Patchett	Institute of Welsh Affairs
Sir Jon Shortridge KCB	Permanent Secretary
Graham Pogson, Laurie Pavelin, Kevin Davies	National Assembly Trade Union Side
Gwenda Thomas AM	Chair – Equality of Opportunity Committee
Ashok Ahir	BBC Cymru Wales

Thursday 7 July 4- 6pm

Jeremy Colman Ian Summers	Auditor General for Wales Assistant Auditor General
Phil Jarrold	WCVA
Christine Gwyther AM	Panel of Chairs

Monday 11 July 9am to 1pm

Jenny Randerson AM	Chair – Business Committee
Roger Sands	Clerk and Chief Executive, House of Commons
Rt Hon Rhodri Morgan AM Hugh Rawlings	First Minister Director, Local Government, Public Service & Culture Department
Professor Robert Hazell, Professor Rick Rawlings	University College London & London School of Economics

Tuesday 12 July 5.30 to 7pm

Ieuan Wyn Jones AM

Leader, Plaid Cymru

Elin Jones AM

Thurs 21 July 2pm to 4pm

Professor Lord Morgan FBA

David Rosser

Business Wales

Ben Cottam

- 4 Many of those who gave oral evidence submitted written evidence as well, and we also received written evidence from a number of other interested individuals and groups. We are most grateful to those who gave evidence at such short notice. Their contribution, both to our work and the consideration of the White Paper, has been invaluable.
- 5 We have undertaken this inquiry with the intention of articulating an agreed Assembly response to the White Paper, as well as informing the wider public debate about the issues. Broadly, we welcome a great deal which is contained within Chapters 1 to 3 of the White Paper. In the rest of this Report, we will look at the various issues thematically. Our approach has been to avoid polemics, and wherever we can to adopt a consensual approach. When consensus has not been possible, we have set out the arguments on either side. We have approached each issue dispassionately, wishing neither to oversell nor to undersell the White Paper's proposals.

SPLITTING THE ASSEMBLY

The end of the corporate body

- 6 Rather curiously, Chapter 2 of the White Paper is entitled "A New Executive Structure". However, it is not just a new executive structure which is being constructed, but a new parliamentary structure as well. The Assembly has long recognised the need to separate government from legislature, and has taken a number of practical steps to give effect to this while keeping within the straitjacket of the Government of Wales Act 1998.² Indeed, when the Assembly endorsed the proposals of the Assembly Review of Procedure in February 2002, it "welcomed the group's adoption of the principle that there should be the clearest possible separation between the Government and the Assembly which is achievable under current legislation".³ What is proposed in the White Paper is the formal legalisation of the separation.
- 7 The creation of legally separate Legislature and Government had the full support of almost all our witnesses.⁴ The corporate body model, with its jumbling together of functions which most constitutions keep separate, was misconceived and confusing. Governments and Parliaments perform different tasks, and people simply do not understand the hybrid model which the 1998 Act created. As Professor McAllister put it, "clarity and accountability are always the watchwords of good governance and democratic accountability".⁵ The Auditor General told us that separation "should strengthen considerably the arrangements for financial management and accountability in the devolved Welsh public sector".⁶ We therefore agree with the White Paper that the corporate body model of the Government of Wales Act 1998 has had "undesirable consequences and limitations",⁷ and we welcome the proposal for its demise.
- 8 Both Sir Christopher Jenkins and Professor McAllister sounded a note of caution on the threat to consensual working which might result from the separation of the Assembly into Government and Legislature.⁸ Professor McAllister asked us to consider "how we might maintain at least some important dimensions of a more inclusive and participatory politics".⁹ We certainly agree that the end of the corporate body should not mean the introduction of a more confrontational style of politics. However, systems (such as those in Scandinavia) where Government and Parliament are separate manage to remain inclusive and participatory. Closer to home, there is evidence in Scotland of a co-

² Referred to in this Report as "the 1998 Act"

³ Record of Proceedings, 14 February 2002

⁴ The principal exception was Sir Christopher Jenkins – EV 2

⁵ Q 29

⁶ EV 12

⁷ para 2.4

⁸ EV 2 and 7

⁹ Q29

operative approach to the management of business across the parties.¹⁰

Ministers and the Assembly

- 9 Under the present corporate body structure, Ministers derive their powers from Plenary. They are Plenary's delegates. That delegation can be withdrawn partially or wholly at any time. This puts real power in the hands of a majority in the Chamber, though, as the White Paper says, it leads to insecurity for government.¹¹ Plenary has other important powers. If it passes a motion of no confidence in its First Minister, he or she must resign immediately,¹² although a successful censure motion of any Minister has no formal consequences. And Plenary must approve the Government's budget, albeit that it does not have the power to amend the budget proposals.¹³ In creating a new structure in the Parliament/Government model, it will be important to secure the right balance of powers between the Legislature and the Executive. If Government has the right to govern, Plenary must have the teeth which will require Government to account to it.
- 10 Ministerial accountability in the parliamentary context has been defined in Resolutions passed by both Houses of Parliament in 1996-7.¹⁴ Essentially the duties of Ministers are:
- to account, and be held to account, for the policies, decisions and actions of their Departments
 - to give accurate and truthful information to Parliament
 - to resign if they knowingly mislead Parliament
 - to be as open as possible with Parliament
 - to require civil servants who give evidence to parliamentary committees to be as helpful as possible in providing truthful, accurate and full information.

Later in this Report we will highlight a number of more or less conventional parliamentary mechanisms which we believe will be essential for the Assembly post-separation. But we believe that either a Standing Order which sets out the principles agreed in Parliament in 1996-7 should be agreed, with appropriate changes, for the post-2007 Assembly, or a Resolution in similar terms passed as soon as possible after the 2007 elections. **We recommend that there should be a clear statement of ministerial accountability to the post- 2007 Assembly.**

¹⁰ Q374

¹¹ para 2.4

¹² SO 2.9

¹³ SO 21.4

¹⁴ see *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd edition, pp 73-4

Appointment and dismissal of Ministers

- 11 One of the pragmatic changes which have been made in the Assembly has been the dropping of the “First Secretary” and “Assembly Secretary” titles contained in the Government of Wales Act 1998. All now accept the use of the terms “First Minister” and “Assembly Ministers”. We agree with the White Paper that these terms should have a statutory footing, and that the Ministers should be Ministers of the Crown.¹⁵
- 12 The White Paper says that the First Minister “will be appointed by Her Majesty from among AMs on the nomination of the Assembly”.¹⁶ It is silent on the process for that nomination or what happens in circumstances where a First Minister no longer has the confidence of the Assembly. As far as nomination is concerned, the process in Standing Order 2 appears to us to be satisfactory, though it is a matter for Standing Orders rather than the Bill. The Bill will, however, need to make provision for dismissal of a First Minister.
- 13 In a letter to the Chair of the House Committee,¹⁷ the First Minister has said that there will be “appropriate provision” in the Bill for the dismissal of a Government if Members have no confidence in it. In Scotland, the First Minister is obliged by law to resign if the Parliament resolves that it no longer has confidence in the Scottish Executive. If two-thirds of the Members of the Scottish Parliament so vote, the Parliament is dissolved and a special General Election held.¹⁸ **We believe that these are appropriate powers for the future Assembly, and we so recommend.**
- 14 The White Paper says that the First Minister will, after his or her appointment, “with Her Majesty’s approval, appoint other Ministers”.¹⁹ It is not clear whether the appointments will require the approval of Plenary. In Scotland, they do.²⁰ Other provisions are made in the Scotland Act about Ministers’ tenure of office, which seem to us to be both sensible and appropriate. **We are attracted by the provision of section 47 of the Scotland Act, and we recommend that similar provisions be considered in the Bill.**

Deputy Ministers and Number of Ministers

- 15 Deputy Ministers have existed unofficially in the Assembly for some time and therefore currently their role is unregulated and responsibilities are unclear. Their work in support of Ministers is regarded by the Government as important, but their positions are

¹⁵ para 2.6

¹⁶ para 2.6

¹⁷ EV 10

¹⁸ Scotland Act 1998 ss. 45.(2) and (3)

¹⁹ para 2.6

²⁰ Section 47 (2) of the Scotland Act 1998

unremunerated because the Senior Salaries Review Body will not make recommendations for their salaries until their position becomes official.²¹ The White Paper proposes to give Deputy Ministers an official status and salary. Under its proposals, Deputy Ministers would be appointed in the same way as Ministers.²² **We agree with the proposal to give a statutory basis to the role of Deputy Ministers.**

- 16 One of the problems of a small Assembly is that of too large a proportion of its Members holding paid office and of the patronage which this creates. At present Standing Order 2.5 limits to nine the number of Ministers. This is a reasonable number. If four Deputy Minister posts are created, and taking into account other paid offices in the gift of the party of Government (in normal circumstances, at least half of the Committee Chairs and one of the Presiding Officers), this means that over half of the governing party or coalition may be part of what is unkindly called the “payroll vote”. Sir Michael Wheeler-Booth suggested that “to lower the percentage of Members available to question the Welsh Government seems questionable”,²³ and a similar point was made by Professor McAllister.²⁴ Business Wales was also concerned with the effect on the size of the payroll vote which would result from the creation of salaried Deputy Ministers.²⁵ The Leader of the Welsh Liberal Democrats suggested that the upper limit on the payroll vote should be one half of the party of Government.²⁶ The number of paid Ministers is regulated in Whitehall by legislation, and we would like to see a similar mechanism in place in Cardiff. **We recommend that the maximum number of Ministers and Deputy Ministers should be regulated by the Bill, with the Assembly having the power to vary that number subject to a two-thirds majority in Plenary.**

Counsel General

- 17 The first Counsel General of the National Assembly was a civil servant, but, since his retirement, the post has not been filled. The Directorate of Legal Services has replaced the Office of the Counsel General, and the Director of Legal Services (a civil servant) provides legal advice to the Assembly Government, while separate legal advice is provided to the Presiding Officer, committees, Members in general and the Assembly Parliamentary Service. Under the White Paper’s proposals²⁷ the Counsel General’s post will be revived, but with important differences: the post will become a statutory one; the appointment will be by the First Minister, subject to the Assembly’s agreement; and he or she will be a member of the Welsh Assembly Government. He or

²¹ Report No 58 of the Review Body on Senior Salaries, paras 2.18 to 2.20

²² Para 2.6

²³ EV 1

²⁴ EV 7

²⁵ EV 20 and Q540

²⁶ QQ15-16

²⁷ para 2.9

she need not necessarily be a Member, though he or she will be able to address the Assembly and answer Members' questions. The appointment of a political figure as the chief legal advisor to a Government is entirely consonant with normal British practice, and we approve it.

- 18 The Counsel General, as a Minister, will not be the appropriate source of legal advice to the Presiding Officer, committees, Members and the Legislature's staff. It will be very important, however, that sound legal advice is available to them. For example, we would expect the Presiding Officer to need to take advice on the legality of draft legislation, just as the Government does. This is what happens in Scotland. This will be a matter which the new Commission, and, in advance of it, the House Committee, will need to consider.²⁸ There is also a reference in the White Paper to the Counsel General having the power "to refer to the courts any issue as to whether the Assembly (acting as a legislature) [is] acting within [its] legal powers".²⁹ It will be important for the legislation to make it clear that the Counsel General will not be in a position to go beyond the sorts of powers which the Lord Advocate has in respect of the legal competence of the Scottish Parliament, and that he or she will not, for example, have any special ability to call into question before the courts the decisions of the Presiding Officer. **We recommend that there be a clear separation between the role of Counsel General and the legal advice to the Assembly.**
- 19 The Leader of the Welsh Liberal Democrats raised the issue of an equivalent to the Advocate General for Scotland.³⁰ We assume that this will be a role for the Attorney General, but would welcome confirmation of this.

The Name of the Government

- 20 The White Paper says that "the Welsh Assembly Ministers collectively will be known as the Welsh Assembly Government".³¹ Many of our witnesses disliked this title. Professor McAllister called the name "ugly and, at times, confusing".³² The Leader of Plaid Cymru also thought the term "rather perpetuates the current confusion", and expressed his preference for the term "Welsh Executive".³³ The Leader of the Welsh Liberal Democrats and the Leader of the Welsh Conservatives also favoured the term "Welsh Executive".³⁴ The First Minister argued that retaining the title "Welsh Assembly Government" was intended to keep

²⁸ Q26

²⁹ para 2.9

³⁰ Q1

³¹ para 2.6

³² EV 7

³³ EV 17; Q491

³⁴ QQ17 and 74

things simple,³⁵ and we acknowledge that the title now has some currency. However, he did not press any argument of principle for the title. Indeed, there are reasons for change: “Welsh Assembly” was deliberately avoided in 1998 because of the somewhat exclusive sense in the adjective “Welsh”.³⁶ And to describe a Government as an “Assembly Government” is to risk perpetuating the mixing of the two branches. We do not talk of the “UK Parliamentary Government”. Ashok Ahir of the BBC made it clear that the greater the distinctness between the names of the two successor institutions, the easier it would be for the media to explain.³⁷ We understand that “Welsh Executive” does not find favour with some, who argue for “Government of Wales”. However, the United Kingdom Government might find that title too difficult to contemplate. Clearly there is no consensus on this issue. **We propose that the Bill allows the Welsh Assembly Government to change its title itself in the future if a consensus can be established.**

National Assembly Commission

- 21 The Chair of the House Committee told us that his Committee favoured the creation of a National Assembly Corporate Body on the model of the Scottish Parliamentary Corporate Body, as in section 21 of, and Schedule 2 to, the Scotland Act 1998.³⁸ This is a body chaired by the Presiding Officer and consisting of the person holding that office and four other MSPs. It provides staff and services to the Parliament, and holds property, enters contracts etc. It can delegate its functions to the Presiding Officer or to the Clerk of the Parliament (who is also a statutory office-holder under section 20 of the Scotland Act). The Clerk can in turn delegate to staff. We heard from the Clerk that these arrangements had been a success in Scotland. We understand from the First Minister’s letter to the Chair of the House Committee that it is the Government’s intention to follow the Scottish model. We see no reason for any departure of substance from the Scottish legislation when the Commission is established in Wales. **We therefore recommend that section 21 of, and Schedule 2 to, the Scotland Act 1998 be followed as closely as possible in establishing a National Assembly Commission.**
- 22 It will, of course, be important for the Commission’s activities to be properly scrutinised. In Scotland, the equivalent body is scrutinised by the Finance Committee, though, as the Chair of the House Committee said, this is not the only possible model.³⁹ Ian Summers of the Wales Audit Office told us that, as a public body, the Commission’s budget

³⁵ Q453

³⁶ It was thought that the “Welsh Assembly” would imply an Assembly with a particular concern for Welsh-speakers, or those in Wales who consider themselves Welsh

³⁷ QQ253-257

³⁸ EV 10 and Q113

³⁹ Q121

“should be subjected to no less scrutiny than the Government’s budget”.⁴⁰ We agree.

- 23 The Commonwealth Parliamentary Association – World Bank Institute Study Group on the Administration and Financing of Parliament made a number of key recommendations on the governance of Legislatures in May 2005. We set these out in an Annex to this Report. We believe that these principles should be applied to the Assembly post separation. **We commend the Commonwealth Principles on the administration and financing of Parliaments, and recommend that they should be followed by the United Kingdom Government where appropriate in the Bill, and thereafter in the drafting of Standing Orders and by the National Assembly Commission.**

Staff numbers and skills

- 24 Several of our witnesses pointed to the challenge for the Assembly Parliamentary Service post 2007, and suggested that the capacity and size of the service might need to be expanded.⁴¹ Christine Gwyther, on behalf of the Panel of Chairs, referred to the need to develop staff independent of the Government, and to the need for a greater number of staff to support committees.⁴² Sir Michael Wheeler-Booth told us that “other parliamentary bodies that have very limited numbers have compensated for this through superb staffing”.⁴³ The Chair of the House Committee stressed the importance of legal skills in the future, though he suggested that a gradual, rather than dramatic, expansion in staff expertise would be necessary.⁴⁴ Longer hours, or more committee meetings, will also require more staff resources in areas like security, translation and the Record of Proceedings. There may indeed be opportunities to re-focus staff efforts inside the Assembly Parliamentary Service, and we certainly would not advocate any wholesale increase in staff numbers. However, we believe that it would be less than honest to argue that the new roles which the Assembly Parliamentary Service is to undertake can necessarily be done inside existing staff budgets.
- 25 Staffing will not only be an issue on the side of the Legislature. The Government also may need more policy support, and will certainly need people with the very special skill of legislative drafting. On policy support, the Permanent Secretary told us that until he had a clearer idea of the amount of legislation which would be brought forward, he could not be sure what extra resource might be necessary. He described the creation of a drafting capacity as “challenging”.⁴⁵ The

⁴⁰ Q273

⁴¹ Leader of Welsh Liberal Democrats – Q10; Leader of Welsh Conservatives – Q61

⁴² Q347

⁴³ Q31

⁴⁴ QQ122-3

⁴⁵ Q207

First Minister thought that competence needed to evolve and develop, but was sure that “we will be able to cope”.⁴⁶

- 26 A particular concern of the Committee has been the need for expertise in the Welsh language as legislative competence grows. This was highlighted by the Chair of the Business Committee.⁴⁷ It is an issue for the Government in drafting legislation, as the Permanent Secretary acknowledged.⁴⁸ It is also a problem for the Assembly Parliamentary Service in advising Members and preparing amendments and so on. According to the Trade Unions, the shortage of bilingual staff “is potentially a big problem”.⁴⁹ We welcome the Chair of the House Committee’s views that the Legislature and the Government should co-operate in this area: there is no ready answer when expertise is in such short supply.⁵⁰ However, we believe that both the Government and the Legislature will need to make much more focused efforts to encourage the use of both languages, if need be by substantial investment in developing the Welsh language skills of key staff.

Status of staff of the Legislature

- 27 Under the White Paper’s proposals, staff of the National Assembly will no longer be civil servants, but employees of the Assembly Commission.⁵¹ The House Committee welcomed these proposals,⁵² and no concerns were expressed about the principle by the Trade Unions in their very positive evidence, though they raised a number of important issues.⁵³ First of all, they argued that existing civil servants in the Assembly Parliamentary Service should be able to retain their status by loan or secondment arrangements. Secondly they favoured a system of two-way secondments between the two organisations as well as an internal job market. They also recommended that there should be a statutory requirement on the Commission to keep terms and conditions broadly in line with those of the Welsh Assembly Government civil service. Finally they suggested various means of guarding against political interference in staffing issues.
- 28 The White Paper tells us that the Assembly “would be expected to maintain terms and conditions for staff broadly comparable to those applying to Assembly Government Civil Servants”.⁵⁴ The statutory link in section 2(2) of the House of Commons Administration Act 1978 (which provides that Commons’ staff terms and conditions must be “broadly in line” with those of the Home Civil Service) is a possible means of achieving this, though we do not believe that it will be

⁴⁶ Q422

⁴⁷ EV 14 (para 8); Q380

⁴⁸ Q209

⁴⁹ Q218

⁵⁰ Q134

⁵¹ para 2.20

⁵² EV 10 and Q110

⁵³ EV 17 and QQ214FF

⁵⁴ para 2.20

appropriate for the Assembly slavishly to follow the Government – there may be good operational reasons for some diversity. For example, the Chair of the House Committee suggested that Assembly Parliamentary Service staff may need to be paid a premium to reflect the fewer career development opportunities they will have within the Assembly Parliamentary Service.⁵⁵ Sir Michael Wheeler-Booth, with his experience of the House of Lords, also stressed the importance of good terms and conditions in attracting and retaining quality staff.⁵⁶ The Permanent Secretary referred to times of work and to pay as areas where there might be some variation,⁵⁷ and the Trade Unions recognised that it would be normal, over time, for there to be variation in the terms and conditions of staff working on the parliamentary side.⁵⁸ Nevertheless, **a statutory “broadly in line” provision would be a helpful reassurance to staff, and we so recommend.**

- 29 The Permanent Secretary expressed his hope for the “fullest appropriate permeability between the two sets of staff”, and suggested that there might be secondments which would obviate the need for staff on either side to go through the open competition route.⁵⁹ The Trade Unions found these words “reassuring”.⁶⁰ It was interesting to hear strong evidence in favour of permeability from the Clerk of the House of Commons also, and of the benefits which flow to parliamentary and governmental staff in consequence.⁶¹ We agree with this. **We recommend that there should be opportunities for the staff of the Welsh Assembly Government and the Assembly to serve in each other’s institutions. If necessary, the opportunity presented by the Bill should be used to remove any legal obstacle to the achievement of this.**
- 30 On the unions’ concerns about possible political interference or patronage in staff management matters, we see considerable merit in the possible involvement of the Civil Service Commissioners to validate the Commission’s appointment procedures, and the development of an appropriate Code to replace the Civil Service Code.⁶² We are assured by what we have heard from the Clerk of the Scottish Parliament and the Clerk of the House of Commons about the ways of operation of the Scottish Parliamentary Corporate Body and the House of Commons Commission respectively.⁶³ We are confident that our colleagues who will sit on the Commission (who will come from all political parties) will act as the Scottish body does as trustees of an impartial and

⁵⁵ Q110

⁵⁶ Q31

⁵⁷ Q200

⁵⁸ Q223

⁵⁹ Q199

⁶⁰ Q214

⁶¹ Q412

⁶² Q216

⁶³ Q414

professional parliamentary service, and will follow the principles set out in Annex A to this Report.

- 31 The White Paper makes it plain that Assembly Parliamentary Service staff will remain members of the Principal Civil Service Pension Scheme (PCSPS).⁶⁴ This was “very much welcomed” by the Trade Unions and by the House Committee.⁶⁵ The unions said that they would be concerned if pensions were in a “by analogy” scheme rather than the PCSPS.⁶⁶ We do not understand this to be the intention of the White Paper, where reference is made to the parliamentary schemes which are fully within PCSPS. We believe that full integration of Assembly Parliamentary Service staff in the PCSPS is welcome.

Statutory Duties of the Assembly

- 32 Under the Government of Wales Act 1998, there are a number of statutory duties placed on the Assembly:
- to conduct its business giving equality to English and Welsh (section 47);
 - to conduct its business with regard to the principle of equality of opportunity (section 48);
 - to make a Local Government Scheme and establish a Local Government Partnership Council (section 113);
 - to make a voluntary sector scheme (section 114);
 - to consult with business (section 115);
 - to exercise its functions with regard to the principle of equality of opportunity, and to report annually on this (section 120);
 - to make a sustainable development scheme and to report on it annually (section 121).

Whether any of these should remain statutory obligations, and whether the obligations should fall on the Government, the Legislature or both were issues which we explored.

- 33 The White Paper does not deal in detail with each of these duties. It says that “some specific statutory duties are laid on the Assembly” and exemplifies them by the duty to publish an annual report on equality of opportunity and to make a sustainable development scheme. The White Paper proposes that these duties will fall on Ministers and goes on to say that “in the same way, Ministers will in future be responsible for discharging the various duties currently laid on the Assembly to establish partnership or consultative arrangements with business, local Government or the voluntary sector”.⁶⁷

⁶⁴ para 2.20

⁶⁵ EV 16 and 10

⁶⁶ Q220

⁶⁷ para 2.13

- 34 On equality of opportunity, there are separate statutory duties in respect of business and functions. To take functions first, these will predominantly become the responsibility of Ministers after separation, and it will be appropriate for the section 120 obligations to fall on them. In addition, they should be required to lay the report they produce before the Assembly, to which they will be accountable. As far as the obligation in respect of conduct of business is concerned, it could certainly be argued that this is a rather curious obligation to place on a legislature. No such obligation exists in Scotland. However, the Chair of the Equality of Opportunity Committee argued strongly that the section 48 obligation should remain: its uniqueness was a strength and gave the Assembly a special focus on equality issues.⁶⁸ She also argued that section 120 should continue to apply to the legislature, but we see no need to distinguish in this way between business and functions so far as the parliamentary Assembly is concerned. Instead, it should be a duty on the Assembly Commission to have regard to equality of opportunity in all its activities. The Chair of the Equality of Opportunity Committee also argued for her Committee to remain in being post 2007. This will be a matter to consider when Standing Orders are drafted. **We recommend that separate equality of opportunity duties be placed upon the Government and the Assembly Commission as is appropriate to their different roles, and that both be required to lay a report annually before the Assembly.**
- 35 On the equality of the English and Welsh Languages, we would be content to see the existing section 47(1) re-enacted. However, we believe that section 47(2) is less relevant for a Legislature. Certainly we do not believe that it is appropriate for any successor regulatory body to the Welsh Language Board to regulate the Assembly's compliance. There have been no complaints about the current Bilingual Services Statement which has been adopted by the House Committee. We believe that there should also be a clear and appropriate bilingual obligation upon the Assembly Government. We do not believe that the obligation that standing orders should be in both languages (section 47(3)) is necessary in the Act.
- 36 The creation and maintenance of a sustainable development scheme is an obligation which is much more appropriate for a Government than a parliamentary institution. We would expect the Commission to manage the Assembly's resources within the best sustainability principles. As far as the Government is concerned, it should again be required to report to the Assembly on its sustainability actions. **We recommend that section 121 obligations should in future fall upon the Government, which should be obliged to lay an annual report before the Assembly and the Commission should report on its compliance.**

⁶⁸ Q232

- 37 The obligations in respect of Local Government, the voluntary sector and business are all rather different in the current Act. The weakest obligations are in respect of business. Business Wales and the Wales TUC both favoured a statutory obligation upon the Welsh Assembly Government to set up a Business Partnership Council.⁶⁹ We took no evidence on this from the Government, but we would like to see serious consideration being given to this proposal. On the parliamentary side, there would seem to be no need for a statutory obligation to consult business or trade unions. It is axiomatic that Members individually, as well as committees when they are taking evidence, will want to consult fully with the social partners. **We recommend that the Government considers seriously the proposal for a statutory obligation upon them to consult business and trade unions through a Business Partnership Council, but we see no need for such an obligation in respect of the Legislature.**
- 38 We take a similar view of the obligations in respect of the voluntary sector and Local Government. Local Government representatives were not able to give evidence to us because of the pressure of time. We did, however, receive evidence from the WCVA who proposed that the Voluntary Sector Scheme should be a responsibility of the Welsh Assembly Government, while the Voluntary Sector Partnership Council should be appointed by the Legislature.⁷⁰ In oral evidence, the WCVA argued that there had been considerable merit in the existing tripartite co-operation of the Government, the Plenary Assembly and the voluntary sector.⁷¹ We have no doubt of the advantages for Members and Committees in working closely with Local Government and the voluntary sector. It is clearly in the interest of everyone. We note that the White Paper says that it will “remain possible for AMs, including those from opposition parties, to attend” consultative meetings.⁷² We believe that any sensible Government would always make it their practice to bring elected representatives from all parties into such arrangements. However, **we agree with the United Kingdom Government that the obligations in respect of Local Government and the voluntary sector under the current Act should pass to the Government alone.**

Other powers of the Assembly

- 39 The Assembly currently has a number of powers under the 1998 Act. Some of these, including the powers to support culture and the Welsh language (section 32); to hold inquiries (section 35), and to hold polls (section 36) would most naturally fall to the Welsh Assembly Government to initiate, but might be for the Assembly in Plenary to

⁶⁹ EV 20 and 21 and QQ556FF

⁷⁰ EV 13

⁷¹ Q294

⁷² para 2.13

authorise. **We recommend that the Government outline its intention in respect of the powers under sections 32, 35 and 36 of the 1998 Act and that where appropriate the Assembly be empowered to exercise those powers by subordinate legislation.**

- 40 Section 33 of the 1998 Act says simply that the Assembly may consider and make representations about any matter affecting Wales. There is no such provision in respect of the Scottish Parliament. This section, however, makes it clear that the Assembly is competent to debate matters outside its devolved powers in the narrow sense. To ensure that its competence is clear and unchallengeable, **we recommend that section 33 of the 1998 Act be re-enacted in respect of the Legislature.**
- 41 Section 41 is a useful provision allowing the Assembly to make arrangements for co-operation with other public sector bodies. This will be valuable both to the Government and the Legislature. **We recommend that section 41 of the 1998 Act be re-enacted in respect of both the Welsh Assembly Government and the Assembly Commission.**
- 42 Section 45 has the effect of requiring the laying before the Assembly of appropriate documents which before 1999 would have been laid before Parliament. This obligation will need to remain. But it will also be necessary for future legislation, whether made in Parliament or the Assembly, to provide for the laying before the Assembly of any new classes of document. In addition, any existing legislative requirements to lay documents before the Assembly will need to be a requirement to lay the documents before the Legislature post 2007.
- 43 The Assembly has a large number of other powers and duties given under many enactments as well as the 1998 Act. As the White Paper notes, “as part of the formal separation of the Assembly’s legislative and executive elements, it will be necessary to decide, in relation to each function, who should be responsible for discharging it in the future.”⁷³ This is potentially a mammoth task, and will form a very lengthy Schedule to the Bill. Most functions will probably sit sensibly only with the Legislature or the Executive. But some may be more difficult to apportion. **We recommend that the parliamentary side of the Assembly be brought fully into the discussion on these matters.**

⁷³ para 2.11

COMMITTEES

New structure

- 44 The White Paper proposes⁷⁴ that the Assembly should in future be able to determine its own Committee structure, so freeing itself from what the Chair of the Business Committee described as “the very prescriptive” structure of the 1998 Act.⁷⁵ By contrast, the Scotland Act is wonderfully concise, with three simple provisions on committees set out in a Schedule to the Act.⁷⁶ None of our witnesses criticised this part of the White Paper, and most appeared to share Professor Miers’s view of the “liberating effect of the welcome proposal”.⁷⁷ **We welcome the freedom that the Assembly will have to determine its own Committee structure.**

Membership

- 45 The White Paper says that the United Kingdom Government agreed with the Richard Commission that effective scrutiny had not developed in Assembly Committees, and lines of accountability were blurred. This was because in part of the presence of Ministers in Subject Committees.⁷⁸ We were told that the Panel of Chairs is “very comfortable with the idea of not having Ministers or Deputy Ministers present”, and Christine Gwyther told us that “some of the best evidence and policy-making sessions” of the Economic Development and Transport Committee had happened when the Minister was absent. It was possible on these occasions to be less adversarial.⁷⁹ The Leader of Plaid Cymru also believed that the removal of Ministers from committees would encourage the sort of “collegiality” which is seen in House of Commons Select Committees,⁸⁰ while the Chair of the Equality of Opportunity Committee identified as one of her Committee’s strengths “the fact that it does operate without a Minister”.⁸¹ We certainly believe that Ministers should not be Members of Subject Committees. However, it is normal in Parliament and the Scottish Parliament for Ministers to participate in committee proceedings when legislation is being considered, and we would expect that to apply in the Assembly. It is not just legislative committees where Ministers can be present – the Modernisation Committee in the Commons is chaired by a Cabinet Minister. While we welcome the implication of the White Paper that Ministers should not serve on scrutiny committees, **we do not believe that there**

⁷⁴ para 2.16

⁷⁵ Q371

⁷⁶ Sch 3

⁷⁷ EV 8

⁷⁸ para 2.14 – 2.16

⁷⁹ QQ319-20

⁸⁰ Q472

⁸¹ Q235

should be any statutory prohibition on appointing Ministers to Committees.

- 46 If Ministers do not sit on committees, this does create a different problem. In an Assembly of 60 Members, if one party of, say, 30 forms a Government, it may have 13 Ministers and Deputy Ministers and one of the Presiding Officers. That would leave only 16 other Members of the Government party to make up the majority on all committees. We assume that committees' workloads are to increase significantly (we discuss this further below). If committees meet weekly, then it will be impossible to have Members serving on more than one principal committee and perhaps one subsidiary committee. In these circumstances, to distribute 16 Members around committees so that they form half of each means that we could only have three principal committees of 10 Members, or four of eight, or five of six. If committees meet fortnightly, then it might be possible to double the number of committees, with Members sitting on two principal committees. This would mean six committees of 10 members, or eight of eight or 10 of six. These will be very hard issues to be grappled with in the drafting of Standing Orders.
- 47 Sir Michael Wheeler-Booth suggested to us⁸² that Assembly Committees might be enlarged by the co-option of non-members as expert members. He thought this might be particularly beneficial to an Assembly of only 60. There was support for this idea from the WCVA who suggested that the Equality of Opportunity Committee, with its Standing Invitees, had "gone some way down that road".⁸³ Christine Gwyther (speaking personally) thought co-option was a possibility, though it would need to be "handled very carefully".⁸⁴ The Chair of the Business Committee was more sceptical, though she advocated the use of expert advisers by committees.⁸⁵ The issue of the lawfulness of co-option has, we understand, been raised in Scotland. While we would not wish to recommend it in Wales, **we believe that the Bill should make it possible for a future Assembly to decide to co-opt non-voting Members to committees if it wished to do so.** It is clearly desirable that there should be no doubt as to whether, for example the Standing Invitees to Equality of Opportunity Committee enjoy protection under the law of defamation.

Party Balance

- 48 One of the provisions in the Scotland Act relating to Committees requires Standing Orders to "include provision for ensuring that, in appointing members to committees and sub-committees, regard is had to the balance of political parties in the Parliament".⁸⁶ This contrasts

⁸² para 2.7 and Q36

⁸³ Q300. The European and External Affairs Committee also has Standing Invitees.

⁸⁴ Q324

⁸⁵ Q372

⁸⁶ Sch3 para 6(2)

with sections 54(2) and 57(8) of the Government of Wales Act which have the effect of requiring *each* committee (except a committee which exists solely to give advice) to be party balanced, as far as is practicable. The Scottish formulation is preferable because it allows a degree of latitude, as at Westminster where committee make-up is not arithmetically exact but is agreed among the “usual channels” so that fairness between parties is achieved across the board. This was the view of the Panel of Chairs.⁸⁷ After the 2003 Assembly elections, the fortuitous party make-up of the Assembly (30+12+11+6+1) made constituting committees of 10 relatively easy. But different size committees would not have worked so easily, while if the parties had varied up or down by two, it would have been difficult to achieve balance on each committee. We agree with the Leader of the Welsh Conservatives that “it would be undesirable for a political party that have a certain minimum representation [he suggested four] not to be represented” on committees. However, we would prefer the Bill to use the Scottish formula and so allow some greater flexibility. It will be necessary for there to be appropriate safeguards for smaller groups. **We recommend that the provision about party balance on committees in the Scotland Act be used for the National Assembly post 2007.**

Number, function and size of committees

- 49 We heard differing views about the number, function and size of committees post-2007. The First Minister did not wish to express a view on committee structure.⁸⁸ However, the Leader of Plaid Cymru favoured having fewer committees in order to help scrutiny, and the Leader of the Welsh Liberal Democrats was happy for this issue to be considered further, pointing to the easier time-tabling which would result from fewer committees.⁸⁹ While the Panel of Chairs believed that committees might need to be reduced in size to six or seven Members with some committees larger than others, the Leader of Plaid Cymru did not believe committees should be smaller. As we have already mentioned, the Leader of the Welsh Conservatives thought it would be undesirable if parties of four Members or more did not all have a seat on committees.⁹⁰ There was also discussion as to whether the Assembly should follow the House of Commons model of dividing legislative committees from scrutiny committees, or the Scottish model (which is the norm in Europe) of committees doing both legislation and scrutiny.⁹¹ Witnesses also pointed to the varying workload of different committees at present, and thought that this might be exacerbated in the future for the committees dealing with subject areas like health where the bulk of the legislation might be made. These are issues for the drafters of Standing Orders.

⁸⁷ Q317

⁸⁸ Q423

⁸⁹ QQ472,16

⁹⁰ QQ316,480,73

⁹¹ QQ7,363,316

- 50 There is a considerable worry that committees will be overwhelmed with their legislative agenda – a legislative agenda which, moreover, would be set by the Assembly Government. In consequence, committee-initiated scrutiny may go by the board. This view was expressed, for example, by the Leader of the Welsh Conservatives.⁹² To an extent this has happened in Scotland, especially in areas where there has been a heavy legislative agenda, such as Justice. The Chair of the Business Committee described this as “worrying”.⁹³ We believe that it will be vital to maintain what the Permanent Secretary described as “the balance ... between administrative oversight and scrutiny and legislative development and scrutiny”.⁹⁴ So much of the activity of Government is administrative rather than legislative, and committees must be able to keep tabs on that as well. Committees must certainly not just be reactive to Government priorities: as the Clerk of the House of Commons put it, the difficulty is to “strike a proper balance between doing things that are the Government’s agenda and setting your own agenda”.⁹⁵ Committees will therefore need to be “fleet of foot”, in John Osmond’s words, able to react to Executive actions, but not having their agenda set by the Executive.
- 51 We do not mean that committees in the new arrangements will be in conflict with Government. John Osmond told us that “the whole notion that the Assembly will engage in an iterative process with the Government on the development of policy will have to go – you will have to abandon that completely”.⁹⁶ However, it is possible to take a less absolutist line on the division between scrutiny and policy development, and indeed between scrutiny of administrative action and scrutiny of legislation: Professor McAllister told us that we should be “seeing policy development and scrutiny as part of the same linear equation”.⁹⁷ The role of committees is certainly to help to hold Government to account, but it is also to contribute to the better governance of Wales.

Powers of Committees

- 52 It will be most important for committees to have the necessary powers to require appropriate people to give evidence or to produce documents to them. The First Minister thought that the Assembly should have the same powers as the House of Commons.⁹⁸ But the powers will need to be given in legislation. This is because the powers are inherent in Parliament. In Scotland, they were given to the Scottish Parliament by sections 23 to 26 of the Scotland Act 1998. These formal powers are very much fallback powers, but they are vital in the

⁹² Q60
⁹³ Q363
⁹⁴ Q207
⁹⁵ Q410
⁹⁶ Q178
⁹⁷ Q29
⁹⁸ Q447

parliamentary armoury, as the Leader of Plaid Cymru argued.⁹⁹ **We recommend that provisions equivalent to Sections 23 to 26 of the Scotland Act be enacted in respect of the Assembly.**

- 53 A particular issue arises in the case of evidence by civil servants. This has been the subject of a long running debate between Parliament and Executive in the House of Commons, as the Clerk of that House told us.¹⁰⁰ Fundamentally, the Commons assert their right to summon any individual, including civil servants, while the Government asserts its right to substitute a Minister for a civil servant. The First Minister told us that he favoured following in Wales the United Kingdom Government's line in Westminster, while the Permanent Secretary suggested that committees should address invitations to attend "in the first instance to Ministers who can then decide whether they want to accept that invitation or to have an official respond on their behalf". Both the First Minister and the Permanent Secretary believed that Accounting Officers were in a different position.¹⁰¹ Laurie Pavelin, the representative of the senior civil servants' Trade Union, told us that "in most instances, senior officials would expect to continue to appear before committees, and I am certain that they would be very happy to continue to do so".¹⁰²
- 54 We expect that in the overwhelming majority of cases, the dialogue between Assembly Committees and the Government will be as the Permanent Secretary describes. However, there may be cases where Governments are less keen to accede to Committee invitations. **We believe that there should be a rule in Wales that if a Committee insists on attendance by Government witnesses, then the Government will always send either a Minister or an official.**

Business Committee

- 55 The Chair of the Business Committee argued that a committee to organise business, which also had the role of reviewing procedure, would be necessary post-2007.¹⁰³ This will be a matter for the drafting of Standing Orders, though we believe that it will be hard to conceive an Assembly post-2007 without a body like the Business Committee or the Bureau in the Scottish Parliament.

⁹⁹ Q483

¹⁰⁰ QQ394FF

¹⁰¹ QQ447 and 201

¹⁰² Q219

¹⁰³ Q365

LEGISLATION

Introduction

- 56 Legislation is the core work of a legislature. That cannot be said of the present Assembly. As the Chair of the Business Committee told us¹⁰⁴ “during the First Assembly only 3% of Committee time and 9% of Plenary time was devoted to consideration of legislation. Even these figures disguise the fact that consideration of a draft Order often took the form of a broad debate...consideration of detailed textual amendments was very rare”. By contrast the White Paper describes the future role of the Assembly as “primarily legislative”.¹⁰⁵ The proposals on legislative powers are indeed, as Sir Michael Wheeler-Booth put it,¹⁰⁶ “the meat” of the White Paper. But there were contrasting views of the proposals ranging from praise for their ingenuity – a “remarkably inventive middle way” according to John Osmond – through Sir Michael’s “thoughtful halfway house “ to the adjectives that Lord Morgan used such as “disappointing”, “cautious” and “piecemeal”.¹⁰⁷
- 57 It is common ground that the present legislative powers of the Assembly are unsatisfactory. The powers which the Assembly inherited were powers of the Secretary of State. As Sir Christopher Jenkins told us, these were not designed to enable the Assembly to change things in Wales, but designed as powers which a Whitehall Cabinet Minister (the Secretary of State for Wales) would exercise in combination with other Cabinet Ministers. They were also, as he put it, “an odd mixture – some trivial, some quite significant, but not having any rationale at all”.¹⁰⁸ In retrospect, the importance of secondary legislative powers was oversold in 1997/8, and the White Paper, in recognising that secondary legislation does not “give the Assembly the ability significantly to influence the legislative framework” and that there is a need to “re-balance legislative authority towards the Assembly”, implicitly acknowledges this.
- 58 On the other hand, an important point was made to us by Sir Christopher Jenkins about the distinction between primary and secondary legislation. From his viewpoint, it is Parliament alone that has primary legislative powers. All other legislative powers are secondary, including the powers possessed by the Scottish Parliament.¹⁰⁹ There is, of course, a gap between practical politics and constitutional legal theory. Nevertheless, Sir Christopher’s evidence was a reminder that the ends rather than the means are important.

¹⁰⁴ EV 14 para 8

¹⁰⁵ para 1.22

¹⁰⁶ EV 1

¹⁰⁷ EV 9, 1 and 6

¹⁰⁸ Q81

¹⁰⁹ QQ86-7

Therefore the White Paper is not to be judged by whether it is giving a particular sort of powers to the Assembly, but whether the Assembly is being given the powers it needs – and, of course, whether those powers are stable ones.

- 59 The White Paper outlines three stages – a wider and more consistent use of framework powers for the Assembly in legislation; post 2007, a power to pass law-making powers to the Assembly in areas delineated by Orders in Council passed in Parliament; and the transfer to the Assembly, after a referendum, of powers akin to those of the Scottish Parliament. We now examine each of these stages in turn.

Stage 1

- 60 Secondary legislative powers can be framed narrowly or widely. Traditionally Parliament has been careful to ensure that Ministers are not given powers which are too wide. That is entirely right. “Henry VIII clauses”, for example – the power to amend primary legislation by means of secondary legislation – have been used very sparingly. But it has been a major challenge for the Assembly to secure for itself wider secondary legislative powers than Whitehall Ministers despite the fact that these powers would be subject to a form of scrutiny in Plenary and Committees way above the perfunctory level of scrutiny to which secondary legislation is subject in the House of Commons. As the White Paper puts it “the Assembly is a democratically elected body, with checks and balances built into it through its robust legislative procedures – quite different in nature from an individual Secretary of State”. The deduction from this is that “that consideration should be the basis underlying Parliament’s deliberations when conferring powers on the Assembly”.¹¹⁰
- 61 What is now proposed is, in effect, what was hoped would happen when the 1998 Act was passed, as Sir Christopher Jenkins pointed out to us.¹¹¹ From time to time, the Assembly *has* been given greater latitude to make secondary legislation, including legislation which amends primary legislation. The Education Act 2002 is quoted in the White Paper, and was referred to by David Lambert and Marie Navarro as one of the “very limited occasions” when this has happened.¹¹² Other Acts have not been so permissive as the Education Act 2002. Although there have been a number of Wales-only Bills, and some specific Welsh clauses in England and Wales Bills, the use of framework clauses has nevertheless been disappointing. “Few and far between” was the judgement of the Leader of Plaid Cymru.¹¹³ According to the White Paper, this will now change: “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

¹¹⁰ para 3.5

¹¹¹ EV 2, para 8

¹¹² para 3.11; EV 3

¹¹³ Q476

detail of how the provisions should be implemented in Wales”.¹¹⁴ **We welcome this intention.**

- 62 The reasons for the non-use of framework powers to date are partly because of the strong disapproval of such powers in the House of Lords especially. The Lords Delegated Powers and Regulatory Reform Committee has always resisted giving excessive delegated power to Ministers, and in an early report it appeared to regard the Assembly in a similar light to Whitehall Ministers.¹¹⁵ Its attitude to the Assembly appears more recently to have changed as it has become more aware of the Assembly’s powers and the way these are exercised, though Lord Roberts of Conwy drew our attention to the Committee’s recent critical comments on the Commissioner for Older People (Wales) Bill.¹¹⁶ Fundamentally, the Lords Committee is sceptical of delegated powers which it regards as too large, controversial or politically contentious.¹¹⁷ It will be vital for the Westminster Government to convince the Lords Committee of the need to change its attitude towards Welsh legislation. We will ourselves be sending a copy of our Report to the Committee.
- 63 Another reason for the comparatively disappointing extent to which legislation has been framed so as to give the Assembly framework powers has been what Professor Miers called “the political culture” in London.¹¹⁸ This is of more fundamental importance than parliamentary considerations since, as Professor Miers puts it, “what Westminster is prepared to confer must initially depend on what Whitehall decides”. Professor Patchett referred to “two different cultures” in Whitehall Departments with some “power hoarding”, though he did detect some sympathy for a more consistent approach to devolution in the future.¹¹⁹ The First Minister agreed that, in the past “Departments simply varied in the degree of empathy with the principle of devolution”, and he hoped “that that inconsistency has been knocked on the head now”.¹²⁰
- 64 The White Paper is clear that there will be no delay in bringing this particular proposal into force. It tells us 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”.¹²¹ The First Minister told us that, as far as he was aware, London Departments were now aware of this new principle, and were implementing it, and Hugh Rawlings said that all Bill teams had been informed.¹²² It will be very important to monitor what Government departments do to

¹¹⁴ para 3.12

¹¹⁵ Eighteenth Report, Session 1997-98, HL 101

¹¹⁶ EV 11

¹¹⁷ Q167

¹¹⁸ EV 8;Q162

¹¹⁹ QQ171 and 191

¹²⁰ Q444

¹²¹ para 1.24

¹²² QQ448- 450

implement this new policy. Professor Rawlings pointed to the difficulty in persuading the whole flotilla of Whitehall Department to change course.¹²³ An important monitoring role could be undertaken by Subject Committees to whom Bills are remitted in the current Assembly. We also hope that the Welsh Affairs Committee of the House of Commons will look carefully at the Welsh provisions of Bills to see whether the policy of the White Paper is being followed. **We recommend that Assembly Committees to whom Bills are remitted report on the extent to which the policies outlined in paragraphs 3.9 to 3.12 of the White Paper are being implemented, and liaise with the Welsh Affairs Committee as necessary.**

- 65 Professor Rawlings pointed out that the White Paper did not say as much about Stage 1 as it might have done. For example, it did not describe any change in United Kingdom Cabinet procedures or in guidance on drafting legislation which might occur.¹²⁴ The need for clear guidance was also emphasised in a recent pamphlet by Alan Trench.¹²⁵ This is a matter which the Welsh Affairs Committee is better able to pursue in their forthcoming inquiry into the White Paper, and we shall draw it to their attention.
- 66 There is also something of a difference between the reference in paragraph 1.24 of the White Paper to delegating “to the Assembly maximum discretion in making its own provisions, using its secondary legislative powers” and paragraph 3.12 which speaks of giving “the Assembly wider and more permissive powers to determine the detail of how the provisions should be implemented in Wales”. The second reference could be construed more narrowly than the first, and **we would welcome a clearer explanation of the Government’s intention.**
- 67 The Leader of the Welsh Conservatives told us that Stage 1 would “have consequences for the way we work”.¹²⁶ We agree with this. If broad enabling powers are given to the Assembly, it is incumbent upon Plenary and Committees to examine their use in a much more effective way than has been done up till now. The Assembly’s current standing orders are designed for proper scrutiny of legislation. While they are hardly appropriate in the case of the mass of statutory instruments which the Assembly passes, they *are* appropriate for statutory instruments made under framework powers. More detailed consideration may lead to more amendments: the Chair of the House Committee reminded us that there may be 300 amendments considered in a single sitting at Westminster.¹²⁷ This is only

¹²³ Q456

¹²⁴ Q463

¹²⁵ Devolution Policy Paper 13, *Better Governance for Wales: An analysis of the White Paper on Devolution for Wales*, published by the Economic and Social Research Council research programme on Devolution and Constitutional Change

¹²⁶ Q57

¹²⁷ Q128

manageable there because of the Speaker's power of selection, a system used to facilitate debate. The Presiding Officer may need to exercise his powers of selection in a different way if we see many more legislative amendments tabled in Cardiff. **We recommend that the Business Committee and subject committees give special attention to any subordinate legislation made under framework powers, and the Presiding Officer consider whether s/he should exercise his/her power to select amendments if large numbers are tabled.**

- 68 The proposition that it is "safe" to give wide secondary legislative powers to the Assembly because their use is subject to democratic scrutiny falls away after 2007 when subordinate legislation making powers will, under the White Paper's proposals, fall to Welsh Ministers rather than the Assembly. It would be preposterous for Welsh Ministers to have *more* powers to make secondary legislation than their Whitehall equivalents. Professor Patchett suggested that there should be "guidance as to when Orders in Council rather than permissive provisions should be used and vice versa", and he argued for more "robusteffective and meaningful" scrutiny mechanisms for Welsh secondary legislation in comparison with Westminster secondary legislation.¹²⁸ Professor Rawlings went a stage further, arguing that powers under Stage 1 should be allocated to the Assembly rather than Ministers after separation. He believed that the Lords Delegated Powers and Regulatory and Reform Committee, and their Constitutional Affairs Committee, would take a dim view of framework powers residing with Welsh Ministers rather than being subject to proper Assembly scrutiny.¹²⁹
- 69 We agree with this analysis, and we take it a step further backwards. Where the Assembly has already been given powers which are more extensive than Whitehall Ministers, those powers should, post 2007, reside with the Assembly as a whole, rather than the Welsh Ministers. These framework powers should be implemented by Assembly Measure, a process which we will describe when we discuss Stage 2. We do not underestimate the difficulties in drafting the forthcoming Wales Bill which this will cause, but **we recommend that any secondary legislative power which has been given to the Assembly since 1999 or which will be given by primary legislation from now on should, if that power is more extensive than powers given to Whitehall Ministers, only be exercisable by Assembly Measure after 2007, and that Standing Orders ensure effective scrutiny of any powers directly vested in Assembly Ministers by Westminster.**

Stage 2

¹²⁸ EV 9 and Q178

¹²⁹ QQ456-61

- 70 What has become known as “Stage 2” is the innovative part of the White Paper. It is unashamedly a halfway house, reflecting what the United Kingdom Government regards as the absence of a consensus in Wales for “full law making powers for the Assembly along the lines of the Scottish Parliament model”.¹³⁰ Under the Stage 2 proposals, Orders in Council would give the Assembly power to pass what is tantamount to primary legislation in specified areas of policy relating to Wales for which Assembly Ministers are responsible. The power, once granted, would continue indefinitely, though it could be repealed. No Order in Council could cover the *whole* of one of the fields listed in Schedule 2 of the 1998 Act. Orders in Council would be made at the Assembly’s request, but would be subject to the Secretary of State’s agreement (which could not be withheld for trivial reasons) and parliamentary approval.¹³¹ Among the advantages of this procedure are that it will allow Assembly proposals for legislation to bypass the logjam of the parliamentary timetable and will allow the Assembly administration a gradual opportunity to achieve greater competence in the legislative process.¹³²
- 71 Some of our evidence argued that this halfway house was neither necessary nor desirable. The Leaders of the three opposition parties criticised the policy: for Plaid Cymru, it fell “substantially short” of the party’s aims of creating a “Parliament with primary law-making powers,” though it was “undoubtedly an advance on the present position”; for the Conservatives, there was a preference to move from Stage 1 to Stage 3 without the “haphazard and capricious” Stage 2, while the Liberal Democrats advanced similar arguments.¹³³ Robust defences of the need for Stage 2 have been made both by the Secretary of State and the First Minister in Plenary and elsewhere. All these comments are on the record, but it is not productive for the Committee to express a view on them. Instead we look at some of practical issues which arise from the proposals.

Extent of Powers

- 72 The first issue is the extent of the powers which would be granted under Orders in Council. At one end of the spectrum, it would be possible to have wide and extensive Orders in Council which could, as Sir Christopher Jenkins put it, “come close to giving the Assembly full competence to legislate in the Schedule 2 fields”.¹³⁴ David Lambert and Marie Navarro referred to the words in paragraph 3.16 of the White Paper that suggest that an Order in Council would allow the Assembly to “modify – i.e. amend, repeal or extend the provisions of Acts of Parliament in their application to Wales or to make new provisions”, and commented “what more can one ask for?”. For them,

¹³⁰ para 3.8

¹³¹ paras 1.25 and 3.14 to 3.21

¹³² see John Osmond EV 9 and Q178; Sir Christopher Jenkins Q82

¹³³ EV 17; Q63;EV 5

¹³⁴ EV 2; Q86

the proposals were “infinitely flexible” and “very efficient”.¹³⁵ Of course, we recognise that the cumulative use of Orders in Council in this way could be regarded as the achievement of primary legislative powers through the back door. This was a concern articulated by the Leader of the Welsh Conservatives.¹³⁶

- 73 On the other hand, Professor Patchett warned us that powers granted under Orders in Council could be “unduly restricted or coupled with limitations that power-retentive Whitehall departments consider to be necessary”. For him “the proof will be in the eating”.¹³⁷ There will also be difficult definitional issues if Orders in Council are too widely based, with the possibility that they will impinge on areas of non-devolved policy – something to which, no doubt, Whitehall Departments will be very alert.¹³⁸ An example used in evidence was a proposal for an Order in Council which would allow the Assembly to ban smacking of children: it could conceivably be done, but would depend on the width of the Order in Council. That could not intrude into the non-devolved area of the criminal law.¹³⁹
- 74 The White Paper sets out “a range of possibilities illustrated ... by examples from Wales-only legislation that has been passed at Westminster since devolution”.¹⁴⁰ These are “something very specific, such as the functions of the Ombudsmen in Wales ... something rather wider, such as the protection and welfare of children ... [or] something considerably wider, such as the structure of the NHS in Wales”. But while these examples are helpful, they are examples of specific legislation which has been passed. None of these pieces of legislation gave general and continuing powers to the Assembly to legislate in these areas, whereas this would be the effect of Orders in Council. What would be helpful would be for the Government to use these three examples and to provide mock-ups of what the Orders in Council would have said in each case.
- 75 There is some mystery over the provision in the White Paper that no Order could give the Assembly powers over the whole of any of the Schedule 2 fields. Sir Christopher Jenkins described this as “arbitrary” and without any rationale in the White Paper. On the face of it, he pointed out that “any minor (but not derisory) exclusion from the field would satisfy the condition”. When asked to speculate on the reason for the provision, he suggested that it might have been included to mark a distinction between Stage 2 and Stage 3.¹⁴¹ Professor Rawlings took the same view.¹⁴² David Lambert and Marie Navarro

¹³⁵ EV 3

¹³⁶ Q57

¹³⁷ EV 9

¹³⁸ Q31

¹³⁹ QQ150; 443

¹⁴⁰ para 3.18

¹⁴¹ EV 2 and Q94

¹⁴² Q463

suggested that the proviso might have been included “to distinguish the proposed new Assembly powers from subject areas legislative functions, such as possessed by the Scottish Parliament”.¹⁴³ The Leader of Plaid Cymru believed that “if this limitation were removed, it would begin to address...the fragmented nature of the Assembly’s powers”.¹⁴⁴ We note that it would be perfectly possible under the White Paper for, say, ninety percent of one field to be transferred under one Order in Council, and the remaining ten percent under another. **We recommend that a much clearer rationale be given for the prohibition on Orders in Council covering the whole of a field.**

76 Elin Jones AM gave us evidence on her particular concern that the Welsh language was one of the fields in Schedule 2 to the 1998 Act.¹⁴⁵ The Welsh language is clearly of much greater interest to the Assembly than it is to Parliament, and, in Elin Jones’s view, the whole of this field should be able to be transferred by a single Order in Council to the Assembly. This would not mean that all matters relating to the Welsh language would transfer to the Assembly. For example, as Elin Jones acknowledged, broadcasting is a non-devolved matter, and so S4C could not come within the Assembly’s remit by Order in Council unless and until broadcasting is devolved. Sir Christopher Jenkins also warned us that there might be reluctance in Parliament to transfer the whole of the field if, for example, parliamentarians were concerned about the potential effect on the private sector.¹⁴⁶ We ask the “appropriateness” question. Is it appropriate for the National Assembly for Wales to have legislative control over the Welsh Language in devolved areas? The answer to that appears to us to be “yes”. **We therefore recommend that consideration be given to special provision in the Bill in respect of legislation on the Welsh language.**

77 There are a number of issues relating to the term “fields” which are not clear from the White Paper. In paragraph 3.18, there is a reference to “fields listed in Schedule 2” of the 1998 Act, while paragraph 1.25 refers to “fields in which the Assembly currently exercises functions”. These are not coterminous even now: as Professor Miers points out, the functions transferred by the Fire Services Act 2004 do not fall within the Schedule 2 fields.¹⁴⁷ And the word “currently” is ambiguous: does it refer to the date of the White Paper or the date of the Bill or the date of future Orders in Council? The White Paper later tells us that the existing power under the 1998 Act to transfer additional functions of UK Ministers to Cardiff would remain, and that “the legislation would provide that if any functions were so transferred, the exclusion of legislative competence in respect of those matters could also be

¹⁴³ EV 3

¹⁴⁴ EV 17

¹⁴⁵ EV 4, QQ502 - 510

¹⁴⁶ Q102

¹⁴⁷ EV 8

removed”.¹⁴⁸ We assume that this means that future Transfer of Functions Orders could transfer responsibility to the Assembly (for example, for the police service) and that it would then be possible for a separate and later Order in Council to transfer legislative competence over part or the whole of the area transferred under the Transfer of Functions Order. **We believe that more detail should be provided as to the Government’s intention in respect of legislative competence in respect of any areas which might in future be transferred from London to Cardiff.**

- 78 In fact, the word “field” may be a little confusing, implying areas which have clearly defined boundaries. Most of the fields in Schedule 2 have very ragged edges, impinging at different points and to differing extents, on non-devolved matters. This will need to be taken into account in drafting both Orders in Council and Measures, and will be no easy task. However we note Sir Christopher Jenkins’s views that there should, in the interests of the development of devolution, be “some awkwardnesses”, and his view of the likely pragmatism with which boundaries will be settled.¹⁴⁹

Processes for Orders in Council

- 79 Our inquiry has thrown up some very contrasting views on the processes for Orders in Council, both in the Assembly and in Parliament. As the Clerk of the House of Commons put it, “how it would work exactly is not clear in the White Paper”.¹⁵⁰ Professor Miers’s evidence suggested that the process of obtaining an Order in Council would be complex, lengthy and fraught with obstacles. He described a procedure where a motion of great detail is put to the Assembly. Effectively he seemed to envisage a draft Order in Council, which set out its intention in detail, going through an evidence-taking and legislative procedure in the Assembly. The Order in Council would then pass through the Secretary of State filter, with the Secretary of State possibly wishing to modify aspects of the Order in Council to ensure it was “legally and constitutionally unimpeachable”. He then suggested that parliamentary committees would apply the rigour which has been shown by the Delegated Powers and Regulatory Reform Committee to the Order in Council, with special attention to any Henry VIII powers.¹⁵¹ Professor Patchett thought that “at least in the early stages, more probably for a longer period, the Orders in Council will not be simple documents at all”.¹⁵²
- 80 In contrast to this picture of a very detailed Order in Council which would have all the appearances of a parliamentary Bill (and one which had already been through a complex procedure in the Assembly), Lord

¹⁴⁸ para 3.27

¹⁴⁹ QQ94,99

¹⁵⁰ Q402

¹⁵¹ EV 8; QQ142-5,167

¹⁵² Q176

Evans of Temple Guiting, the Lords Minister who made the Statement on the White Paper, told Parliament that an Order in Council would probably contain no more than the Long Title of a Bill.¹⁵³ The First Minister endorsed Lord Evans's statement, telling us that it would be "completely unworkable" for legislation to be worked up and debated before being sent to Parliament.¹⁵⁴ From a former practitioner's viewpoint, Sir Christopher Jenkins believed that an Order in Council could be as short as a Long Title, though a complex proposal might need "a bit more".¹⁵⁵

- 81 The First Minister outlined to us his thinking behind Stage 2. First, he believed that additional powers should be sought for a purpose, not for "aggrandisement or status, but to have the tools to do the job".¹⁵⁶ Secondly he favoured the development of "custom and practice" in the relationships between London and Cardiff – an evolutionary process in the tradition of the flexible British constitution.¹⁵⁷ He stressed that what was envisaged in the Order in Council was in effect a question being posed to Parliament as to whether it was appropriate for the Assembly to be allowed to legislate in a discrete area. Parliament was not being asked to approve the legislation itself. In these circumstances, he believed that new procedures would evolve, and the Delegated Powers and Regulatory Reform Committee would be dealing with a new set of circumstances.¹⁵⁸
- 82 We hope that the First Minister is proved correct. We are, however, concerned that there may be caution, not to say reluctance, to allow the Assembly too wide a scope. The powers will be enduring ones, and we are sure that those who are sceptical about the Assembly will argue that, although the Assembly Government's stated aims are to do A, B and C, they might in the future attempt D,E,F and all the way to Z. However, the essential "logic of devolution", as Professor Rawlings put it,¹⁵⁹ is letting go of control. **We therefore recommend broadly framed Orders in Council, with the Secretary of State and Parliament deciding on the appropriateness of the devolution, not the detail of the laws which the Assembly will then make.**

Consideration in the Assembly

- 83 Even if the elaborate system which Professor Miers envisaged is not what will be required, there will be a need for proper consideration by the Assembly of any proposal for an Order in Council (and indeed, as we shall return to later, of any Measure made under that Order in Council). The importance of this scrutiny was emphasised to us by

¹⁵³ HL Deb, 15 June 2005 col1213

¹⁵⁴ Q425

¹⁵⁵ Q100

¹⁵⁶ Q419

¹⁵⁷ Q420

¹⁵⁸ QQ427,432 and 439

¹⁵⁹ Q464

the Leaders of Plaid Cymru and of the Welsh Liberal Democrats.¹⁶⁰ As Professor Rawlings said “the more that Westminster can see that the Assembly as a whole has had an input, the more impressed Parliament is likely to be when it comes to judge the appropriateness question”.¹⁶¹ This scrutiny will be a matter for Standing Orders. But we would envisage a norm of some form of scrutiny of the principle by Committee, involving the taking of evidence from interested parties, a report to Plenary and a vote in Plenary on an amendable motion.

- 84 The White Paper says that the Secretary of State would be obliged to reply to the Assembly Government if he or she were unwilling to accede to a request for an Order in Council, but implies that the request for the Order in Council would come from the Assembly, not the Government.¹⁶² Several of our witnesses were concerned that the request should be one for the Assembly as a whole to make, and that there should be mechanisms to allow Assembly Members other than Ministers or Committees, to initiate such requests. The Leader of the Welsh Liberal Democrats believed that an “open model” where Members other than Ministers could table motions, and where proposals were subject to scrutiny in committee and amendment in Plenary, was desirable.¹⁶³ Professor McAllister referred to the “real danger of Executive dominance”,¹⁶⁴ while the Chair of the Business Committee thought both that non-Executive proposals should be possible and that Assembly endorsement would give greater authority to Executive proposals.¹⁶⁵ The Leader of the Welsh Conservatives envisaged three routes “through the Executive, the full Assembly and ... Private Members’ Legislation”.¹⁶⁶
- 85 Several of our witnesses referred to the Private Members’ procedure for initiation of legislation under Standing Order 31. That Standing Order has its limitations because of the present legislative powers of the Assembly. The Chair of the House Committee thought that the Standing Order might be used to allow backbenchers to initiate Orders in Council.¹⁶⁷ The Leader of the Welsh Liberal Democrats called for special assistance to Members successful in the ballot.¹⁶⁸ The Leader of Plaid Cymru told us that he “would like to see an Assembly Member occasionally succeed in getting legislation through”.¹⁶⁹ We recognise, as Professor Patchett reminded us, that Private Members’ proposals are fragile flowers, seldom flourishing without Government support.¹⁷⁰ The First Minister saw the need for Private Members’ initiatives, in the

¹⁶⁰ QQ476 and 12

¹⁶¹ Q465

¹⁶² para 3.20 and 1.25

¹⁶³ EV 5

¹⁶⁴ EV 7;Q929

¹⁶⁵ EV 14

¹⁶⁶ Q66

¹⁶⁷ Q126

¹⁶⁸ Q1

¹⁶⁹ Q492

¹⁷⁰ Q177

same way as Private Members' Bills in the Commons: he told us that he did "not think that proposing measures should be exclusively a matter for the Government".¹⁷¹ We welcome this, though it is not clear whether he was intending to refer only to Measures and not to proposals for Orders in Council. **We recommend that Standing Orders should make provision for Members to initiate proposals for Orders in Council.**

- 86 In Scotland there have been several successful examples of Committee-generated Bills. Northern Ireland Assembly Committees can also initiate Bills. Giving evidence on behalf of the Panel of Chairs, Christine Gwyther was amenable to such a system in the Assembly though she stressed that the issue had not been considered by the Panel.¹⁷² **We recommend that Standing Orders should make provision for committees to initiate proposals for Orders in Council.**
- 87 In practical terms, it is possible to envisage a variety of different scenarios which will lead up to the request for an Order in Council. In the majority of cases, the initial stage is likely to be private Government-to-Government dialogue – what John Osmond called "doing the deal beforehand".¹⁷³ Where there is agreement between London and Cardiff (obviously easier when Governments of the same party are in power in both places, but quite possible when Governments are of different persuasions), an agreed proposal will be presented to the Assembly. This will be for endorsement by Plenary, after some pre-legislative scrutiny, though this might have preceded or even initiated the Government-to-Government dialogue. If endorsed, the formal request will then be transmitted to the Secretary of State, and the Order in Council laid before Parliament. There will be some scrutiny by parliamentary committee, before short debates in each House. It will then be the job of the Assembly Government to present a worked-up Measure for the Assembly's legislative process. Where a proposal is a back bench initiative, it would be likely that there would be more extensive Assembly scrutiny before a final vote was taken in the Assembly on whether to endorse the proposal. There might also be proposals for Orders in Council which an Assembly Government wished to send to the Secretary of State in a less co-operative way, challenging London to decline to accede to a majority decision in Cardiff.
- 88 What we would clearly want to avoid is a great deal of otiose work being done in Cardiff only for the idea to be turned down in London, whether by the Secretary of State or Parliament. This was a particular concern of the Leader of Plaid Cymru.¹⁷⁴ However, we assume that, in

¹⁷¹ Q421

¹⁷² QQ319, 339-43

¹⁷³ Q175

¹⁷⁴ Q470

normal circumstances, the preparatory work done by officials will detect the way the wind is blowing.

Role of the Secretary of State

- 89 The Secretary of State will act as a gatekeeper. The White Paper asserts that “clearly it would not be appropriate” for the Secretary of State to be compelled to accede to the Assembly’s requests.¹⁷⁵ This is an area where there was no consensus. Some argued that it was undemocratic to allow the Executive to interpose between one democratic body and another. Examples were quoted of requirements on the Secretary of State to put propositions to Parliament even if he or she did not agree with them (the reports of the Boundary Commission were cited).¹⁷⁶ Lord Morgan wondered whether the Secretary of State would be a conduit or a barrier, and pointed out that the White Paper did not even raise the issue of how a disagreement between the Secretary of State and the Assembly might be resolved.¹⁷⁷ If, as both the Leaders of Plaid Cymru and the Welsh Liberal Democrats anticipate,¹⁷⁸ proposals for Order in Council form part of the manifesto on which political parties fight the 2007 and subsequent Assembly elections, then the Secretary of State or Parliament are moving on to tricky ground if they are seen to trump that mandate. For the First Minister, while “the Secretary of State would undoubtedly have the right not to take it forward”, it was for the Assembly to make a convincing case of principle.¹⁷⁹
- 90 Many of our witnesses discussed the robustness or otherwise of the Stage 2 procedures, and particularly the issue of whether they could survive if Governments of different political persuasions were in power in London and Cardiff. The First Minister told us that he believed that, if custom and practice were established, the system would work in these circumstances – and indeed would work better than a system which relied on the Bill mechanism for meeting the Assembly’s wishes.¹⁸⁰ The Chair of the House Committee thought that there would be “change anyway over the years”.¹⁸¹ David Lambert and Marie Navarro believed it would be “very difficult for a Secretary of State not to put to Parliament a proposal which had overwhelming support in the Assembly – and, indeed, for Parliament to refuse to approve the proposal”.¹⁸² This view was shared by the Chair of the House Committee.¹⁸³ However, the Leader of the Welsh Conservatives did not think the system was durable, while the Leader of Plaid Cymru

¹⁷⁵ para 3.20

¹⁷⁶ Leader of Welsh Liberal Democrats, EV 5, Q1; Professor McAllister, Q29; Leader of the Welsh Conservatives, Q63

¹⁷⁷ QQ516, 518

¹⁷⁸ EV 17, QQ470, 471 and 1

¹⁷⁹ Q432

¹⁸⁰ QQ420 and 428

¹⁸¹ Q138

¹⁸² EV 3

¹⁸³ Q132

suggested that a Westminster Government could use “delay and prevarication” to frustrate the will of the Assembly Government, so leading to “endless constitutional wrangling”¹⁸⁴. Professor McAllister warned us that “any system that is based on goodwill is inherently unstable”.¹⁸⁵ It would be foolish to pretend that the new system does not have a number of rocks which will need to be steered around deftly, but this would be helped by greater clarity as to the circumstances in which the Secretary of State might decide not to accede to an Assembly request. This may be something which the Welsh Affairs Committee will wish to pursue.

- 91 According to the White Paper,¹⁸⁶ the Assembly makes a request for an Order in Council but the Secretary of State, if he or she is unwilling to proceed, would be obliged to reply to the Assembly Government within 60 days. Since the request comes from the Assembly and not the Assembly Government, it seems illogical for the reply not to come to the Assembly also. Professor Miers drew our attention to this.¹⁸⁷ This is not of great moment since the letter will have to be published in any case, but **we recommend that any letter of refusal be sent by the Secretary of State to the Presiding Officer.**

What happens in Parliament?

- 92 Orders in Council are a form of secondary legislation. They are, as the Clerk of the House of Commons told us, just a piece of machinery, some controversial, some not.¹⁸⁸ They are normally subject to affirmative resolution in both Houses of Parliament. In the House of Commons, this usually means consideration for a relatively short period in one of the Standing Committees on Statutory Instruments, or occasionally on the floor of the House. Even the Orders in Council which are, in effect, Northern Ireland primary legislation during the time the Northern Ireland Assembly is suspended are considered in this way. The White Paper envisages something more elaborate for the Orders in Council to transfer powers to the Assembly, arguing that it would be “likely - indeed, desirable - that they would be considered by Parliamentary Committees, or perhaps a Joint Committee of both Houses, before the Affirmative Resolution procedure in the floor of each House”.¹⁸⁹
- 93 The nature and extent of that parliamentary scrutiny was speculated upon by witnesses. Professor Miers and Professor Patchett had in mind the rather technical and close scrutiny of the House of Lords Delegated Powers and Regulatory Reform Committee, and awkward questions being asked about the appropriateness of Henry VIII powers

¹⁸⁴ Q58 and EV17

¹⁸⁵ Q34

¹⁸⁶ para 3.20

¹⁸⁷ EV 8

¹⁸⁸ Q403

¹⁸⁹ para 3.21

being given to the Assembly.¹⁹⁰ The Clerk of the House of Commons was “sure that the Select Committee on Welsh Affairs will want some kind of role in considering which areas of legislative competence should be devolved to the Assembly”, and he envisaged the possibility of joint meetings between Assembly and Commons Committees in some circumstances.¹⁹¹ Professor Rawlings believed that some form of pre-legislative scrutiny in Parliament was necessary “so that parliamentarians have a genuine forum to discuss the question and suggest amendments”.¹⁹² He also believed that some joint meeting with Assembly Members might also be appropriate. The Leader of Plaid Cymru was concerned that pre-legislative scrutiny might be used as a means of delay.¹⁹³ We are concerned that there should not be over-scrutiny of the Orders in Council. While recognising that the Assembly and Parliament have different jobs to do, flexibility must be built in to the system to allow for joint scrutiny where appropriate. It is, of course, for Parliament to decide what scrutiny it gives to Orders in Council.

- 94 Professor Hazell also referred to the possibility of what is known as the “super-affirmative” procedure.¹⁹⁴ This was a system introduced in both Houses at Westminster in 2001 for Orders which amend primary legislation (Regulatory Reform Orders, Remedial Orders under the Human Rights Act and certain Northern Ireland Orders). The fundamentals of the procedure are that these Orders are laid as Proposals for Orders. After laying, a 60-day consultation period begins, by the end of which Committees of both Houses, or a Joint Committee of both, must examine and report upon the proposal. After receipt of the report, the Secretary of State lays the final Order, explaining how (if at all) he or she has taken account of the changes proposed by the Committee or Committees. The Committee(s) then consider these documents again. In the case of Regulatory Reform Orders, if the Commons Committee is not satisfied, it may report to this effect, and the Order cannot be approved without a debate on the Floor lasting up to three hours. We can see some demand in Parliament for the “super-affirmative” procedure to be adopted for Stage 2 Orders in Council, and we will be interested to hear the Government’s view on this.

Wales-only Bills

- 95 There is a somewhat puzzling reference in the White Paper to Parliament continuing “for at least some years into the future to enact Wales-only Bills”.¹⁹⁵ Professor Patchett suggested to us that the Order in Council procedure “obviates the need to compete for a place for

¹⁹⁰ QQ143 and 176

¹⁹¹ Q415

¹⁹² Q464

¹⁹³ Q473

¹⁹⁴ Q466

¹⁹⁵ para 3.33

Wales-only Bills in the Government's legislative programme".¹⁹⁶ It is possible that Wales-only Bills will continue to be necessary over the period when the Assembly builds up its capacity to deal with Orders in Council and the resultant Measures. **We recommend that the Government outline the circumstances in which it would expect Wales-only Bills post 2007.**

Assembly Measures

- 96 Little is said in the White Paper about the legislative process in the Assembly which will follow Orders in Council. We understand that the Assembly will be asked to pass "Measures" – a term borrowed from the Church of England, and something of a half-way house between primary and secondary legislation in that context. It will be important to put in place proper systems for dealing with Measures. This is not just because legislation is improved by proper scrutiny but because, as Professor Patchett put it, it will be "the proof of the Assembly's capacity to handle legislation and it lays the foundation for a grant of primary powers in a securer way".¹⁹⁷ Hugh Rawlings told us that he expected the Bill to stipulate "some sort of basic principles, standards or procedures" for the scrutiny of Measures, and he drew our attention to section 36 of the Scotland Act.¹⁹⁸ Under that section, the Scottish Parliament is obliged to have a debate on the principle of its Bills, an opportunity for Members to vote on the details and a final stage at which a Bill is passed. In fact, in addition to this, the Parliament uses committees to take evidence on Bills. This is a classic parliamentary procedure, very similar to that used in Parliament also. We expect such a procedure to be followed in the Assembly: as the First Minister put it "until somebody comes up with a better [procedure], you are still going to come round to that sort of model".¹⁹⁹
- 97 We do, however, agree with the First Minister's approval of the use of expert witnesses and the consideration of legislation in draft.²⁰⁰ This has been a relatively recent change in practice in the House of Commons. As Sir Michael Wheeler-Booth put it "you want to have a process that allows a committee to do two things – to hear evidence from witnesses and test it".²⁰¹ **We recommend that the Bill requires three minimum stages for Measures: a debate on the principle; consideration of detail, with the possibility of hearing witnesses; and a vote on the final Measure.**
- 98 What we have said earlier²⁰² about the rights of ordinary Assembly Members and of Committees to initiate proposals for Orders in Council

¹⁹⁶ EV 9

¹⁹⁷ Q178

¹⁹⁸ Q424

¹⁹⁹ Q424

²⁰⁰ QQ434-5

²⁰¹ Q27

²⁰² see paras 84-5

also applies in the longer term to the initiation of Measures under Orders in Council.

- 99 Bills of the Scottish Parliament and the Northern Ireland Assembly receive the Royal Assent, as do Measures of the Church of England. Nothing is said in the White Paper about the final approbation of Assembly Measures – the act which converts them into law. At present, Assembly legislation is converted into law by being signed by the Presiding Officer. As we move closer toward the parliamentary norm, **we believe it would be appropriate for Assembly Measures also to receive the Royal Assent. We so recommend.**

Number of Orders in Council/Measures

- 100 We asked our witnesses how many Orders in Council or Measures they anticipated each year. The First Minister thought that there might be three to five; the Leader of Plaid Cymru three to six; the Leader of the Welsh Liberal Democrats thought “about seven”, based on Scottish experience; the Leader of the Welsh Conservatives spoke of six or seven; the Chair of the Business Committee thought up to 10.²⁰³ In a sense, discussion of the number of Orders in Council or Measures is of little point. Parliament is frequently criticised for passing too much legislation, and too much ill-considered legislation. It will be important for the Assembly not to fall into that trap. Ministers should not regard Orders in Council or Measures as trophies, and they should not be baited by Opposition parties for not having obtained them. On the other hand, an Assembly whose role is “primarily legislative”²⁰⁴ must expect a reasonable diet of substantial legislation. We return to the effects on the timetable of the Assembly later.²⁰⁵
- 101 One point which was raised by Alan Trench is the possibility that there might be one annual “jumbo” Order in Council.²⁰⁶ This would have the advantage of using up less parliamentary time, but would also be susceptible to failure if one of its elements were found objectionable. **We recommend that the Government clarify its intention so far as separate Orders in Council for separate policy goals are concerned.**

Stage 3

- 102 The White Paper envisages a third stage in the transfer of power to the Assembly. At some indeterminate date in the future,²⁰⁷ and following a two-thirds vote in the Assembly and a majority vote in Parliament, a

²⁰³ QQ436,470,493,5,64,381

²⁰⁴ White Paper, para 1.22

²⁰⁵ See para 142

²⁰⁶ Devolution Policy Paper 13, *Better Governance for Wales: An analysis of the White Paper on Devolution for Wales*, published by the Economic and Social Research Council research programme on Devolution and Constitutional Change

²⁰⁷ Not before 2011, according to the Secretary of State – HC Deb 15 June 2005, col 264

referendum could be held which would, if passed, result in the transferral of “primary legislative powers over all devolved fields direct to Assembly”.²⁰⁸ Comparatively little was said in our inquiry about this stage, except in the sense that some (like the Leader of the Welsh Conservatives or Lord Morgan²⁰⁹) called for Stage 3 to follow Stage 1. Quite a lot has been said elsewhere about the desirability or otherwise of a two-thirds majority in the Assembly and a simple majority in Parliament to trigger a referendum, but that was not raised in Committee, and we express no opinion upon it.

103 Sir Christopher Jenkins described this part of the White Paper as “sketchy” and said that elaboration of the phrase “transfer primary powers over all devolved fields to the Assembly” will be necessary: he asked in particular what was intended by the words “primary” and “devolved fields”.²¹⁰ Professor Patchett also asked some pertinent questions.²¹¹ We paraphrase them below:

- will an extended and detailed list of enactments protected from modification, and of reserved matters, be included in the Bill?
- if not, will this be done later by Order or by primary legislation?
- if by Order, why would Parliament allow these matters to be decided by Order for Wales when they were contained in the Scotland Bill?
- how will it be possible for a referendum to be held without this detail?
- how is a list drawn up now which will be relevant in, perhaps, ten years’ time when a referendum is held?
- will discussions of these areas bog down the parliamentary passage of the Bill?

More detail of what is envisaged for the legislation for Stage 3 would be helpful.

Other legislative matters

Future Secondary Legislation

104 It is proposed to transfer to Assembly Ministers “the kind of powers to make subordinate legislation traditionally exercised by Ministers under the Westminster (and Edinburgh) model”.²¹² In principle, this is unobjectionable. We have already expressed the view that where the Assembly has or will have powers *beyond* those of Whitehall Ministers, these powers should be exercised by Measure.²¹³ But where the Assembly has or will have the same powers as Ministers in London to

²⁰⁸ para 3.22 to 3.28

²⁰⁹ Q547

²¹⁰ EV 2

²¹¹ EV 9

²¹² para 2.12

²¹³ see paras 68-9

make subordinate legislation, it is appropriate for these powers to be vested in Welsh Ministers.

- 105 When an Assembly power is identical to a Whitehall Minister's power, we see no reason in principle why the Assembly should not use the same form of procedures (if any) to which that instrument is subject in Parliament. This will, in most cases, be annulment, but in the case of important instruments, affirmative resolution. However, the Chair of the Business Committee argued for the Assembly, not Ministers or the United Kingdom Parliament, to decide the form of scrutiny to which secondary legislation made by Welsh Ministers should be subject.²¹⁴ The Legislation Committee also regarded the form of scrutiny as an issue to be watched carefully.²¹⁵ Where the Assembly itself gives this power by Measure, it will be for the Assembly to determine the proper control over the Order-making power. Where Parliament gives the power to make subordinate legislation to Assembly Ministers, it should set minimum standards, but allow the Assembly to impose stricter standards if it decides to do so. Thus, for example, the Assembly should be empowered to decide that an instrument which Parliament says should be subject to annulment should be subject instead to affirmative resolution. In this case, however, the Assembly should not have the power to decide that the instrument should be subject to no procedure at all.
- 106 The Assembly should certainly not simply follow the parliamentary model of dealing with statutory instruments. "Technical scrutiny", as the Clerk of the House of Commons described it,²¹⁶ is done well in the Commons, but, according to a leading study of Parliament "there remains universal acceptance of the inadequacy of parliamentary scrutiny of secondary or delegated legislation" so far as the merits of the instruments are concerned.²¹⁷ This has been ameliorated somewhat by the establishment in 2003 by the House of Lords of its Merits of Statutory Instruments Committee which can draw the special attention of the House to (among other matters) any instrument which it regards as politically or legally important.
- 107 The Chair of the Legislation Committee told us that the "big benefit of the Committee at present is the fact that it is there". Although he was interested in other possibilities for the technical scrutiny of statutory instruments, perhaps by officials, he thought that the work of the Legislation Committee would remain necessary after 2007. However, his Committee did not believe that there needed to be a statutory requirement for the Committee (as there is at present) – this should be a matter for Standing Orders. He also suggested that the Committee's role might be expanded to be "judgmental" about statutory instruments, and, in a personal capacity, he said that he favoured the Committee

²¹⁴ EV 14

²¹⁵ EV 22

²¹⁶ Q141

²¹⁷ Griffith and Ryle on Parliament, ed. Blackburn and Kennon, 2nd ed., p768

having a role more akin to that of the Merits Committee in the House of Lords.²¹⁸ The Leader of the Welsh Liberal Democrats also favoured expanding the role of the Legislation Committee in this way.²¹⁹ The Leader of the Welsh Conservatives was concerned that there simply would not be any time for secondary legislation to be considered post-2007, and the Leader of Plaid Cymru was worried that Assembly Ministers would be subject to as few checks in making secondary legislation as the Secretary of State was before 1997.²²⁰

- 108 We accept that not all secondary legislation will be examined post-2007 in the same way by Members as it has been in the past. There is bound to be displacement by the meatier proposals for Orders in Council and Measures. We also accept that delegated legislation will be a matter for Ministers primarily. However, Assembly Members will not be doing their duty if they simply wave through Ministerial Orders. As the Clerk of the House of Commons told us, “ you have to be selective and accept that... you are delegating a power and there has to be a safety net to catch the really bad ones that might otherwise slip through”.²²¹ We also note Professor Patchett’s advice that it will help the Assembly to meet any concerns about Orders in Council in Parliament if “the scrutiny procedures in relation to secondary legislation are robust and effective and are seen to be much more meaningful, perhaps, than those that exist in relation to secondary legislation in London”.²²² While we accept that appropriate secondary legislation will in future be made by Welsh Ministers, **we recommend that the Standing Orders of the New Assembly make provision for both the technical examination of secondary legislation and the examination of the merits of important instruments.** We welcome the First Minister’s acknowledgement that this was a question for the Legislature, not for the Government, to decide.²²³
- 109 The Chair of the House Committee raised the issue of whether statutory instruments might be amendable.²²⁴ Under current Assembly procedures, if an amendment to a draft Order is passed by Plenary, the Minister is obliged to “prepare a revised draft Order which takes account of the amendments agreed by the Assembly”.²²⁵ We would envisage a similar procedure applying after 2007, with Plenary being able to pass an amendment to a motion to approve a statutory instrument to the effect that it “declines to approve X order unless amendments A,B and C are made to it”. For annulment, the Assembly could pass an annulment resolution with an explanatory addition explaining its reasons for doing so.

²¹⁸ QQ42-50; EV 22

²¹⁹ Q13

²²⁰ QQ68,484FF

²²¹ Q411

²²² Q178

²²³ Q423

²²⁴ Q112

²²⁵ SO24.21

Legislative Conventions

- 110 The issue of the Sewel Convention came up frequently in our inquiry. This is the procedure under which the Scottish Parliament agrees to the Westminster Parliament legislating in devolved matters. Professor Hazell set out for us a number of issues which have arisen in relation to Sewel.²²⁶ The First Minister regarded the Sewel Convention as a precedent for the legislative partnership between the Assembly and Parliament which the White Paper proposes. In his view, both were examples of the “evolution of an unwritten constitution”.²²⁷
- 111 David Lambert and Marie Navarro suggested that a convention like Sewel could arise in Wales “whereby the UK Parliament voluntarily agrees not to legislate for Wales in matters for which the Assembly is given competence by Orders in Council, unless the Assembly so requests”.²²⁸ The Leader of the Welsh Liberal Democrats also called for a “device by which we agree to allow the UK Parliament to pass legislation that will be devolved to Wales”²²⁹ but Professor Laura McAllister warned the committee about the drawbacks of the convention based on the Scottish experience.²³⁰ While a convention precisely like Sewel is not entirely appropriate in Wales at least until Stage 3, we would like to see a convention developing that primary legislation should not be passed at Westminster which will affect Wales in the fields for which the Assembly is responsible unless the Assembly, by resolution in Plenary, is content for that to happen.
- 112 This is not the only part of the legislative relationship between London and Cardiff which would benefit from the adoption of clear and agreed principles. The Assembly in the past has adopted the “Rawlings principles” to govern legislative relations, and many of these were publicly accepted by the United Kingdom Government.²³¹ The post 2007 Assembly will need new principles. Some were proposed to us by Professor Patchett.²³² They include guidance as to when Orders in Council or permissive powers would be used; a restriction on the future use of Henry VIII powers, with the use instead of Orders in Council/Measures; a convention that Orders in Council would only be repealed with the Assembly’s agreement, and guidance on when legislative powers in Bills should be conferred upon the Assembly and when upon Assembly Ministers. Professor Patchett suggested that these might be set out in the Devolution Chapter of the Cabinet Office’s guide to Legislative Procedures. We believe that the greatest

²²⁶ Q463

²²⁷ QQ433,437

²²⁸ EV 3; Q155

²²⁹ Q1

²³⁰ Q33

²³¹ See Government response to the Fourth Report of the Welsh Affairs Committee: The Primary Legislative Process as it Affects Wales (HC 989, Session 2002-03)

²³² EV 9

clarity in the complex legislative relationship between Cardiff and London is desirable. **We recommend the publication by both Governments of comprehensive guidance on the future legislative relationship between the United Kingdom Government/Parliament and the Welsh Assembly Government/National Assembly.**

Other matters relating to legislation

- 113 One issue raised in our inquiry was whether the Assembly would have any power to pass private legislation – that is legislation which is not public and general but which confers private or particular rights or is local in effect. Among others, this was mentioned by the Chair of the House Committee and the Leader of the Welsh Liberal Democrats.²³³ The Chair of the House Committee believed that private legislation powers were desirable, but that a truncated procedure, similar to that at Westminster since the passage of the Transport and Works Act 1992 rather than the full-blown and time-consuming Scottish procedure, was desirable.²³⁴ Under Section 37 of the 1998 Act, the current Assembly may promote or oppose private Bills in Parliament. We do recognise that the Assembly is far more likely to find time for private Measures applying to Wales than Parliament is. However, private Bills have taken up a great deal of time in the Scottish Parliament, where the procedures have sometimes proved onerous. It will be necessary to look very carefully at the processes used with regard to private Bills in the Assembly.
- 114 Professor Patchett argued for the advantages of a single constitutional Act for Wales to follow the White Paper.²³⁵ We agree. A constitutional document of this nature ought not to be spread over several enactments. Though there is a traditional reluctance, for reasons of parliamentary time management as much as anything, to re-enact provisions, we believe that comprehensibility of the settlement will be vital. **We recommend that the 1998 Act be repealed, with appropriate sections re-enacted through the Wales Bill.**
- 115 It is also important that the legislation made for Wales is accessible. David Lambert told us that “we could not have a more confusing system than the present one”; the Leader of the Welsh Conservatives spoke of “an unholy mishmash” and Professor Patchett identified nine different sources in the future for Welsh law.²³⁶ Although David Lambert believed that there was an opportunity in the new arrangements for more clarity through consolidation, there is equally likely to be even more confusion in some areas where primary legislation may have been amended by Measure. The publication of legislation has traditionally been a matter for Government. **We recommend that the Governments in both London and Cardiff**

²³³ QQ124 and 1

²³⁴ Q125

²³⁵ EV 9

²³⁶ QQ142, 66 and EV 9

agree on the means by which a “Welsh statute book” can best be made available.

BUDGETARY MATTERS

Consolidated Fund

- 116 In the absence of any power to withdraw delegated powers from Ministers, the most crucial weapon in the Assembly's armoury will be the "power of the purse". It is through the voting of a budget and the scrutiny of expenditure that a vital strain of Ministerial accountability to the democratic body is secured. A Government cannot remain in office if it is refused Supply.
- 117 Although the White Paper does not specifically mention a Consolidated Fund, the First Minister has indicated in his letter to the Chair of the House Committee²³⁷ that it is envisaged that a Consolidated Fund procedure, based on those used in Scotland and Northern Ireland, will be included in the Bill. The Auditor General described a Consolidated Fund Bill procedure as "absolutely consistent" with the principle of separation of Legislature and Executive.²³⁸ The formal position is that the Welsh Consolidated Fund will be an account held with the Paymaster General. The Secretary of State will pay the block grant into the Fund after deducting the amount required for the Wales Office. The Welsh Assembly Government will need to draw from the Fund in order to pay its bills. Ministers will therefore be required to prepare an estimate of their financial requirements and submit it to the Assembly for scrutiny and approval. The approved budget resolution (it may be in the form of a Measure but a simple Assembly Resolution may be sufficient) will give Ministers the legal authority to use resources and draw cash from the Welsh Consolidated Fund up to the amount specified in the resolution. When money is required from the Fund, the Government will request a credit from the Auditor General. On receipt of that credit, the Paymaster will transfer funds to the Welsh Assembly Government bank account. The Auditor General is performing what is known as a "comptroller" function, and he or she will be acting in the interest of Assembly Members by ensuring that amounts are only drawn in accordance with the law and approved budget resolutions.²³⁹
- 118 Separately, the National Assembly Commission will have to produce an estimate in the same form as the Government for scrutiny and approval by Assembly Members. Although the Commission will not be subject to Ministerial control, it will be a public body spending public money, and therefore subject to appropriate scrutiny. When the Commission's budget is approved, the Auditor General will grant credits on request for the drawing of funds in the same way as will happen with Government, and the Paymaster will transfer funds to the Commission's bank account.

²³⁷ EV 10

²³⁸ Q 273

²³⁹ Q 273 and EV 12

119 The Auditor General recommended that the Wales Audit Office should also receive its financing direct from the Welsh Consolidated Fund, rather than from Ministers, following Assembly approval of the annual budget prepared by the Auditor General.²⁴⁰ We agree with this proposal²⁴¹, and, although we did not take evidence on this, we assume that the budget of the Public Services Ombudsman for Wales should be treated in the same way. We agree with the White Paper's view²⁴² that appointments to the offices of the Auditor General and Ombudsman "should be seen to be entirely independent of executive authority in Wales". Budgetary independence will be important also. We return to the parallel issue of the Children's Commissioner later.²⁴³

Finance Committee

120 Some of our witnesses favoured the creation of a Finance Committee to inquire into budget proposals and report upon them before they are placed before Plenary. This is a model which operates successfully in Scotland, where proposals both of the Scottish Executive and of the Scottish Parliamentary Corporate Body are examined by the Parliament's Finance Committee. The Assistant Auditor General and the Chair of the House Committee both believed that that this was a possible model for the future, but argued against prescription.²⁴⁴ **We make no recommendations on this matter so far as the Bill is concerned, but we should like the possibility of a Finance Committee being considered when Standing Orders are drafted.**

Resource Budget

121 It is important for Members to be able to examine the way money has been spent as well as planned expenditure. The Auditor General recommended that "the legislation..... should require Ministers to prepare their annual budget on a resource basis" so that expenditure can be checked against budget.²⁴⁵ This is an essential prerequisite for Members to be able properly to scrutinise devolved public expenditure in Wales, and we agree with the Auditor General that the present arrangements are a "considerable defect" because accounts "throw very little light on whether or not the budget is being complied with".²⁴⁶ **We recommend that the Bill require budgets to be presented in such a way as will enable Members to compare outturn with approved expenditure.**

²⁴⁰ EV 12

²⁴¹ Separate arrangements may be appropriate in the case of audit, inspection and studies of Local Government.

²⁴² para 2.19

²⁴³ see para 135

²⁴⁴ QQ283 and 113

²⁴⁵ EV 12; Q279

²⁴⁶ Q 279

Audit Committee

- 122 The Audit Committee is the only committee which the White Paper proposes should continue to be a statutory requirement after separation.²⁴⁷ The Auditor General agreed with this proposal, pointing out that the Committee “performs an essential non-party political role in holding the public sector to account and helping to improve the delivery of public services”. He also told us that “key to its success is a close working relationship with the Auditor General for Wales and the Wales Audit Office”.²⁴⁸ We agree with this and have no difficulty with a statutory requirement for such a Committee – though the Chair of the House Committee thought even this was unnecessary since the Assembly would clearly wish itself to establish the Committee.²⁴⁹ We also agree with the Auditor General that the current functions of the Audit Committee are the right ones for the future as well.²⁵⁰
- 123 The Auditor General and Ian Summers did, however, favour a change in the name of the Audit Committee. Essentially, their argument was that the term “Audit Committee” has, since the Sharman report, become the term used in most organisations for their Corporate Governance Committee. Even the House of Commons has an Audit Committee, consisting of non-MPs, of this nature, though the Scottish Parliament has an Audit Committee with broadly similar functions to ours. The term “Public Accounts Committee” is not one which we favour. **But we believe that the Assembly should be free to give the Audit Committee any title it wishes, and we recommend that the Bill so provide.**

Other proposals

- 124 The Auditor General made a number of other proposals:²⁵¹
- That the holder of his office should be appointed by Her Majesty on the recommendation of the Assembly (as proposed in paragraph 2.19 of the White Paper);
 - That the Bill should provide that the Auditor General is not subject to the direction or control of Ministers or the Assembly;
 - That the requirement under the 1998 Act for the Audit Committee to consult the Secretary of State before modifying the Auditor General’s budget should be dropped;
 - That the Assembly, presumably by Measure, should be empowered to amend the list of public bodies which fall within the Auditor General’s remit.

²⁴⁷ para 2.16

²⁴⁸ Q278 and EV 12

²⁴⁹ EV 10 (para 18)

²⁵⁰ Q284

²⁵¹ EV 12

We agree with these recommendations.

OTHER ISSUES

Standing Orders

- 125 The White Paper proposes that the Assembly should have greater freedom to create its own procedures rather than being constrained by statute.²⁵² We welcome this; as Sir Michael Wheeler-Booth put it, the specific procedural requirements laid down by the 1998 Government of Wales Act meant that the Assembly's standing orders were "deeply flawed from the outset".²⁵³ Once again, the Scotland Act provides a better model than the Government of Wales Act. Certain minimum requirements are made in Schedule 3, and these are expressed more concisely than the equivalent provisions for Wales. We are very attracted to the idea of a minimum number of requirements being set out in a Schedule. **We welcome the Government's intention to provide for a lighter statutory regime for Standing Orders.**
- 126 There are, however, a couple of areas where the basis in law for the Assembly to take certain actions must be absolutely secure. Examples include the powers to stop payments to Members excluded from proceedings, or powers to impose conditions on visitors attending Assembly proceedings. **We recommend that the Secretary of State's officials liaise with officials of the Assembly Parliamentary Service on these matters.**
- 127 We recognise that there will need to be, as the White Paper puts it,²⁵⁴ "major amendments to the Assembly's Standing Orders". Current Standing Orders do not necessarily need to be scrapped in their entirety, however: the Chair of the House Committee argued that "rather than drafting a completely new set of Standing Orders, I would like to see us starting from our existing Standing Orders".²⁵⁵ Certainly many of the Assembly's current Standing Orders work well and are familiar to Members. There is no need for change for change's sake.
- 128 The White Paper also proposes that the Secretary of State should "take powers to make a new set of Standing Orders", assisted by an advisory committee.²⁵⁶ We received no evidence in support of this proposal among outside contributors, Sir Michael Wheeler-Booth pointed out that "parliamentary procedure is normally left to the Assembly concerned to regulate"; Professor Patchett thought it would be "very sad" if the Assembly were not allowed to draft its own Standing Orders, and Professor McAllister described the proposal as "unnecessary and patronising".²⁵⁷ From within the Assembly, the

²⁵² paras 3.30 and 3.32

²⁵³ EV 1

²⁵⁴ para 3.31

²⁵⁵ Q112

²⁵⁶ 3.31

²⁵⁷ EV 1; Q195 and EV 7

Leaders of the Welsh Liberal Democrats, Plaid Cymru and the Welsh Conservatives²⁵⁸ all argued for Members to have the prime role in writing Standing Orders. We were also told that the House Committee “believe that the Assembly itself, with its six years experience of working with its Standing Orders and supported by its experienced staff, is the only body capable of making rules to govern its proceedings”.²⁵⁹ The same view was expressed by the Chair of the Business Committee, who pointed to her Committee’s considerable expertise in this area and suggested that the Business Committee, with the Presiding Officer in attendance, might take the lead in developing and drafting the new Standing Orders.²⁶⁰ The Clerk to the Scottish Parliament also told us that the Parliament had benefited greatly from the ability to frame and alter its own Standing Orders. We also note the welcome offer by the Clerk of the House of Commons to provide technical assistance in the process.²⁶¹

129 The Chair of the Business Committee recognised that there might be a need for a backstop position if the Business Committee failed to agree on the new Standing Orders. She suggested that this might be the party leaders and, only if they failed to agree, the arrangements proposed by the Secretary of State.²⁶² The First Minister’s evidence suggested that this was the position to which the Secretary of State was now moving, rather than the position in the White Paper. He told us 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”, and he also told us that “we all accept that in principle it is better for the Assembly to do it than the Secretary of State”.²⁶³ We agree with this. The Assembly is a mature institution which can regulate its own procedure. It would be absurd for outsiders to do so.

130 We are confident that Members will be able to come together to write a set of Standing Orders which will govern our proceedings in the new Assembly. The Bill may need to contain default powers to allow the imposition of Standing Orders if no agreement can be achieved – we cannot have an Assembly elected in 2007 without Standing Orders – but we are confident that these default powers will not need to be invoked. If they were invoked, it would do nothing for the credibility of our institution. **We recommend that the Bill contain only default powers to allow the imposition of Standing Orders in areas where the Assembly has not been able to agree.**

131 The drafting of Standing Orders is a complex business. Until the Bill is published, it is difficult for that work to begin. But even the preparatory

²⁵⁸ EV 5, EV 17 and Q63

²⁵⁹ EV10, para 20

²⁶⁰ Q.362, EV 14 paras 14 and 15

²⁶¹ Q416

²⁶² Q362

²⁶³ Q447

work cannot be undertaken until it is clear where responsibility for drafting Standing Orders is to lie. It is in no-one's interest for Standing Orders to be considered in haste. **We therefore recommend that the Standing Orders of the new Assembly be drafted by Members and that the Secretary of State makes an early announcement to this effect.**

- 132 The White Paper makes no recommendation on whether the new Standing Orders will require a two-thirds or a simple majority for amendment. Because of section 46(6) of the 1998 Act, a two-thirds majority is needed to change Standing Orders in the current Assembly. Sir Christopher Jenkins told us that it was to be hoped that the Standing Orders would not be entrenched, and he drew our attention to the phrase "building on the foundations laid by the new Standing Orders" in paragraph 3.32 of the White Paper.²⁶⁴ This could be taken to imply an intention to entrench Standing Orders. The arguments in favour and against two-thirds majorities are finely balanced. A two-thirds majority is likely to mean that there is a broad measure of consensus for any change in Standing Orders, or for their suspension. However other Parliaments operate with a simple majority which can favour a Government if it holds more than half the seats, or opposition parties when a minority Government is in power. **We believe that the current position in section 46 (6) of the 1998 Act requiring a two thirds majority to change SOs should remain.**

- 133 Sir Christopher Jenkins argued persuasively for flexibility in Standing Orders and the Clerk of the House of Commons gave his advice to "leave plenty of space between the lines.... rather than being too detailed or prescriptive".²⁶⁵ We believe that this is wise advice. Standing Orders set the tramlines within which an Assembly or Parliament operates. They ought not to try to dot every "i" or cross every "t" in the way in which, for example, tax legislation must. While they must give clarity to some procedures, they must also provide some growing room, and opportunities for interpretation which suit the variety of political circumstances with which Members are faced. Only those with experience of parliamentary institutions, whether Members or officials, have the understanding necessary to draw them up.

Maladministration

- 134 The system of Ombudsmen is closely associated in the United Kingdom with Legislatures. The United Kingdom Ombudsman's proper title is the "Parliamentary Commissioner for Administration"; under section 91 of the Scotland Act, it is for the Scottish Parliament to make provision for complaints about maladministration; and in Northern Ireland, the Northern Ireland Commissioner for Complaints reports annually to the Assembly. This is because Ombudsmen and

²⁶⁴ EV 2

²⁶⁵ QQ95 and 416

elected representatives share a special responsibility for protecting the public against maladministration. Under the Public Services Ombudsman (Wales) Act 2005, the Ombudsman is appointed by Her Majesty on the recommendation of the Secretary of State, after consultation with the Assembly. The Ombudsman's reports are made (among others) to the First Minister. The White Paper says that the Ombudsman will in future be appointed by Her Majesty on the Assembly's recommendation because of the Government's belief that the appointment "should be seen to be entirely independent of executive authority in Wales".²⁶⁶ We welcome this, but we also believe that he or she should also be required to report to the Assembly annually, and be entitled to make special reports from time to time. **We recommend that the Bill be used as an opportunity to forge closer links between the Ombudsman and the Assembly.**

Children's Commissioner

- 135 We received written evidence from the Children's Commissioner for Wales which argued that his office should be appointed and financed in the same way as those of the Auditor General and the Public Services Ombudsman.²⁶⁷ This would protect the independence from Government which is vital for the Commissioner's success. These are persuasive points, and **we commend them to the Secretary of State.**

Standards Issues

- 136 We received as evidence a copy of the letter which the Chair of the Standards Committee has sent to the Secretary of State on Standards of Conduct issues.²⁶⁸ The letter makes a number of legislative proposals in the Standards area. All are endorsed unanimously by the Standards of Conduct Committee. First it is suggested that there should be a statutory basis for a post of Commissioner for Standards. Most notably, the Commissioner might then have powers to call for certain persons, papers and records; the right to determine when and how to carry out any investigation; the power to compel witnesses to co-operate; and clarity on the law on defamation in respect of his or her work. Secondly, the Committee makes proposals to provide a defence to the offences relating to non-declaration of interests in section 72 of the Government of Wales Act. Finally, the Committee expresses some concerns about the possibility that section 72 (4) might restrict Members from receiving expert assistance from voluntary and other specialist interest groups. We understand that the Standards Committee has spent considerable time in considering an appropriate standards regime for the Assembly, and has benefited particularly from the study of the Scottish Parliamentary Standards Commissioner Act 2002. **We commend the Chair of the Standards**

²⁶⁶ para 2.19

²⁶⁷ EV 24

²⁶⁸ EV 19

Committee's letter to the Secretary of State, and urge the United Kingdom Government to use the Wales Bill to give effect to the Committee's recommendations.

Defamation

- 137 The protection afforded to Members and to witnesses against any action for defamation is an important guarantor of free speech. We expect this to continue after 2007. We note that section 77 of the Government of Wales Act is much more complex than Section 41 of the Scotland Act. This might be an opportunity to revisit this. We also assume that actions of Ministers and of Government officials outside proceedings of the Assembly will not be privileged after 2007. If and when legislation is introduced in Parliament to implement the recommendations of the 1998/9 Joint Committee on Parliamentary Privilege, we hope that the opportunity will also be taken to examine the privileges of the other parliamentary institutions of the United Kingdom, including the Assembly.

Presiding Officers

- 138 We believe that the provision in statute that the PO and DPO must come from different parties should be removed. However, **the Bill should stipulate that for the Presiding Officers to come from the same party the relevant election (be it for PO or DPO) would require a two-thirds majority. We also recommend that the Bill contains provisions enabling a Deputy Presiding Officer to exercise the functions of the Presiding Officer in a situation where a Deputy Presiding Officer is authorised to do so or where the office of the Presiding Officer is vacant or the Presiding Officer is unable to act.** The use of the wording of section 19(4) and (5) of the Scotland Act would appear to be appropriate in this regard.

Size of the Assembly and names

- 139 The Leader of the Welsh Liberal Democrats argued that the legislative workload of the Assembly would be too great for a membership of 60.²⁶⁹ Professor McAllister told us that “60 Assembly Members is an unworkable figure now and will become even more so in an enhanced legislative body”.²⁷⁰ An obvious solution to this problem would be to enlarge the Assembly. The Richard Commission proposed an Assembly of 80, and several of our witnesses pressed the case for more Members.²⁷¹ We understand that the Secretary of State has canvassed the possibility of including within the Bill a power to increase the Assembly’s size to 80, if and when primary powers are given to the

²⁶⁹ QQ1 and 6

²⁷⁰ EV 7

²⁷¹ eg Lord Morgan Q534

Assembly.²⁷² However, both the Leader of the Welsh Conservatives and the Leader of Plaid Cymru acknowledged that an increase in the number of Assembly Members was, as Ieuan Wyn Jones put it, "a difficult argument to propose at present".²⁷³

- 140 We heard some support for the National Assembly to be renamed as the Parliament of Wales or Senedd – this was proposed by the Leaders of both the Welsh Conservative and Welsh Liberal Democrat parties.²⁷⁴ As in the case of the size of membership, or the name of the Welsh Assembly Government, there is a case for including in the Bill provisions which may allow the Assembly to be renamed in the future without recourse to primary legislation.

Working Hours

- 141 A new Assembly with new powers can be expected to meet for longer hours, both in plenary and committee. The present Assembly has been accused by the Secretary of State of not working hard enough. Certainly up until now, plenary sitting hours have been modest and committee meetings infrequent in comparison with other parliamentary bodies in the United Kingdom. We heard various estimates of what would be required in the future. The Chair of the Business Committee thought that the Assembly would in future be engaged in formal business for three whole days rather than the present two.²⁷⁵ The Leader of the Welsh Liberal Democrats thought committees would meet "on most days of the week".²⁷⁶ The Leader of Plaid Cymru also thought the Assembly would need to meet for "three full days", which might call into question some current practices, such as the timing of party meetings.²⁷⁷ One other change of practice advocated by the Panel of Chairs would be the freedom to hold committee meetings during Plenary.²⁷⁸
- 142 Speculation about sitting times is premature at this stage. But it is safe to say that proper legislative scrutiny will take time. Assuming that only three Orders in Council are made each year (this was the First Minister's lower estimate), and that each is followed by only one Measure, this means that six substantive pieces of legislative process will occur each year from about 2008 onwards. At the very minimum, we could expect ten hours in committee, and three hours in Plenary, on each of these Orders in Council or Measures, especially when pre-legislative scrutiny is included. Complex or controversial legislation will

²⁷² Devolution Policy Paper 13, *Better Governance for Wales: An analysis of the White Paper on Devolution for Wales*, published by the Economic and Social Research Council research programme on Devolution and Constitutional Change, para 2.43

²⁷³ QQ60, 472

²⁷⁴ QQ17 and 77

²⁷⁵ Q368

²⁷⁶ Q6

²⁷⁷ QQ476, 482

²⁷⁸ Q324

take longer. Taking into account the non-legislative scrutiny agenda as well, there will clearly be a major effect on current sitting patterns.

Recommendations of Commonwealth Parliamentary Association/World Bank Institute Study Group on Administration and Financing of Parliament – May 2005

The Independence and integrity of Parliament

- All Commonwealth Parliaments should implement “The Commonwealth Principles on the Accountability of and Relationship Between the Three Branches of Government”, especially those relating to the independence of the Parliament.
- Parliamentarians must be able to carry out their legislative and constitutional functions in accordance with their constitution, free from unlawful interference.
- Parliamentarians should maintain high standards of accountability, transparency and responsibility in the conduct of all public and parliamentary matters.

The governance of Parliament

- Parliaments should, either by legislation or resolution, establish corporate bodies responsible for providing services and funding entitlements for parliamentary purposes and providing for governance of the parliamentary service.
- There should be an unambiguous relationship between the Speaker, the corporate body and the head of the parliamentary service.
- Members of corporate bodies should act on behalf of all Members of the Parliament and not on a partisan or governmental basis.
- The corporate body should determine the range and standards of service to be provided to Parliament, such as accommodation, staff and financial and research services.
- Corporate bodies should promote responsible governance that balances the unique needs of Parliament with general legal requirements, such as employment law, freedom of information and occupational health and safety.
- The head of the parliamentary service should be appointed on the basis of merit and have some form of protected status to prevent undue political pressure.
- The head of the parliamentary service should be given appropriate levels of delegated authority.

Financial independence and accountability

- Parliaments should have control of, and authority to set out and secure, their budgetary requirements unconstrained by the Executive.
- The remuneration package for Parliamentarians should be determined by an independent process.

²⁷⁹ see para 23

- The corporate body should ensure that an effective accountability framework is in place.
- Corporate bodies should ensure regular monitoring of actual expenditure against the amount of money appropriated for parliamentary services.
- The corporate body should ensure compliance with generally accepted accounting standards.
- The head of the parliamentary service should have ultimate financial responsibility for the Parliament.

Parliamentary Service

- Parliament should be served by a professional staff independent of the public service and dedicated to supporting Parliamentarians in fulfilling their constitutional role.
- The corporate body should ensure that the parliamentary service is properly remunerated and that retention strategies are in place.
- The statutory terms and conditions for the parliamentary service should be based on the needs of the Parliament and not constrained by those of the public service.
- There should be a code of conduct and values for members of the parliamentary service.
- The parliamentary service should include not just procedural specialists but also staff with specialised expertise in such fields as finance, human asset management, research, communications and information and communications technology.
- Effective recruitment on the basis of merit and equal opportunity strategies should be in place that will ensure the parliamentary service is representative of the diversity of the wider community.
- Corporate bodies should promote an environment that encourages best practices for employee well-being.

Public accountability

- The corporate body should publish an annual report on its work on behalf of the Parliament, including information on the audited accounts and budget estimates.
- There should be an information strategy detailing how the membership and operations of the Parliament will be communicated to the general public.
- Parliaments should develop programmes to promote the general public's understanding of the work of the Parliament and, in particular, to involve school children in increasing their awareness of citizenship issues.
- The corporate body should ensure that the media are given appropriate access to the proceedings of Parliament without compromising the dignity and integrity of the institution.

ANNEX B

Committee on the Better Governance for Wales White Paper List of Written Evidence Submitted to the Committee

Page Number	Evidence Number	Submitted by
66	BGW2 EV1	Sir Michael Wheeler- Booth
70	BGW2 EV2	Sir Christopher Jenkins
72	BGW2 EV3	Cardiff Law School – Marie Navarro and David Lambert
77	BGW2 EV4	Elin Jones AM
79	BGW2 EV5	Michael German AM
83	BGW2 EV6	Professor Lord Morgan of Aberdyfi
84	BGW2 EV7	Professor Laura Mcallister
88	BGW2 EV8	Professor David Miers
93	BGW2 EV9	Institute of Welsh Affairs
102	BGW2 EV10	Dr John Marek AM, Chair of House Committee
109	BGW2 EV11	Lord Roberts of Conwy
110	BGW2 EV12	Jeremy Colman - Auditor General for Wales
112	BGW2 EV13	Wales Council for Voluntary Action
114	BGW2 EV14	Business Committee (National Assembly for Wales)
117	BGW2 EV15	Dr Russell Deacon Parliament for Wales Campaign
118	BGW2 EV16	Trade Union Side
120	BGW2 EV17	Ieuan Wyn Jones AM
122	BGW2 EV18	Dr John Cox – Parliament for Wales Campaign
128	BGW2 EV19	Committee on Standards of Conduct (National Assembly for Wales)
130	BGW2 EV20	Business Wales
133	BGW2 EV21	Wales TUC
134	BGW2 EV22	Legislation Committee (National Assembly for Wales)
135	BGW2 EV23	Nicholas Bourne AM
136	BGW2 EV24	Lord Livsey of Talgarth
138	BGW2 EV25	Children's Commissioner for Wales
139	BGW2 EV26	William Graham AM

Comments on the White Paper 'Better Governance for Wales' (Cm6582)

By Sir Michael Wheeler-Booth

1. These comments reflect membership of the National Assembly Standing Orders Commission 1998-1999 and of the Richard Commission 2002-04. On the first of these Commissions we were tied down by the preceding Government of Wales Act 1998, which had over seventy specific procedural requirements for the Assembly laid down in the Act in great detail, unlike in the Scotland Act, 1998 where the Scottish Parliament was left fairly free. In consequence the first standing orders for the National Assembly were deeply flawed from the outset. Further the Act, while passing into law, was radically changed from its original conception of a committee based system (on local government lines) to a cabinet system more akin to Westminster, without being withdrawn and redrafted in its entirety. The consequence was that the Act was over long, badly drafted and over-prescriptive.

2. The Richard Commission on the Powers and Electoral Arrangements of the National Assembly for Wales (hereafter 'Richard') on the other hand was set up by the National Assembly Government, led by the First Minister, Rhodri Morgan, with wide terms of reference, which in no way fettered the scope. In consequence, the Report was evidence-based and carefully reasoned. We found that Welsh devolution was evolutionary and with a dynamic of its own (p.10). The evidence suggested that Welsh devolution from 1998-2003 had been "second class" (p.12), in comparison with Scotland or N. Ireland. "Executive devolution" was muddled in conception and indeed that it was astonishing it had worked as well as it had, a reflection of the wish by all concerned, including the newly elected A.Ms to make a success of devolution and of the desire of the governments in Whitehall and Cardiff of similar political complexion to co-operate². We were repeatedly reminded of the 'Redwood' era in Welsh history, and the likelihood that sooner or later administrations of a differing political colour would occur, which would cause major problems to the National Assembly.

3. The existing Assembly has made remarkable progress given the inherently unsatisfactory nature of its present powers. If these were extended to include primary legislation, it would present a challenge to members, which would lead inevitably to a change in calibre. The existing split accountability between London and Cardiff is confusing for the citizen and unsatisfactory in terms of democratic legitimacy.

4. It follows that my reaction to the Government White paper is one of 'two cheers', in particular that they do not follow the logic of a desire for "more accountable, participatory and effective" reformed structure of government to its conclusion, which would be more nearly on the lines of the Richard Report. In particular, they neglect the recommendations for a bigger assembly elected by STV in order to carry the legislative load, nor for the tax raising responsibilities appropriate to an elected body (even a Parish Council has such powers).

5. Richard was the first ever systematic review of the constitutional arrangements between Wales and England. Whatever the outcome of the White paper, Richard will provide material for later developments, recalling Ron Davies's oft quoted remark that Welsh devolution is "a process, not an event". Although arguably it would have been better to have done as in Scotland and had a constitutional Convention, with the carefully drafted reports of the 1990s as precursors to actual devolution story of 1997-1999, Wales is now enabled to learn from the lessons elsewhere. (see [Key Proposals for Scotland's Parliament: A report to the Scottish Constitutional Convention](#) and the subsequent [Report of the Consultative Steering Group on the Scottish Parliament Dec. 1998](#))

Specific Comments on the White Paper**Foreword and Introduction**

6. It is noticeable that although the British government now claim credit, it was the National Assembly who observed through their own experience that "executive devolution" does not work satisfactorily and set up the Richard Commission. And now HMG select only certain proposals for extending the devolution settlement.

² Hearing evidence

7. Although the government in the White Paper seem not to have considered recent procedural developments in Edinburgh and Cardiff, it would be desirable that the recent changes of legislative scrutiny in the Commons, Lords, National Assembly and Scottish Parliament should be taken forward, with each parliamentary assembly willing to learn from the experience of others.

Chapter One

8. p.5 1.2 The original Labour proposals for devolution from 1995 "Shaping the Vision" prepared for the May 1995 Labour party conference - on "The Powers and Structure of the Welsh Assembly", was a typescript of 9 pages, which contained only the barest outlines of the original scheme - with many of the proposals radically different to those eventually put to the electorates in 1997 and 1998. It suggested, for example, 'the first past the post' system of election to the Assembly, instead of proportional representation.

9. p.5 1.4 It would be "Parliament" rather than "Government Ministers" which would transfer functions to the Assembly?

Chapter Two: A New Executive Structure

10. These proposals are directly based on the Richard report, and follow a lead from the Assembly in February, 2002 and are extremely welcome.

11. Ministers p.13 2.6. The institutionalising of Deputy Ministers will lead to an even greater proportion of the Assembly membership being salaried front benchers, and not part of the back bench section of the Assembly. In an Assembly of only 60, to lower the percentage of members available to question the Welsh government seems questionable.

12. p.14 2.9 The approximation of the role of the Counsel General to that of the law officers at Westminster, with the important distinction that he will not be a member of the Assembly confuses the role of a member, with that of an adviser.

13. p.15 2.12 It is not clear by which authority differing statutory instruments will be made, but the suggestion is that some will be made by Welsh Ministers, with provision for either approval (the 'affirmative procedure'), or subject to annulment ('negative procedure'). At present under the complicated procedures laid down in the Government of Wales Act, SS, 58, 64, 55, the Assembly may amend S.I.S - unlike in Parliament where each House can either approve or reject instructions, but not amend them. The White Paper suggests that the details of these procedures have not been worked out - they will require careful scrutiny.

14. p.18 2.20 In order to attract good recruits, Assembly Staff must have not only broadly comparable terms and conditions as civil servants but arrangements made for loan interchange ability with the Home Civil Service, including those of Scotland and Northern Ireland and possibly with other occupations, business, academic, law, banking and others. First rate staffing will be even more required if the Assembly is to be kept at 60 and yet have additional tasks to perform. In the exchange in the Statement, reference was made to increases in the Wales Office staff in London. The White Paper may necessitate changes at Cardiff.

15. Scrutinising Ministers

pp16-18, 2.14-219 Although the Richard Report was impliedly critical of the "over-cosiness" of committee meetings and the lack of proper scrutiny of Ministers in Assembly

Committees, where Ministers here in the past appeared to "rule" the committees which are supposed to be questioning them, it will be important not to go to the other extreme. The role that Ministers have played in Special Standing Committees, or, for example, in the Constitutional Reform Bill Committee could serve as a source on which to draw for a new relationship in the Assembly.

Chapter 3 Enhancing the Assembly's Legislative Powers

16. This chapter is the meat of the White Paper. It provides a thoughtful halfway house between those who wish to confer primary legislative powers on the Assembly quickly, and those who wish to procrastinate. The exact meaning of the "streamlined procedures" referred to in the Ministerial Statements will require to be probed.

17. p.20 3.6 Although *in theory* the sovereignty of Parliament is not affected by the Scotland and Government of Wales Acts, 1998, *in practice*, once an Assembly (or Parliament) elected by proportional assembly has been set up, the reality is that Parliament's sovereignty has in part been given over.¹ In saying in the White Paper that it is "now time to re-balance legislative authority towards the Assembly, without affecting the overall constitutional supremacy of Parliament..." the government expresses the theory, not the reality. The government's incremental approach in the first instance shows caution, but the wholesale extension of Henry VIII powers to Welsh legislation to be made by the Assembly will arouse doubts in Parliament, where constitutionalists believe that delegated powers ought to be tightly constrained, and not of a general nature. Criticisms of 'framework' or 'skeleton' bills have been powerfully voiced in both Houses over many years, eg on the Education (Student Loans) Bill, and governments have been constrained to listen to critics. Many instances could be cited.

18. Although there are no formal legal or constitutional rules about what should be subject to primary legislation rather than secondary legislation, there is nevertheless a well understood practice whereby parliamentary draftsmen frame legislation, whereby the broad objectives of legislation are laid down in primary legislation, and it is only the detailed application of these objectives which are left to delegated legislation. This is a matter on which the Committee may wish to take evidence from Parliamentary Counsel. Further, the House of Lords Delegated Powers and Regulatory Reform Select Committee have drawn attention to the conventional constitutional niceties on this issue in several of their reports, although they have acknowledged that there is some difference between such powers when exercised by an elected Assembly, rather than a UK Minister. The ability, up to now, of the Assembly to scrutinise the wording of S.I.s, hear evidence and amend them (which Parliament does not do) is another factor.

19. p.22 3.16.19 The precise meaning of this paragraph will become clearer when the bill is produced, but in the White Paper it is unclear.

20. pp 23-4, 3.18-21 The proposals for enabling the Assembly Government to achieve "its legislative priorities more quickly, within its current areas of responsibility" are generally desirable, and the proposal to do so by Orders in Council, with Henry VIII powers to "modify provisions of Acts of Parliament, or to make new provision" uses a well recognised process. As said in the White Paper, the procedure proposed for affirmative resolution orders is well understood, and the safeguard of Parliamentary Committees or a Joint Committee to scrutinise them before consideration on the floor of each House would enable evidence, both written and oral to be taken as desired, and would allow the transfer to be probed in depth. It would be important to ensure that the parliamentary committees with whom this work is done should be of the Special Standing Committee variety, and not Standing Committees.

21. pp25 3.22-29 The government further suggests that, possibly in the next Assembly, after 2011, following a referendum of the Welsh people, means to transfer primary legislative powers over all devolved areas to the Assembly should be provided for in the new legislation. The government propose that such a referendum would need to be previously

agreed to both in Parliament, and in the Assembly by a two-third majority. This transfer would be initiated by the Secretary of State, after appropriate consultations, tabling an Order. The referendum would be decided by a simple majority of those voting. It is envisaged that a procedure (like Sewel motions in the Scottish Parliament) would be put in place to allow Westminster to continue to legislate in appropriate cases with the consent of the Assembly. Incidentally, the suggestion that the Parliament Acts could be made to apply to orders (H.C. Hansard, 15 June, 2005, c.271) is mistaken.

22. It is suggested that the reasons for this delay, and for the various complicated procedural requirements for the conferring of primary powers, lies in existing uncertainties of the electorate's views. Nevertheless the White paper's proposals appear cumbersome for no clear reasons. A referendum would leave the decision to the appropriate authority, namely the Welsh electorate.

Standing Orders

23. pp. 26-27 3.30-32 The proposal to make a bonfire of the procedures of the Assembly laid down in the Government of Wales Act 1998 is welcome. But to do so by a further set of Standing Orders to be drawn up by the Secretary of State, assisted by "an advisory committee" with "broad based representative membership" is more questionable.

Parliamentary procedure is normally left to the Assembly concerned to regulate. This was the case for the new Scottish Parliament, which drew up their procedures after careful consideration and prior advice from experts, including proceduralists from Westminster and the European Parliament and political scientists and

¹ See V. Bogdanor 'The Start of a New Song': the Hume Lecture 1998 others (see the Crick-Millar Report). This was also the case for Northern Ireland, where after the initial Standing Orders drawn up by the Secretary of State, the Assembly set up in 1988 a Committee to draft Standing Orders. Similarly, in New Zealand in 1993-95, after their Parliament was transformed by the adoption of the mixed member proportional voting system for the electorate, in replacement of 'first past the post'. Such instances could be multiplied.

24. At the least, it is to be hoped that the proposed advisory committee would listen to, and be guided by, representatives of the National Assembly, where wishes should be regarded as paramount. The proposed provision for simpler procedures is welcome. In addition to shorter Standing Orders, it would be desirable to draft a Companion to the Standing Orders, in which much of the practice could be clarified and explained, as exists in other assemblies.

25. The implications of the recent Puttnam Report on the Communication of Parliamentary Democracy Members Only? Parliament in the Public Eye (Hansard Society Commission 2005), which draws on the Welsh experience of the National Assembly (pp 61-62), will need to be considered carefully when the revision of the Standing Orders is undertaken. The Report contains a number of far-reaching recommendations, which need to be addressed.

Relations between the Assembly and Westminster

26. p.27 3.33 The White Paper proposals to continue and increase the practice of submitting Wales only bills to prelegislative scrutiny is welcome, as is the suggestion that such scrutiny should be conducted on a bipartisan basis, with the relevant Assembly committees meeting together with the appropriate Commons and Lords Committees - whether in Westminster or Cardiff as convenient. In so doing they will be building on the precedents of recent years referred to in Chapter 8 of the Richard Report, and on the practice

between the wars in the case of the Joint Committee on the Indian Constitution in the 1920-30s.

27. In the proposed rewriting of the Standing Orders of the Assembly, it would be desirable that consideration should be given, not only to practice to date at Cardiff, but also to procedures at Edinburgh, Westminster and elsewhere in other Parliaments in the Commonwealth and elsewhere. One possibility which should be examined would be the regular enlargement of parliamentary committee by the co-option of non-parliamentarians as expert members.

Chapter 4: Electoral Issues

28. p.28 41-44 These proposals are likely to be unwelcome to all political parties, except one. The implications of the change suggested for Wales will have repercussions for Scotland, which may be unwelcome. Chapter 12 of the Richard Report accurately states my views and there is no point in repetition.

BGW2 EV2

SIR CHRISTOPHER JENKINS

Comments on the Wales Office White Paper "Better Governance for Wales"

1. These comments are on the proposals in the three areas covered in the White Paper, taken in the order: electoral issues, executive structure, legislative powers.

Electoral issues

2. The proposal is directed at the perceived problem that a "list" member can take an active role in a particular constituency. The proposed change may not have the desired effect: under any additional member system, a successful "list" candidate could claim to have been elected for an area that includes the constituency.

3. Short of sweeping away the additional member system altogether (as proposed by the Richard Commission in the context of an enlarged Assembly), perhaps the only remedy is general agreement rather than legal.

Executive structure

4. I have the impression from the White Paper and also from the Richard Commission report that this proposal arises mainly from practical difficulties that have been presented by the present statutory structure, though that structure has not prevented the solution of many problems thought intractable at first. The principal awkwardness may be the danger of conflicting loyalties for advisers. That and other problems encountered in practice may justify change.

5. In so far as the Paper relies on more intangible arguments for change, it seems less persuasive. For example –

(1) The problems arising from corporate identity. But this has not stopped local authorities from moving to a "Cabinet style of government" (para 1.8).

(2) The confusion about accountability. This exists in the Westminster model too, perhaps in greater degree - are civil servants or Ministers accountable (and in either case, which one)? Agencies have created a further kind of obscurity on accountability.

(3) The effect of “clarifying” accountability. Ministers are to be appointed by (or with the approval of) the Crown, rather than by AMs elected by voters. But they are to have greater powers, including powers of making subordinate legislation. Is there not a danger of making voters feel further removed from the government process?

(4) This danger may also be exacerbated by the reduction in the involvement of ordinary AMs in the process of developing policy, and the partial abandonment of the ideal of consensual politics.

(5) The Crown’s role in the separation of powers. The White Paper (eg para 2.2-3) stresses the significance of this. But it is a matter more of (sporadic) form than substance. In both Westminster and Cardiff, the principal Minister depends on having the support of the elected body, as in practice do other Ministers. The fact that in Wales he is elected by the Assembly seems closer to reality and more transparent.

(6) The separation of powers itself is a notoriously unreliable guide in devising a structure. The White Paper suggests that in future there will be a clear division between legislative functions and executive functions. But it is now proposed that Ministers should for the first time have powers of making delegated legislation.

6. The new Counsel General is to be the adviser to the Government rather than to the Assembly. But the Assembly will have the right to question him. Will this include the right to ask for written advice? Is any of his advice to the Government to be confidential? If the Assembly cannot have free access to him, presumably it will have its own legal adviser. Will the Assembly publish its own adviser’s advice where it differs from that of the Counsel General?

Legislative Powers

Paragraphs 3.1-13

7. The exposition in paragraph 3.1-7, and particularly in paragraph 3.5, seems to me accurate and useful.

8. Paragraphs 3.9-13 are welcome, and represent very closely the incremental developments that were hoped for when the 1998 Act was passed.

Paragraphs 3.14-21

9. The proposals in paragraph 3.14-21 for Orders in Council are also welcome. They will make it possible to bring some clarity into the miscellany of powers inherited by the Assembly from the Secretary of State, which have been universally agreed to be unsatisfactory. Without the new power, desirable changes are always liable to be frustrated by the shortage of time for government legislation (though the proposal for affirmative resolution procedure will also take up some Parliamentary time).

10. But the framing of the limitations proposed in paragraph 3.17 and 3.18 will raise difficult questions.

11. Para 3.17 blocks the transfer of legislative powers in new fields. This is a substantial limitation, which seems likely to prevent the organic development of the Assembly’s functions into something much more like the Scottish model. The extent of the limitation depends on the gap between the Scottish and Welsh areas of competence. This is difficult to establish from the legislation, if only because the Scottish Parliament’s powers are expressed to be all-embracing except for those that are reserved.

12. In addition, two areas of definition difficulty occur to me. Firstly, policy areas overlap with one another, so that there is always the possibility that changes in one will have knock-on effects in another. Second, there is no statutory definition of the policy areas for which UK Ministers are responsible in

Wales, though no doubt there are working definitions. So there will be considerable scope for argument about the scope of the order-making power. This might inhibit its use.

13. The limitation proposed in paragraph 3.18 is that no Order may transfer powers over “the whole of any of the fields listed in Schedule 2” to the 1998 Act. This seems arbitrary, and the White Paper does not set out any rationale for it. On the face of it, any minor (but not derisory) exclusion from the field would satisfy the condition. This would mean that a series of Orders could come close to giving the Assembly full competence to legislate in the Schedule 2 fields.

Paragraphs 3.22-29

14. The proposals for “changing the current settlement” in paras 3.22-29 are sketchy. They are to “transfer primary legislative powers over all devolved fields direct to the Assembly”. The White Paper provides little further detail. But elaboration will be needed.

15. For example, what is “primary” intended to mean in this context? How would such a power differ from a series of generally expressed powers to make (secondary) legislation in each devolved field?

16. And what is meant by “devolved fields” here? Is it (as paragraph 13.26 perhaps suggests) a reference to the list in Schedule 2 to the 1998 Act? Or is the plan to create a new list of devolved matters, or to follow the Scottish model and devolve everything except specifically reserved matters?

17. If the devolved fields are to be much the same as now, then (subject to the comment made above on paragraph 3.18) this proposal seems to offer little more than the proposed power to make Orders in Council. If liberal use is made of that power, a referendum would come too late, as the horse would already be up, away and running.

Paragraphs 3.30-33

18. It is to be hoped that the new Standing Orders made for the Assembly by the Secretary of State’s will not be entrenched and that the Assembly will be free to alter them. Clarification will be needed of the intention behind the phrase “building on the foundation laid by the new Standing Orders” in para 3.32 .

Christopher Jenkins
1 July 2005

BGW2 EV3

MARIE NAVARRO AND DAVID LAMBERT

The White Paper on Devolution: A real way forwards for Wales

The White Paper has several aims. Our paper will concentrate on Chapter 3, that is the proposals for enhancing the Assembly’s legislative powers. No doubt other authors will comment extensively on the other Chapters.

This Chapter 3 is of particular interest to us in the context of Wales Legislation Online (www.waleslegislation.org.uk) which has now been in existence for 6 years. It aims to set out the powers of the National Assembly for Wales as well as the legislation it produces. The consequences of Chapter 3 directly relate to our day to day work and interests.

A New Framework of Assembly’s Powers:

The White Paper offers various possible ways of giving powers to the Assembly in the future:

I-1 The Assembly can continue to receive powers by means of transfer of functions orders made under section 22 of GOWA. This will allow it to receive functions presently exercised by central government

in relation to Wales under existing Acts of Parliament. A recent example of this is the order transferring functions relating to animal health.

I-2 New Acts of Parliament will continue to give powers to the Assembly in the same way that, on average, up to 15 Acts a year have done since 2000.

It will be possible in these new Acts to give powers to the Assembly in relation to subject matters for which they are not presently responsible. A recent example of this has been Fire and Rescue services.

For the future all bills giving powers to the Assembly will be drafted “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.” Paragraph 3.12.

An example of such powers is in various sections of the Education Act 2002 and there is also a general power at the end of the Act by which the Assembly can make regulations “to give full effect” to the Act in section 212. In this section giving effect to the Act can include amending, adding to or repealing Acts of Parliament. So far since devolution such a power has only been given on very limited occasions to the Assembly. For the future it seems that this power will become a minimum requirement for all future legislation giving powers to the Assembly. In addition particular Acts could give more general powers to amend legislation in the body of the Act.

I-3 The Assembly will continue to be designated as the relevant body for implementing EU Directives under section 29 of GOWA and section 2(2) of the European Communities Act 1972. An average 2 such designations a year have been made so far.

I-4 The White Paper also proposes that the Assembly will be given enabling powers by Order in Council “to modify legislation or make new provision on specific matters or within defined areas of policy...” Paragraph 1.25.

The Assembly would derive many of its powers to make legislative provisions from these Orders in Council. These will specify the areas of policy within which the Assembly can legislate. It is only these Orders in Council **NOT** the Assembly’s legislation made under them that will be subject to Affirmative resolution procedure Parliament. This will be debated for up to one and a half hours in each House prior to which the extent of the Order will probably be considered in a Committee of each or both Houses. Paragraph 3.21.

This proposal is subject to two major provisos at Paragraph 3.18:

- 2 such powers will not be used in relation to matters which are the responsibility of UK Ministers in Wales
- 3 the Assembly will not be given powers over the whole of any subject field listed in Schedule 2 to GOWA.

However the reference to such matters which are the responsibility of central government Ministers are not immutable i.e. they can gradually change as they have done since the beginning of devolution for example with the decision to give the Assembly powers in relation to Fire services and in relation to rail transport..

Presumably the reason for the exemption in b) is to distinguish the proposed new Assembly powers from subject areas legislative functions such as are possessed by the Scottish Parliament.

The initiative for an Order in Council will come from the Assembly as a request to the Secretary of State (for Wales) to consider the preparation and laying of a draft Order before Parliament.

The nature of the Orders in Council:

The form of the Orders will not be specified in the proposed Government of Wales Bill. Their content will be a matter for specific decision in each case.

Because of the limitations set out in a) and b) above, it is almost inevitable that each Order in Council will have provisos. The form which these provisos take would seem to vary according to the width of the policy area which the Assembly is seeking.

By reference to the useful examples given in paragraph 3.18 of the White Paper it is possible to envisage the nature of the provisos:

(i) Very specific policy areas – the example given in (a) of Para. 3.18 to amend specific existing legislation so as to combine the three existing Welsh Ombudsmen Offices into one- would probably be achieved by an Order stating that the power to be exercised would be to combine of the 3 Wales offices into one. The Order would then set out the existing Acts of Parliament which could be amended, added to or disapplied in their application to Wales by the Assembly to achieve this. The Order would be framed so as not to make these Acts alone subject to amendment or disapplication or addition. The Acts would only be given as examples so that other legislation could similarly be amended if necessary to achieve the objective of the designation in the Order.

A very specific policy area such as this would probably only give rise to the making of only one comprehensive set of laws by the Assembly. However it would not prevent the Assembly from changing these laws if it was decided to change the nature of the new Ombudsman Office in the future. Equally by making subsequent provisions the Assembly would be able to amend, add to or disapply future legislation enacted by Parliament relating to ombudsman in so far as such legislation applied to Wales “unless a particular Act contain a specific prohibition precluding use of the Assembly modifying powers” Para. 3.16.

(ii) The second example of “something rather wider” in the nature of an Order in Council is given in (b) of Para.3.18. The example is an enabling powers by which the Assembly could make laws for the protection and welfare of children. As the example shows the Assembly’s laws could cover a range of policy matters relating to education, local government and social care.

Para 3.17 of the White Paper is in terms of “policy areas” for which either Assembly Ministers will be responsible or central government Ministers. Thus in education, central government is responsible, among other matters, for the pay and conditions of service of teachers.

This suggests that it would be possible to set out the general policy area of the protection and welfare of children as being the matter for which the Assembly can legislate and the provisos to that power could similarly be described by reference to policy areas. This is the way adopted by some of the Transfer of Functions Orders (TFOs) giving powers to the Secretary of State for Wales in the 1970’s in particular in relation to education. This would avoid the extraordinary complexity of the 1999 TFO giving powers to the Assembly. Anything is better than that!!

This would also mean that if the policy area provisos to the Assembly’s powers in an Order in Council are reasonably specific then the Assembly will be able to have wide general powers to make legislation.

What needs to be avoided as far as possible are the exceptions to the Scottish Parliament’s powers (set out in schedule 5 to the Scotland Act 1998) in so far as they refer to the “subject matter” of sections of Acts of Parliament. Such a concept is very difficult to apply.

As in the example at (i) above an Order in Council giving a wider policy area would permit the Assembly to amend or disapply relevant future Acts of Parliament.

The example given in (c) of paragraph 3.18 illustrating the wide nature of an Order which could be “something considerably wider” is similar to that of example in (b).

These various examples show that there is quite a variety of possible Orders in Council and a wide range of their scope.

II- Benefits of the White Paper:

II-1 One of the benefits which seems not to have been commented on by anyone is the commitment in the White Paper from now onwards in Bills coming before Parliament to give “wider and more permissive powers” to the Assembly “to determine how the provisions of new Acts giving powers to the Assembly should be implemented.” Such a general commitment is a major step forward because it will help to overcome the very variable nature of powers currently possessed by the Assembly. This is the interim proposition put forwards by the Richard Commission pending the implementation of its recommendation for full primary powers and it is a proposition which we have constantly highlighted in seminars to the Assembly, to the House of Lords and academic meeting.

Even if a future Act contains no more than a general power to “give full effect” to the objective of the Act this will give the opportunity for the Assembly to start making legislation of a wider nature and of the sort they will be able to make under Orders in Council after May 2007.

II-2 There is a fundamental misunderstanding in the media about the proposals to give the Assembly legislative powers by Orders in Council. The proposal is that only the Orders in Council will be the subject of approval in Parliament, not the laws made under them by the Assembly. This presents much more flexibility for the Assembly to make legislation than as been recorded in the media.

Once an Order in Council has been made then the Assembly can make law within the scope of the Order free from the requirement of Parliamentary intervention.

If the Assembly law is outside the enabling power of an Order in Council the law can be challenged by anybody not only by the Attorney General as a devolution issue under Schedule 8 to GOWA. In this respect the Scottish Parliament is in no different position to that of the Assembly. The Acts of the Scottish Parliament are a type of subordinate legislation. As such as with all subordinate legislation their legality can be challenged by the Courts and this is provided for in the Schedule 6 to the Scotland Act 1998. Legality apart the Assembly laws as with Scottish Acts are not subject to Parliamentary supervision.

II-3 Much has been made of the situation when a government is in power in the Assembly and a government of a different political colour is in power in Westminster. The assumption seems to be that the Assembly will find it very difficult to continue to receive new powers under new Orders in Council and that possibly existing Orders in Council will be repealed.

It might be useful to recollect that the Welsh Office continued to receive new powers by TFOs both when there was a Labour Government and a Conservative Government in power in Whitehall. At no time was there any threat to amend existing TFOs.

We consider that if the Assembly votes overwhelmingly for a new Order in Council to give them powers to implement new policy areas it would be very difficult for a Secretary of State in receiving such request from an elected body to refuse to put a draft to Parliament and it would be very difficult for Parliament to refuse to approve the Order. Equally it is not conceivable that once an Order in Council has been approved that it will be repealed. While it is possible to repeal an Order in Council because it continues to give enabling powers to Assembly to make laws within its ambit, the effect of repealing an Order in Council will be to automatically repeal all the laws made under that Order in Council as well, unless they were specifically saved.

II-4 We agree with paragraph 3.15 of the White Paper, that an Order in Council will enable the Assembly to make law which at present it can only be made by an Act of Parliament. Acts of Parliament giving powers to the Assembly “are constrained by the legislative priorities of the UK government.”

Furthermore once an Order in Council is in place the Assembly can change the law it has previously made by using the provisions of the Order. Orders in Council which give wider policy area powers will enable new policy to be reflected in new law made under the Order without the need to require further enabling provisions under new Acts.

II-5 Arising from what is said above in II-4 the concept of an Order in Council describing a policy area within which the Assembly can make law is very different to that of an Act which usually sets out lists of specific powers under which the Assembly can exercise functions. This gives considerably more flexibility to the Assembly to make laws. It is not constrained by the parameters of individual sections of Acts.

II-6 Taking the example in the White Paper of an Order in Council giving legislative powers to the Assembly in relation to the protection and welfare of children, this would enable the Assembly to “modify- i.e. amend, repeal or extend the provisions of Acts of Parliament in their application to Wales or to make new provisions.” In relation to this policy area Para.3.16 What more can one ask for? It would enable the Assembly to disapply all the separate provisions relating to children’s welfare and protection which are to be found in a number of Acts (see examples in our Annex) covering education, local government and social care, so that these separate provisions would only apply to England. The Assembly could start with a clean sheet in relation to Wales and set out a comprehensive statement of the law as it applies in Wales for the protection and welfare of children.

In setting out this comprehensive statement, the Assembly's laws having disappplied relevant current legislation, could include aspects of this legislation which amendments or additions as part of its comprehensive statement of the law.

In general while current legislation giving powers relating to policy areas to central government Ministers as regards Wales could not be amended or disappplied, but there is nothing in the White Paper by which with the Cabinet's agreement the boundaries of such policy areas could be reduced, so that this Assembly's laws could then amend or disapply legislation no longer coming within these policy areas.

Conclusion

This is an infinitely flexible settlement proposed for the Assembly.

The only difference between that scheme and general legislative competence is that the general legislative competence of the body is set out initially in an Act in relation to subject areas with stated restrictions. The Assembly's powers to make law are not set out in an Act of Parliament but in a series of Orders in Council.

While no individual Order in Council could give a total subject area competency to the Assembly in time a series of policy areas Order in Council can add up to a subject area.

In our opinion this is a very efficient way of giving over time to the Assembly all the powers it needs to implement the policies it intends to carry out. In the future this may obviate the need for the Assembly to have general primary legislative powers as it would in due course receive all the powers it needs in relation to Wales to implement its policies.

A final thought is that the equivalent of the Sewell Convention may emerge whereby the UK Parliament voluntarily agrees not to legislate for Wales in matters for which the Assembly is given competence by Orders in Council, unless the Assembly so requests.

For the first time there could be a series of Acts which apply only to England with laws for Scotland and Wales being made by the respective devolved bodies- a interesting development of the British Constitution.

Marie Navarro and David Lambert

Annex

Social Services

The total number of Acts relating to children Welfare and Protection currently are: 18

199	(40)	Adoption (Intercountry Aspects) Act
9		
197	(C.	Adoption Act
6	36)	
198	(1964	Adoption Agencies Regulations
3)	
200	(C.	Adoption and Children Act
2	38)	
198	(265)	Adoption Rules
4		
200	(C.	Carers and Disabled Children Act
0	16)	
200	(C.	Children (Leaving Care) Act
0	35)	
200	(c.31)	Children Act
4		
198	(C.	Children Act
9	41)	
196	(C.	Children and Young Persons Act
9	54)	
196	(C.	Children and Young Persons Act
3	37)	

193	(C.	Children and Young Persons Act
3	12)	
200	(C.	Children's Commissioner for Wales Act
1	18)	
197	(C.	Local Authority and Social Services Act
0	42)	
198	(C.	Registered Homes Act
4	24)	
199	(C.	Social Security Act
0	27)	
198	(C. 7)	Social Security Act
8		
200	(C.	Tax Credits Act
2	21)	

The enabling provision in a future Order in Council could summarised in one sentence “children welfare and protection subject to central government Ministers” instead of the various powers separately listed in the above 18 Acts.

The individual provisions contained in these 18 Acts could be disappplied, added to or amended in their application to Wales and entirely new provisions made so that there is one comprehensive set of laws applying to children welfare and protection in Wales instead of the considerable number a separate provisions in the present 18 Acts.

ELIN JONES AM

BGW2 EV4

Ein Cyf / Our ref: CPA/118/6

Dear Dafydd

I'm writing following the resolution to establish an Assembly Committee to consider the White Paper. I am eager to present evidence to the Committee on one particular aspect of the White Paper – namely legislation relating to the Welsh language.

I had an opportunity to raise the very point I wish to address during the recent Assembly debate on the Queen's Speech. I enclose a copy of my contribution to the debate. The Secretary of State failed to respond to my comments.

I am of the opinion that the National Assembly is the appropriate place to legislate on the Welsh language. The White Paper, by means of Orders in Council, affords an opportunity for this to happen. An Order in Council, giving the Assembly the power to legislate on the Welsh Language, could be passed in Westminster. The Assembly would then be free to discuss and approve Measures on the Welsh language at any time. Given that the Welsh Language is relevant only to Wales, this would not be contrary to the spirit of the White Paper.

However, there is a clause in the White Paper that precludes this. Clause 3.18 states that: “The power would be framed to ensure that no Order could give the Assembly powers over the whole of any of the fields listed in Schedule 2 of the Government of Wales Act.”

The Welsh language is one of the policy areas listed in Schedule 2. I would therefore value an opportunity to make the case that the Welsh language should be exempt from the above clause. It could be argued of course that clause 3.18 as a whole should be deleted – but I will allow others to raise that issue.

My points relate only to the Welsh language, to affording a special status to our legislative process and the Welsh language within the framework of the Act in time. I make this case in the context of the UK Government's intention to increase the Assembly's legislative powers. The National Assembly should be given total flexibility to legislate on the Welsh language through an Order in Council.

I hope that it will be possible for me to present my evidence in person, however I am aware that time is scarce.

Yours sincerely

Elin Jones, AM

Legislation and the Welsh Language
A response to the White Paper on Better Governance for Wales
Elin Jones A.M.

Introduction

Better Governance for Wales proposes the enhancement of the legislative competence of the National Assembly. In this context, I believe it is timely to ask the question: *'who should legislate on the Welsh language?'* The Welsh language is of unique interest to Wales. Previous legislation on the Welsh language has always been geographically-specific to Wales and to services delivered in Wales. Therefore, it is logical to conclude that, within a wider debate on the enhancement of the National Assembly's legislative powers, the opportunity could be taken to allow the Assembly to become the legislative body on all policy matters to do with the Welsh language.

This Paper has no view on what or when such Assembly legislation on the Welsh language should be – that would be a matter for Assemblies in the future. But perhaps it is worth stating here, that this proposal is not a back-door attempt to seek legislation that requires the private sector to provide services bilingually. In fact, nothing could be further from the case. It is obvious that there is a large political majority in the Assembly, as in Westminster, which would oppose such legislation. It is a matter of regret, I believe, that discussion on legislation and the Welsh language over the last few years has focussed exclusively on the use of Welsh by the private sector.

The purpose of this Paper is purely to propose a case and a means for the National Assembly to become the appropriate body to legislate on the Welsh language, whatever that legislation may turn out to be.

The White Paper

The White Paper states in Section 3.18 that *"The power would be framed to ensure that no Order could give the Assembly powers over the whole of any fields listed in Schedule 2 of the Government of Wales Act"*. The Welsh language is listed as one such field in the Act. Straight away therefore the White Paper prohibits the Assembly gaining full legislative competence in the field of the Welsh language. The White Paper says that Orders in Council could only be framed for discrete policy areas within the field of the Welsh language. An obvious current example of this would be the Assembly Government's intention to seek a statutory base for Y Dyfarnydd.

However, section 3.18 precludes framing one Order in Council that would allow the Assembly to create legislation on all policy matters within the field of the Welsh language. What this means in practice is that everytime the Assembly wishes to create or amend a piece of legislation within the field of the Welsh language, it will be required to seek further Orders in Council. It would be far more efficient to allow the Assembly to create legislation or Assembly measures without a need for further Orders in Council. Such legislation could be amending legislation or it could be new legislation not already covered by statute, as proposed in Section 3.16 of the White Paper. All legislation of course would be subject to consultation with Westminster departments operating in Wales as with other interested parties.

Proposal

If the principle is accepted that the National Assembly is the appropriate body to pass legislation on the Welsh language, then making the Welsh language an exception to section 3.18 is the means of putting that principle into action.

My proposal therefore is that the Welsh language should be exempted from Section 3.18 and at any point in time the Assembly could request that an Order in Council be placed in Westminster that would allow the Assembly to pass legislation on policy matters within the field of the Welsh language. The National Assembly would become the law-making institution in the field of the Welsh language.

Elin Jones
July 2005

MICHAEL GERMAN, WELSH LIBERAL DEMOCRAT GROUP BGW2 EV5

Report to the Committee on Better Governance for Wales White Paper Welsh Liberal Democrat Group

At the outset, I must make clear that I would not have started from here. The approach taken by the White Paper does not meet the aspirations of my party nor achieve the advances recommended by the Richard Commission in its widely commended and evidence-based report. In short, it is a lost opportunity. The proposals are founded, yet again, on political compromise within a single party rather than the long-term interests of the people of Wales.

The White Paper is an incomplete document, addressing the development of the executive and largely silent on the development of the legislature side. It is this latter area where this committee has its most significant task. This aspect of the White Paper also reinforces the need for this Assembly to be responsible for developing its own Standing Orders, with Secretary of State involvement purely as a fallback in the event of the Assembly not being able to reach agreement.

The main differences from the Richard Commission's unanimous recommendations are that:

- * They proposed a stable constitutional settlement but the White Paper would lead to a state of uncertainty and continuing debate for years, perhaps even decades, ahead.
- * They proposed a single short interim phase, in the context of a clearly adopted destination, but the White Paper proposes two interim phases and no certain destination.
- * They proposed to simplify the basis of devolution, so people do not have to be legal experts to understand whether responsibility lies in Cardiff or London but the White Paper makes such easy understanding utterly impossible by introducing further complications and a process of continuous change.
- * They proposed to maintain the well established clarity between primary legislation and secondary legislation, after a short run-in period, whereas the White Paper blurs that distinction on a long-term basis.
- * They proposed to match enhanced legislative powers with enhanced scrutiny but the White Paper places legislative power largely in the hands of the executive without the matching enhancement of the Assembly's scrutiny capacity.
- * They proposed to increase the capacity of the Assembly to discharge a wider range of functions and to effectively scrutinise legislation, in order to match the greater power of the executive, by increasing the size of the Assembly to 80 AMs - still far smaller than the Scottish Parliament - but the White Paper finds it convenient to place all the extra resources in the hands of the executive.
- * They proposed an electoral system which would be roughly equivalent in terms of party advantage to the present system, whereas the White Paper makes a single change to the existing system which would benefit of one party and potentially remove experienced AMs of opposition parties, thus weakening the scrutiny capacity of the legislature.

In this evidence, I shall comment in the context of a White Paper which I regard as profoundly inadequate. I do so reluctantly and solely because I recognise that the votes of some 22% of the British population may have enabled the Government to force through the narrow party interests reflected in the White Paper.

Motions for an Order in Council

The mechanism by which the Assembly formally makes a request for an Order in Council is a key issue. A closed model would be where the right to put down such a motion would be restricted to the executive. In this model, the extent and direction of expanded powers of the legislature would be dictated by the executive rather than the legislature itself.

A more open model would allow any member via a 'private members bill', or opposition party via their minority party debate to put down such a motion. That would be a more democratic and transparent basis for the exercise of the right of initiative.

Related issues are the process by which such a motion to request further powers is scrutinised and whether it is amendable. If such a motion is scrutinised through subject committees and is amendable in plenary, then there are opportunities for the terms of the motion to be amended both informally (via comments and suggestions in committee) and formally (amendments in plenary).

If an executive motion is harder or even impossible to amend, again the terms in which the Welsh settlement expands becomes an executive rather than a legislature preserve. An open and amendable motion gives the legislature the opportunity to contribute to shaping the way ahead.

Legislative scrutiny

Both the introduction of 'framework' legislation, promised by the UK government for future Wales only bills and clauses; and the wider delegation of powers promised through the Order in Council route will make the Assembly's SI and other regulations more complicated and involve greater discretion as to their contents.

It is vitally important both for sound law making and for confidence in the Assembly's functions (from the people of Wales and the MPs /Peers who will decidethe Assembly wider powers) that these are scrutinised properly. We don't want to limit the role of subject committees in carrying out policy reviews or scrutiny of the executive and Assembly sponsored public bodies. That means there needs to be a significant expansion in our committee capacity - to enable a level of scrutiny which parallels that which takes place in Westminster standing committees. It would soon discredit the whole concept of devolved government if half-baked measures were adopted through inadequate scrutiny.

The Scottish experience suggests that, with only 129 members, they have struggled to have a standing committee structure without an adverse impact on the rest of the parliamentary structure, i.e. plenary sittings, subject committees etc. Yet, this may be the only way to bring together enough AMs for sufficiently long periods without prejudicing the ongoing work of subject committees. This dilemma underlines the inadequacy of a mere 60 AMs - never more than 30 of them in opposition and some of those already loaded with additional responsibilities - to scrutinise proposals from the Welsh Assembly Government.

Already the demands on committee timetables vary, with some committees having far greater legislative demands on them than others. This further change will only exacerbate this disparity. If subject committees were also given the role of legislative scrutiny, given that a House of Commons Standing Committee might devote up to 100 hours of scrutiny to a single bill and it then goes to the House of Lords for further detailed scrutiny, these disparities would become huge and probably unmanageable. To say the least of it, such an added responsibility would make essential more flexible committee timetables. However, it seems inconceivable that committee members, especially from opposition parties each having only one or two members on each committee, could both carry out the ongoing work of the committee and this fluctuating burden of intensive extra work. It highlights the imperative nature of the need for 80 AMs to fulfil these extra responsibilities.

Given our present number of AMs, the minimum size that a committee responsible for scrutiny at any stage of the process would need to be would be 8. This would provide for a balance of opinion, party and experience across the committee.

The extra responsibility on members to provide scrutiny of the executives' new powers would demand an increased resource available to the APS to provide that support.

Private bills

A further issue that hasn't been highlighted in the White Paper so far is the issue of private bills, many of which would be in the areas over which the Assembly would have a variant of primary legislative powers. To ensure a coherent legislative structure whether this would remain vested in Westminster or move to the Assembly and how to ensure that they are part of the wider Welsh legislative structure needs to be considered.

'Sewel' motions

'Sewel motions are a device in the Scottish Parliament to allow the UK Parliament to pass legislation ordinarily devolved to Scotland. Whilst there is a debate in Scotland at the moment on the appropriateness of their use, it seems obvious that a similar mechanism will need to be devised for Wales.

'Policing' the border

Serious thought needs to be given to the creation of an office within the UK government akin to that of the Advocate General for Scotland. Her role involves judging where the devolution line falls between the responsibilities of the Scottish and UK legislatures. With a settlement that has less clarity and more grey areas than the Scottish settlement, the position of both the executive and legislature law officers from both the UK and the National Assembly side needs to be carefully thought through

How does SO31 change?

The process by which our private members bill system operates will need to be examined. In the same way that the options for the government are made both wider and more complicated so will the system for private members bills. For example, will private members bill be able to encompass areas that have not yet been subject to delegation?

Could a private members bill call for a specified area to be delegated with a specified piece of legislation cited as the example of its use? This would enhance the range of opportunities of the SO31 route, though would reduce its chances of success. Would resources be made available to members successful in the SO31 ballot to develop the extra tier of detail so required? SO31 under the present powers of the Assembly places a substantial (if largely welcome) burden on individual members' shoulders. To expand this system would reinforce the role of the private members bill but would need a recognition of the extra burden.

Secretary of State discretion over tabling

I do not believe there is a compelling reason for the Secretary of State to have discretion in his gatekeeping role. Although it is unusual for non-members of parliament to be able to insist that orders are laid, there are precedents, such as the boundary commissioners / committees (parliamentary and local government). The affirmative resolution model already has the thresholds of requiring approval from both houses. To require the tacit approval of the Secretary of State as well seems an unnecessarily high threshold.

Programme

The UK government has a Queen's Speech setting out its programme for the next year. Although not required to be an exhaustive list of every last piece of legislation intended, it does set out most such legislation. The Scottish Parliament has a similar, if less formal, procedure with a First Minister's statement on anticipated legislation over the next year.

The opportunities presented by the White Paper surely provide the trigger for the National Assembly to make a similar move. The forward plan of legislation presented to each committee already provides the building blocks for such a report. But consolidating them, together with requests for further powers and other significant items of business would enhance the Assembly's position in Welsh life and allow all interested parties to know the Welsh Government's intentions over the next year.

The 'withering on the vine' of the need for primary legislation bids does provide the opportunity for some sort of equivalent 'Orders in Council' bids process; which would take on a 'Queen's Speech' like quality.

Access to the law

The blurred distinction between primary and secondary legislation will give rise to problems of access to the law. Normally, lawyers and even individual citizens can look at the comparatively limited volumes of primary legislation to find the basic law and then refer to secondary legislation for some of the detailed implementing measures. In our case, both principles and detail would be contained in secondary legislation. Furthermore, when primary legislation is amended by further primary legislation, the relevant legal texts are updated. This would not happen if we amend by secondary legislation.

The Assembly has already recognised this problem under its existing powers. It has funded work by Cardiff University Law Department to make information available systematically on the internet. Far more will need to be done if the scope of our secondary legislative powers is enlarged to cover many matters which are normally dealt with only in primary legislation.

Conclusion

The White Paper has chosen to go down paths which I would not have chosen as the way ahead. I have illustrated some of the problems but I have done so in a constructive spirit, trying to minimise these inherent weaknesses. However, an enormous amount will need to be done to put the legislature in a position to exercise even minimally effective scrutiny. The White Paper offers no solutions to the problems it has created.

Additional Comments

I believe that the Assembly is now a mature body with a good understanding of how its Standing Orders would need to be adapted to take into account its new powers.

I acknowledge that there needs to be a role for the Secretary of State in the unlikely event that the Assembly can't reach agreement on new Standing Orders; but that none-the-less the initial responsibility for drafting and approving new Standing Orders should rest with the Assembly; and not with the Secretary of State.

Michael German AM
July 4th 2005

PROFESSOR LORD MORGAN OF ABERDYFI

BGW2 EV6

3 July 2005

Annwyl Dafydd

Thank you for your letter about the Committee considering the white paper on 'Better Governance for Wales'. I hasten to send a few written thoughts, although I would be prepared to give oral evidence in the (unlikely) event that your committee would find it useful.

The White Paper makes three main proposals and I find myself in broad agreement with both the first and third.

(1) The proposed changes in the executive structure (pp. 11 -16), distinguishing clearly between the Assembly and its government, are unquestionably right and remove a major anomaly in the original scheme, perhaps drawn unwisely from the analogy of local government. They also would make the role of the civil service far clearer and more satisfactory.

(2) I agree also with what is proposed for electoral matters (pp. 28 -9) although for the STV system could also be explored, while I tend to agree with the Richard Commission report that 80

assembly members would be preferable to 60 given the burden that AMs have to bear. I suppose finance is a major factor here.

(3) However, on the second proposal regarding the assembly's legislative powers (pp. 19 -26), the White Paper is (predictably?) disappointing. It reflects both the extreme caution of the Welsh Labour MPs regarding the role of Assembly members, and perhaps a wider lack of self-confidence going back in modern Welsh history to the earliest devolution proposals in the 1886 -92 parliament, a time when Scotland had already re-acquired its Secretary of State, an achievement which it took Wales nearly 80 years to match. The Richard Commission made a strong and intellectually coherent critique of the inadequacy of Welsh law-making processes and made the case for the Assembly having primary legislative powers in a way that commanded wide assent amongst those (eg the London Constitution Unit) who take a special interest in these matters. I declare an interest here because gave evidence to the Richard Commission myself in July 2003 and the report happened to follow very much the same lines as I suggested at that time, and which I have also argued elsewhere, including in the Lords. Such proposals as making more use of secondary legislative powers, using Orders in Council to enhance the Assembly's role and developing the current settlement in devolved areas in other detailed respects are, of course, helpful in many ways, but they avoid entirely the logic of the case of giving Wales's devolved assembly powers of legislative change as vested in the Scottish Parliament. They are cautious, piecemeal and fall short of real devolution. In addition, the current mess in Welsh legislative processes would continue (eg having Welsh clauses scattered through 'English' measures like currants in a bun, as happened with the Communications Bill, or the totally disastrous case of the Children's Act of 2004 which allowed the English Commissioner to interfere in Welsh matters, with a different vision of human rights and much reduced powers). Until the Welsh Assembly has primary powers, this confusion will continue.

There are, in my view, at least two major reason for having Welsh devolution at all.

(a) To have an all-Welsh view, followed by executive action driven by Welsh interests and perceptions, on issues that concern the domestic interests of the people of Wales.

(b) To allow for possible divergence, variety and pluralism in public policy between the different parts of the United Kingdom (including perhaps in some future incarnation some kind of regionalism in England).

Under the White Paper, neither would be achieved. It takes refuge in a board generalization (para 3.8) that there is no consensus at present for full law-making powers. No evidence is offered and in itself the judgement is of no value. There is polling material to provide alternative conclusions.

We would also continue to have the wholly anomalous role of a Secretary of State (no personal implication of any kind is meant here) acting as a possible filter, rival or roadblock to a democratically elected Welsh assembly. The Lords Select Committee on the Consultation, of which I was then a member, urged in its report in 2002 that the Secretaries of State for Scotland and Wales be abolished, and new national/regional remits be given to the Secretary for Constitutional Affairs. The Scottish Secretaryship of State now has all the vigour and dynamism of the Doge's Grand Council in the later states of the Venetian empire. It is disappointing for Wales that his proposal has not found favour and that the Department for Constitutional Affairs since its inception two years ago has been so inert and lacking in pro-active energy in this area.

As a Welsh historian and one who has never been a nationalist, I hope very much that your Committee can at least state the case for something much bolder – and far more democratic and accountable – than what is proposed in the White Paper. It takes the argument forward but, like patriotism, it is not enough.

Gyda phob dymuniad da

Kenneth O. Morgan (Prof. Lord Morgan of Aberdyfi)

BGW2 EV7

LAURA MCALLISTER

EVIDENCE TO THE COMMITTEE ON SCRUTINY OF THE WHITE PAPER “BETTER GOVERNANCE FOR WALES”

Laura McAllister, Professor of Governance, University of Liverpool and a Member of the Richard Commission

Introduction

It was with great interest that I – and, I think, all members of the Richard Commission – read last month’s White Paper. Sir Michael Wheeler-Booth and myself appear at this Scrutiny Committee as a double act. We have discussed the Paper’s contents in some depth and are of one mind in saying we commend progress towards a greater measure of devolution for Wales. However, we remain convinced that a more measured and sustainable blueprint for improvement is offered in the Richard Commission report, published last year. The Commission’s report has no discernible shelf life, for it contains a set of robust and thorough recommendations which will, we feel, act as the benchmark for future constitutional change. Therefore, as Sir Michael says in his paper, “two cheers” to progress (I might moderate that to a cautious “one and a half” cheers!).

I offer here an evaluation of the White Paper proposals, building on Sir Michael’s analysis, and focusing on my areas of interest in the hope of adding value to this Committee’s deliberations.

Clearly, there can be no teleology to constitutional arrangements; by that, there is no perfect, settled, end point towards which we should work. Constitutions should change as societies and public expectations change. This means there is no perfect “solution” or steady state for Welsh devolution as we cannot predict changes in expectations. Nevertheless, the history of devolution has been a steady evolution towards more powers. On the one hand, the White Paper is to be commended for recognising and internalising this trajectory; on the other, it offers another (possibly unnecessary) interim constitution. If I may offer an analogy, a car’s broken fan belt can be temporarily repaired with a pair of tights, which would just about allow you to get to the nearest garage where you would naturally replace the tights with the real thing. My concern with this White Paper is that we may have already reached the garage and are now replacing our pair of tights with a used, rather frayed and untested fan belt.

The Status of the Assembly

The first key area of the White Paper on the dismantling of the corporate body will have few dissenters and indeed, recognises substantial shifts that have already taken place within the National Assembly’s own operation. The word “innovation” is used in the White Paper to refer to the devolution settlement generally. I consider the real, critical innovations to have been self-generated by you as an Assembly, slowly and steadfastly transforming yourself into a parliamentary body in the knowledge that clarity and accountability are the watchwords of a good and proper democracy. Thus, the formal separation of the Assembly from an official government offers greater clarity and, simultaneously, an opportunity to shed the ugly and, at times, confusing term, Welsh Assembly Government. The “Government of Wales” would offer a more accurate and understandable nomenclature for the executive.

A word of caution here however: at its inception, the Assembly was rightly lauded for striving to operate in a new political style. A change in status poses challenges for the further development of more consensual, co-operative, participatory politics. Whilst recognising the difficulties with operationalising these values, there is a very real danger of throwing the baby out with the bathwater in this respect, and it will need serious and mature consideration in the redrafted Standing Orders.

Legislative Powers

The second area (the meat of the White Paper, as Sir Michael rightly says) is set out in Chapter Three. Increasing the legislative powers of the Assembly *as a concept* is to be warmly welcomed; the route map set out here less so for it contains some road works, diversions and possible dead ends. I concur with all of the potential difficulties outlined in Sir Michael’s paper. I focus here on two others that reflect my areas of interest:

- 2 The question of the *initiation* or *request* of Orders in Council: who will initiate in the main and how many Orders are likely to be accepted? Does the White Paper imply government-to-government dialogue or does the Assembly have a right to contribute directly (as paragraph 1.25 suggests)? If the recommendations originate in the Assembly, what are the real powers and discretion of the Secretary of State (especially given the built-in safeguards with the Order in Council procedures, and precedents for insisting that orders are laid- for example, the Boundary Commissions) and what is the reality of the right to veto? What of the future- will this arrangement function after 2009 when there might be a Conservative government in power at Westminster? There seems to me to be a real danger of executive dominance of this process.

- 3 The *scope* of the coverage of Orders in Council: there needs to be better clarification of the “wide” or “narrow” descriptors referred to in paragraph 1.25. The Orders cannot refer to “the whole of any of the fields listed in Schedule 2 of the GWA”, therefore, the way in which they are framed and their essential limitations are likely to be the really critical issues and the site for most debate. Could an Order include the bulk of one devolved field listed in Schedule 2 of the GWA, with the tactical omission of a minor specific to ensure it meets these conditions? This might allow, for example, for a review of local government finance (although substantial changes here might have an impact on non devolved areas like the Inland Revenue) or general powers over the Welsh language. The wider the coverage the more likely there is to be effective, innovative, joined-up policy-making. This, of course, would effectively be the acquisition of full primary powers in the Schedule Two fields without the transparency and clarity of formal legislative change.

Clarity and Equality

Underpinning both of the above points is a conviction that the driver for any change to devolution in Wales should be to improve *clarity* and *intelligibility*. Any political system that is not readily understandable to its citizens can scarcely be termed democratic. A cleaner-cut framework where general powers for making primary legislation in the devolved areas is infinitely preferable to that said out in the White Paper. The Electoral Commission report on the 2003 Assembly elections drew attention to the links between clarity, provision of information and public awareness.

The issues of *equality* and *accountability* also loomed large in the rationale for the Richard recommendations. These, we decided, was better delivered by the primary model, ahead of the various “half-way houses” that we discussed and rejected. In football parlance, there was a strong sense in which Scotland had a Premier League Parliament, whilst Wales had one not much above Nationwide Conference status! Critically, that message came loud and clear from the Welsh people (the constituency that really matters) through a proper and far-reaching consultation exercise. There is little doubt that elements within the existing settlement would have most constitutional planners scratching their heads and wondering why a *national* institution should have fewer powers, in certain respects, than a parish council or a regional assembly. As the Assembly prepares to move to its splendid new home, it is timely to remind ourselves that this is our *national* institution and we are discussing here *national devolution*, not a local or regional authority.

Scrutiny

This was an underlying concern in the Richard Commission deliberations and there will need to be careful consideration as to how this will be safeguarded and developed within the new arrangements, given their potential for creating an imbalance between the WAG and the Assembly. This can only be counterbalanced by more muscular scrutiny mechanisms.

My ongoing research on the committee structure here in the Assembly, making some comparisons with Scandinavian committee models, underlines the point that lessons do not have to come exclusively from Westminster or local government. The existing (unique) dual roles for the Assembly Subject Committees - policy development and scrutiny - are far from contradictory, it is entirely possible to make significant contributions to policy innovation whilst also scrutinising effectively. Indeed, the two might be seen as part of the same linear activity, with a single objective.

It is eminently sensible for procedural mechanisms to be removed from the remit of the amended legislation and its prescriptions. Nevertheless, there will need to be some serious and well-thought rebalancing of the overall committee structure to cope with the extra legislative load, as well as the time, agendas and approaches to manage its scrutiny. In terms of party balance, it would seem more sensible for the new Standing Orders to manage a new committee structure in a holistic way, seeking to ensure party balance across the piece rather than individually. This will permit more streamlined, focused committees with more frequent meetings and better-crafted agendas. There will also need to be better alignment of the committees here with those at Westminster.

Standing Orders

I too have serious reservations about the tone and the motive for a new Standing Orders advisory committee set up by the Secretary of State. This strikes me as unnecessary and patronising. It is right and constitutionally regular for *this* institution to take charge of the process of making its procedures work effectively in future. Neither should such procedures be static, and the authority to amend and improve them should rest with this body.

The Referendum and Future Primary Powers

The inclusion of a mechanism for moving to a cleaner cut (and, in my view, better) settlement is to be welcomed. However, the details of the transfer need clarification. With regard to the “devolved fields”, I would strongly advocate drawing on the Scottish model, with the Assembly acquiring primary powers over all, except specifically reserved areas. This will add greater simplicity and clarity to the new settlement (see my earlier remarks). It is regrettable that no serious rationale is presented for excluding the possible future transfer (incrementally and on the basis of a cost benefit analysis- see the Richard Commission report, chapter nine) of powers over new fields.

I am also concerned with the lack of a clear timescale for this element in the devolution route map. The rationale presented here for not moving to the preferable option of a cleaner-cut settlement is a lack of consensus amongst the Welsh people. Consensus *is* difficult to measure, although my belief - backed up by some credible, longitudinal opinion polling - is that a public consensus already exists. That said, I would merely point out that future measurement is unlikely to get easier if the variables and indices for gauging support are not known. Indeed, it may be even harder to time a referendum if the Orders in Council are maximised or used in an expansive manner.

Furthermore, there seems no sensible reason why such a trigger would need to be supported by two thirds of the National Assembly (where the impetus should, in truth, lie), but by a simple majority at Westminster.

The Size of the Assembly

I am frankly baffled by the jettisoning of a very conservative recommendation in the Richard report for a minimal increase in the number of AMs. In my view, 60 AMs is an unworkable figure now and will become even more so in an enhanced legislative body. I searched the White Paper for an intellectual or practical case for preserving the current under resourced state and found none. Whatever other tactical reasons there may be for not pursuing the logic of a larger Assembly to manage an increased load, maintaining the current number of AMs will pose serious problems first, for managing the additional scrutiny function, second for managing the enhanced opportunities for policy divergence, and finally, the role and status of the Deputy Ministers will exacerbate problems by further reducing the number of “backbenchers” to deal with i and ii.

The Electoral System

This does not come within the terms of reference of this committee but features prominently in the White Paper so requires some comment. Chapter Four is short, reflecting the inevitable difficulty of defending the indefensible. “Solutions” (such as they are in politics) should be designed to “solve” problems. These amendments deal with some specific *symptoms*. There are many weaknesses in the Additional Member System (AMS) - these are clearly set out in chapter twelve of the Richard Report - most fundamental of which is that it internalises two types of elected member. Admirable efforts have been made (by the Presiding Officer and the Assembly Parliamentary Service, in particular) to assuage the impact of this but it will remain an intrinsic feature of AMS. In Richard, we adopted a more organic approach closely linked to the previous point on size. More powers need more members, which itself presents an opportunity for unearthing a better electoral system

measured against some clear criteria. The Single Transferable Vote (STV) came out on top for us (and remember this conclusion was reached by consensus by some staunch advocates of the FPTP system). No electoral system is perfect but the change recommended in the White Paper to prevent individuals standing in both parts of the ballot will have serious “unintended consequences” as follows:

- 2 There will remain two “types” of AM;
- 3 The “best” party candidates will avoid marginal seats, being kept back for the regional lists. Given these are *party* lists, the stellar candidates have no real incentive to actively campaign or publicise themselves;
- 4 This might lead to low levels of political campaigning in many parts of Wales, especially where there are few marginal seats. This is an unwelcome phenomenon at a time of low level public engagement with the electoral process as the Electoral Commission report on the 2003 Assembly elections rightly points out;
- 5 The human rights/civil liberties angle;
- 6 It raises issues for Scotland where problem has scarcely been raised (neither has it incidentally in Germany and New Zealand), possibly due to the spread of seats gained on each ballot by different parties there.
- 7 The emotive use of a “winners and losers” debate. This is certainly not as simple as has been suggested- for example, in Llanelli, where the Plaid Cymru candidate “lost” by 21 votes to Labour, Plaid candidate was elected on the party list meant the electorate, most of which was almost evenly split, effectively “won” in AMS; equally, Labour “won” 50% of the seats in 2003 with 38% of the vote.

On the basis of the above, I repeat my cautious one and half cheers for the White Paper. The proposals draw on the Richard recommendations but appear more concerned with the consequential of the measured, sustainable blueprint in Richard rather than debating its intrinsic logic. These measures are clearly an improvement to the status quo and give considerable potential for capacity building and greater autonomy for our national institution, which is to be welcomed. Nevertheless, it has the impression of another temporary arrangement using some proven, but some entirely untried procedures and, like all interim measures, is likely to throw up as many new issues as it will provide solutions to current ones.

Laura McAllister
4 July 2005

BGW2 EV8 PROFESSOR DAVID MIERS

BETTER GOVERNANCE FOR WALES Comments by Professor David Miers

I wish to comment on the proposals to develop and to enhance the Assembly’s law making powers.

My comments are organised as a narrative that addresses the processes by which new Assembly legislative powers will be conferred, in particular via the ‘enhanced’ route. For this purpose I assume that the Assembly will enjoy the liberating effect of the welcome proposal that the complex prescriptions in GOWA concerning its Committees will be removed and that it will be free to devise new Standing Orders (para. 2.15). The Assembly has a prime opportunity to revisit and revise its Committee structure to purposes that are more clearly focused (because of the de jure recognition of the de facto separation of powers: para. 1.18) and make better use both of AMs’ and WAG’s time for its deliberative and scrutiny functions. The narrative will remark on some political and constitutional rubbing points.

The proposals to develop and to enhance the Assembly’s law making powers

1 `Developing the current settlement

This proposal expresses the Government's intention that current Whitehall measures should as a matter of principle move from the more narrowly defined to the wider allocation of legislative discretion to the Assembly (paras.1.24, 3.9). While para. 1.24 speaks of the Government's immediate intention 'in drafting' legislation for Wales, this is of course a matter of policy in the given case. The issue is whether Ministers will, as a matter of policy, be more inclined in the future to take a 'more liberal approach' (para. 3.9) than has been evident to date. Certainly there are areas where Acts have transferred a very wide measure of discretion to the Assembly to make secondary legislation (the Education Act 2002 is a good example, cited at para. 3.10). But the practice adopted in the 1999 TFO of very particular transfer of functions remains the norm.

The central question is whether it is reasonable to expect a change in the political culture in London. The White Paper makes it clear, that as matters stand, the Assembly's powers reflect what Parliament is 'prepared to confer' (para. 3.5) and that in the future, 'to what extent and on what terms Parliament might be willing' to confer additional authority on the Assembly to make law (para. 3.7). Since what Westminster is prepared to confer must initially depend on what Whitehall decides, the success of this 'development' will, as it always has, depend on Ministers' views about devolution and their departmental responsibilities.

This is a matter that has been frequently debated. Why should Ministers considering the delegation of powers in areas such as the environment, planning or transport, now change to a more liberal approach? One influential voice argues that for a more liberal policy to work, Ministers should be expected to start from the presumption that in giving powers to themselves or to statutory or other bodies so far as England is concerned, the same breadth of discretion should be transferred to Assembly Ministers. This is one of the Rawlings principles, and could constitute, in the form of a Concordat or DGN, an express commitment to the intention of para. 3.9.

What this proposal does not address are the weaknesses exposed by the Lords' Constitution Committee concerning communication between the Assembly, Whitehall and Westminster. As para. 3.33 notes, the joint scrutiny by Assembly and Parliamentary committees of a Wales-only Bill was a useful advance on the accepted practice. Formalisation of this innovation is welcome.

2 Enhancing the current settlement

In terms of the Assembly's medium-term powers to make secondary legislation, this section of the White Paper is unquestionably the most interesting, holding out the prospect of real advance.

The White Paper notes (para. 3.13) that its proposals for developing the current settlement do not address the underlying problems that the Assembly faces in trying to secure new legislative authority to act (paras. 1.21, 3.15). What is proposed here is modelled on what is already permitted under section 22 of GOWA, since there is nothing in that section that requires transferred executive functions to be cast in the detailed manner that has been the norm. Paras. 3.14-3.21 propose a means by which broadly defined legislative functions can be transferred. A number of issues need to be addressed.

2.1 What is to be transferred?

The White Paper draws a careful distinction between 'fields' and 'policy areas' (paras. 3.17, 3.18), and 'policy areas' exist within 'fields' (para 1.25). An interesting question that is prompted by para 1.25 arises as to the scope of 'field'.

The paragraph says that the enhanced powers would apply to 'specific matters or within defined areas of policy within *the fields in which the Assembly currently exercises functions.*' I have italicised these words because they require interpretation, both as to the meaning of the word 'field' and of 'current'.

First, the para.1.25 fields must be taken to include 'fields' in the technical sense of Schedule 2. These 'fields' are immutable, because they were enacted for the sole purpose of the first TFO. Clearly the Assembly has acquired many functions within these fields, and will continue to do so, but the 'fields' themselves cannot change, as they have served their statutory purpose. If the meaning of 'fields' in para 1.25 were so confined, the addition of the italicized words would be superfluous.

But, under GOWA section 21(b), Parliament may confer functions under any Act other than GOWA. Until the Fire Services Act 2004, these functions have all fallen within the ‘fields’, but this Act does not. The question which therefore arises is whether ‘fire services’ now constitute a field, in the non-technical sense. If it does, then the Government has, by that Act, extended the ‘fields’ within which the Assembly now has executive functions. And, once the enhanced settlement is in force, it would also have potential to amend that Act in its application to Wales. It would also be able to make new legislative provision.

To put this point more shortly, if this analysis is correct, it appears to be Government policy that the Assembly should, over time, have more fields conferred on it. There is, however, a serious issue concerning what exactly constitutes the field created by the Fire Service Act 2004, and consequently what would constitute the scope of any Order in Council conferring legislative authority on the Assembly to modify it.

The second point that arises under para 1.25 is that Orders in Council can apply only to policy areas in ‘the fields within which the Assembly currently exercises functions.’ This I take to mean ‘current’ at the date of the Order and not at the date of the GOWA Amendment Act. If the latter, then the scope of the Assembly’s devolved legislative powers will be frozen in time to fields that exist in, say, 2006. If that were the case, and no further fields in the non-technical sense were conferred before that date, then the Assembly’s powers under the enhanced settlement would be limited to the 18 ‘fields’ plus fire services.

If the former (‘current’ at the date of the Order), then the scope of the Assembly’s legislative powers will expand as over time functions within new fields are conferred on it; for example, in respect of the police service.

(a) Scope

The first matter to note is what is excluded as possible transfers of legislative authority:

- Within any ‘field’ (as defined) there could be no transfer of legislative powers that could only be the responsibility of HMG (para. 3.17)
- Within any ‘field’ (as defined) legislative powers could be transferred only in respect of a ‘policy area’ of wide or narrow scope, as determined by Parliament (HMG) (paras. 2.25, 3.18).
- However wide the scope of the ‘policy area’ that is transferred, it can never be coterminous with the ‘field’ to which it belongs (para. 3.17); even in the case of the Welsh language, therefore, the ‘enhanced’ settlement could not give the Assembly exclusive secondary legislative authority.

The second matter to note is that whatever comprises the ‘specific pieces of legislation’ or clearly defined topics’ will need to be very carefully drafted. They will be closely scrutinised by UK Ministers to ensure that they do not encroach on their policy areas, and by Parliamentary Committees to ensure that they do not give the Assembly inappropriate Henry VIII powers as measured by the accepted criteria for such clauses. These points are picked up below.

(b) The power to amend, repeal or extend primary legislation

The power to be given to the Assembly under this procedure is analogous to that which applies to Regulatory Reform Orders (originally Deregulation Orders), but goes some way beyond them. These Orders give Ministers authority to modify primary legislation where that modification will achieve the benefits that are specified within the Regulatory Reform Act 2001.

To understand fully what is proposed in the White Paper, it is necessary to recognise that the Deregulation and Contracting Out Act 1994 was the first occasion (other than wartime) that Parliament had given a general authorisation to the executive to amend primary legislation. The 1994 Act restricted such amendments, broadly speaking, to effect reductions in the burdens on business, while retaining necessary protections for those affected by the legislation.

The 2001 Act took this further. First, it authorises not merely the reduction or removal of burdens (as was the case under the 1994 Act), but permits Ministers to impose or increase them. I mention this

because this extension alone caused the relevant parliamentary committees to look carefully at the procedures that they should apply to Ministers' proposals for such Orders.

Secondly, the 2001 Act provides that RR Orders may apply prospectively, to legislation passed after the Act where the legislation to be amended is at least two years old when the Order is made. This too engaged the attention of the Lords Delegated Powers and Regulatory Reform Committee (DPRR).

Prospective Henry VIII clauses are rare, and the White Paper appears to propose that this power to amend should be routine, save where expressly prohibited. This is bound to generate issues for DPRR, and for the equivalent Commons Committee (see further below).

2.2 The role of the Assembly Government

It might be helpful to visualise the process by which the Assembly's request will be made and thereafter managed. A policy area might be identified by the Assembly Government as part of its mandate, or arising from difficulties encountered in the implementation of existing powers, but which cannot be remedied other than with fresh powers for which the Assembly has no authority. Alternatively, the Assembly may identify the area as part of its deliberative or scrutiny functions.

Whether the idea for the 'policy area' that is to be the subject of the Order emanates from the Government or the Assembly, it will be the Government's responsibility to ensure that the motion that is to be put to the Assembly for its agreement

- defines and justifies the policy area or 'topic'
- identifies and demarcates any aspects of the policy that might touch on UK Ministers' responsibilities
- identifies the 'specific pieces of legislation' that are to be modified, and the exact nature of that modification
- identifies how the Assembly might propose to make use of its powers in the immediate future
- identifies any aspects of the 'specified area' which, if Parliament were in future to enact legislation, the Assembly would wish power to modify
- meets and anticipates any issues concerning the criteria that will be applied by Parliamentary Committees

This will be a substantial task, but one which, as the Commons Regulatory Reform Committee put it in its Regulatory Reform First Special Report (HC 908, 2002-03, para. 9), the Government 'should be expected to get ... right first time.' If for no other reason, any error that is revealed while the draft Order is being considered by UK Ministers or by parliamentary committees will inevitably add to what is likely in any event to be a lengthy timescale for any request.

2.3 The role of the Assembly

The Assembly's role is to make the request to the SSW (paras. 1.25, 3.19). As one of the principal justifications for the enhanced settlement is the Assembly's democratic credentials (para. 3.5), it will need to establish a procedure that enables AMs to debate, amend and approve the proposed Order that is the subject of the request. A second reason is that the Parliamentary Committees that consider the draft Order will need to be persuaded that there has been consultation on its substance as well as scrutiny by the Assembly (para. 3.12).

Provision would be made for the Minister formally to introduce the proposal that will comprise the request for its consideration in plenary, thereafter to be committed to (say) a Legislation Committee that performs a function similar to Westminster Standing Committees. That Committee should be given power to take evidence, prior to debating and agreeing or rejecting amendments, and reporting to the Assembly in plenary for final approval.

In essence, the request is the product of a deliberative process that resembles Bill procedure, but with the addition of evidence taking at the Committee stage. This is now a routine feature of Draft Bills in Parliament, though not of Bill procedure.

The Presiding Officer would have to make a compliance statement (as in Scotland) that the draft Order did not contravene the excluded matters.

2.4 The role of SSW

In the words of a former holder of this office, the role of the SSW 'is to present, not to represent the Assembly's views'.

Before any question of the draft Order being laid, SSW will need first to satisfy him/herself that HMG can support it in debate. This does not imply that HMG supports it in the sense that it represents a policy position that it would adopt; rather, that it represents a policy position that the Assembly, as a democratic devolved body, wishes to adopt, and which does not conflict with any UK Minister's responsibilities.

Upon receipt, the SSW will consult Departments within whose areas of responsibility the Assembly's request falls. They will determine whether the request trespasses on areas for which they alone have responsibility. They will need to be satisfied that the list of modifications is in order. They will need to be satisfied that any future cases that the Assembly has identified as those in respect of which it would desire the power to modify does not foreclose for them their range of future action.

Officials in the Assembly Government will have drafted the draft Order. It will now be referred to Parliamentary Counsel.

The question that then arises is, what steps might SSW take if any aspect of the scope of the draft Order or the detail of what the Assembly would do with the power it defines is objectionable? It may be objectionable because it conflicts with what is prohibited by paras.1.25, 3.17 and 3.18 or because of its execution. In either case SSW would be unwilling to proceed (for a reason other than the trivial), and is obliged to write to the Assembly Government giving his reasons (para. 3.20).

Two major issues to which this gives rise are:

- It is unclear why, if the request has come from the Assembly it is the Assembly Government and not the Presiding Officer who receives this letter (para. 1.25); it is one matter to say that the Assembly cannot compel SSW to lay the Order (3.20), but it does not follow from that that SSW must give his reasons to the Assembly Government;
- On the assumption that the draft Order is objectionable because of its execution, but could be remedied fairly easily, what scope is there for the Assembly (the Government) to make that remedy and resubmit? Or does the request die? Any resubmission would, like the original, have to come from the Assembly, since the Assembly would have to approve the remedied version.

2.5 The role of Parliament

The White Paper suggests that it is likely, and probably desirable that the draft Order would be scrutinised by parliamentary committees before the Affirmative Resolution debate (para. 3.21).

In the Lords the most obvious candidate for this role is DPRR Committee. This Committee has a well-established and robust procedure for examining the scope and proposed effect of delegated powers. It pays special attention to Henry VIII clauses, and can be expected to pay even greater attention to such clauses where it is proposed that they may apply to primary legislation yet to be enacted. (See N. Barber and A. Young, 'The Rise of Prospective Henry VIII clauses and Their Implications for Sovereignty' [2003] *Public Law* 112-127). 'Its Special Report on Henry VIII clauses (HL 21; 2002-03), which dealt with the addition of such a clause in a Bill on its Third Reading, while not exactly in point, nevertheless demonstrates the vigilance that the Committee brings to these clauses.

In the Commons the RR Committee performs a similar role as the DPRR, but only in respect of RR Orders. But since they also give Henry VIII powers, its criteria, which are similarly rigorous, will need to be addressed when the Assembly Government and the Assembly are formulating, debating and approving the request.

It is an open question, whether Parliament would wish to extend the remit of the existing Committees to Assembly draft Orders, or to establish, as para. 3.21 canvasses, a new Joint Committee. Whichever, one point is very clear. That is, that the Assembly can expect that the criteria that the two Committees currently apply will, suitably modified, apply with equal rigour to its requests.

Two key points concerning these committees' scrutiny of RR draft Orders warrant mention. The first is that both require the Order to be an 'appropriate' subject for the use of the deregulation procedure. Both Committees have on a number of occasions considered what is or is not an appropriate subject. The most recent observations are those of the DPRR Committee (Special Report, HL 110, 2004-05; paras. 49-51). There can be no doubt but that if either (or a joint) committee were to consider an Assembly request an inappropriate use of the enhanced settlement, it would be rejected..

The second point concerns consultation: 'it will be key to establishing whether a proposal is suitable to enactment', (HL Special Report, *ibid*, para 52). Both Committees take evidence from the Department proposing the delegated power. They do this to test that the Department has met the statutory and parliamentary criteria for RR Orders. In the case of Assembly requests, these could include vires, consultation, clarity of expression, and EU compatibility. It would also include the justification for the appropriate use of the procedure. Who would give evidence in support of the Assembly request? In this instance the Assembly Government is better placed, even though procedurally it is not its request.

(The Standing Orders for RR Orders specify a two-stage procedure: an initial proposal, which is considered by the Committee, followed by a second stage consideration of the draft Order prior to a recommendation to the House. The extension of existing parliamentary procedures to consideration of Assembly requests would have to conclude whether, because of the Assembly's democratic and deliberative input, a single stage was sufficient).

3 Conclusions

Apart from any others, one conclusion that may be drawn from this is that it is likely to take some time for a draft Order to be successfully piloted through these various steps. Each request will need the equivalent of a 'Bill team', which also raises the question, how many requests could the Assembly realistically expect to make in any one year?

Professor David Miers
5 July 2005

INSTITUTE OF WELSH AFFAIRS

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OVERVIEW John Osmond

Despite its shortcomings, due in large measure to the apparatus it was given at the start, the National Assembly has achieved a great deal in establishing itself as a Parliament in all but name. In six short years it has left behind the corporate body local government style ethos legislated for in the Government of Wales Act 1998. Instead it has created the Welsh Assembly Government on the one hand, and the independent Presiding Office with its parliamentary service on the other, in the process separating the executive from the legislature. It has also begun the process of creating a legal personality for Wales, generating a greater range of Welsh-specific legislation than in any other equivalent period, while at the same time demonstrating its inherent weaknesses in both initiation and scrutiny. Most importantly it has spawned the cross-party Richard Commission which, after great deliberation, recommended a coherent way forward for the Assembly to become a fully-fledged Parliament.

In large measure the White Paper agrees with these changes, and acts so to speak to make them legal. Thus, it says a new Wales Bill will be brought forward in the current session to formally constitute the Assembly Government, putting on a statutory footing the terms First Minister, Assembly Ministers, and

moreover Deputy Ministers who simply appeared a few years ago as if on Rhodri Morgan's whim. Equally important, and generally unexpected it resurrects the title of Counsel General, a position that had been thought of as defunct following the spat between the First Minister and the Presiding Office over the failure to appoint a successor to the inaugural holder of the office, Winston Roddick QC. As the White Paper has it:

“The new status of Welsh Assembly Ministers as Ministers of the Crown, and the developing role of devolved government in Wales, now makes it appropriate to make more formal provision. A new statutory post of Counsel General to the Assembly Government will therefore be created.”²⁸⁰

This position will be directly equivalent to the Lord Advocate in Scotland. The Counsel General will be a member of the Cabinet, able to address the Assembly and answer AMs' questions, but need not necessarily be an Assembly Member. He or she will also have the power, as do UK Law Officers, to refer to the courts if there is doubt whether the Assembly, acting as a legislature, or the Assembly Government are acting within their legal powers.

The White Paper also formalises the split between the executive and legislative sides of the Assembly. In future civil servants will act exclusively in support of Assembly Ministers. Meanwhile, staff supporting the Assembly itself, via the Presiding Office, will have an independent status, like the clerks to the UK and Scottish Parliaments.

Assembly Ministers will no longer participate directly as members of the Assembly committees. The White Paper says it agrees with the Richard Commission's analysis that, as it puts it, “Ministers' membership of the subject committees had inhibited the exercise of an effective scrutiny function, and that a culture of scrutiny on traditional parliamentary lines had failed to develop”. Henceforth, the committee structure in the Assembly will not be dealt with in legislation, as in the 1998 Act which prescribed the committees that would be established. Instead, the Assembly itself will be able to establish committees as it sees fit, in accordance with Standing Orders.

It is at this point that the White Paper starts to go wrong. It was prompted by the Richard Commission recommendations and central to these is that the Assembly should become a fully-fledged Parliament, with primary law-making powers. The White Paper acknowledges the force of the Richard Commission argument. Essentially this is that the Assembly cannot be compared with a Whitehall department in competing for legislative time at Westminster for the measures it wishes to enact. Peter Hain had attempted to argue the point in the evidence he himself gave to the Commission. He told them there were a lot of frustrated Ministers in the UK Cabinet who could not get their bills into the Queens Speech:

“There is always a big negotiation as to what goes in and what there is legislative time for and so far we have a pretty good track record of Welsh legislation, Welsh-only legislation and Welsh clauses in legislation. It does not follow that because you cannot get everything tomorrow, the fundamental settlement has to be altered in a substantial fashion.”²⁸¹

The Commission dismissed this argument in one cogent sentence:

“This views the Assembly as the counterpart of an individual UK Department, rather than the democratically elected body for the whole of Wales with responsibility for a broad range of policy matters.”²⁸²

Now the White Paper accepts the force of this position. As it puts it:

²⁸⁰ *Better Governance for Wales*, Chapter 2: *The New Executive Structure*, para 2.8.

²⁸¹ Report of the Richard Commission on the Powers and Electoral Arrangements of the National Assembly, Chapter 7: *the Wales-Whitehall relationship*, para. 57, 2004.

²⁸² *Ibid.*, para 58.

“Once executive powers are conferred directly on Welsh Assembly Ministers rather than on the Assembly as a corporate body, they will also be able to exercise many of the Assembly’s existing powers to make secondary legislation. ... Even so, these powers will not give the Assembly the ability significantly to influence the legislative framework within which the Assembly Government will operate. The Government believes that the Assembly should have this function.”²⁸³

The question is: how? The most obvious answer is to follow the Richard Commission recommendation and straightforwardly give the Assembly primary powers. However, this option is not open to Peter Hain, since he is constrained by the Labour Party’s determination to have a referendum before this can be allowed, and particularly following the experience of the recent referendum in North East England, the Westminster Government is not minded to follow this course in a hurry. Welsh Labour MPs at Westminster are not in a hurry either, since they are acutely conscious of the Richard Commission’s side recommendation that primary powers should be accompanied by an increase in Assembly Members and an implied decrease in Westminster MPs representing Wales. Peter Hain rationalises these realities by saying that a referendum, if held now, could not be won.

In these circumstances he has come up with a remarkably inventive middle way through the obstacles, so to say. This is to enable the National Assembly to exercise primary powers in all but name, though not for any entire subject field listed in Schedule 2 of the Government of Wales Act. The proposal is as follows:

(i) following passage of the Bill, and in the wake of the 2007 Assembly election, the Assembly of the day will be able to signal to the Secretary of State such enabling legislative powers as it wishes to see conferred on it to enable it to legislate on specific matters or defined areas of policy where it has responsibility;

(ii) assuming there was agreement that Wales should follow an initiative, the Secretary of State would frame an Order in Council giving the Assembly powers, in the specified aspects of policy, to modify or repeal existing Acts of Parliament or to make new provisions;

(iii) such Orders in Council would have to be approved by both Houses of Parliament in short debates, after committee consideration; and

(iv) the Assembly Government’s parliamentary draftsmen would then proceed to draw up the required legislation which would be considered by the Assembly and its appropriate standing committees before passing into law, presumably following the Presiding Officer’s signature.

Such is Peter Hain’s ingenious device for giving the National Assembly primary powers through the back door. And the proposal does have at least three advantages. First, it has the potential for breaking the present Westminster logjam, providing the Assembly Government much more freedom of manoeuvre to pursue its own agenda without having to ask for the enactment of Wales-only bills. Secondly, the process will prove a useful learning curve for the Assembly, putting into place over time the procedures and expertise that are necessary to enact primary legislation. Finally, it moves the Assembly on in the direction of primary powers without having to traverse any political obstacles such as a referendum.

On the other hand, there are substantial drawbacks to the scheme. In the first place, Orders in Council for Wales still require the consent of the Westminster government of the day and both Houses of Parliament. This may work well enough while Labour continues to rule in both London and Cardiff, but such conditions inevitably change, even perhaps by the time these provisions come into force. Secondly, although the legislation that will be available to the Assembly under these terms will be potentially far reaching, it will still be secondary and not primary legislation. The importance of this is not the necessary distinction between the two – and it has to be conceded that the boundaries between primary and secondary legislation are increasingly becoming blurred – but the fact that secondary legislation is subject to judicial review for exceeding the limits of the power granted. It is only UK primary legislation which is generally immune from such challenge.

²⁸³ *Better Governance for Wales*, Chapter 3: *Enhancing the Assembly’s Legislative Powers*, para 3.4.

Orders in Council will typically lay down the parameters within which the Assembly can amend existing or enact new legislation in general terms; the Assembly will then proceed to legislate in the necessary detail within the provisions of the Order. Differences in interpretation between the two processes open up scope for aggrieved parties to have recourse to the courts to question whether the legislation is within the terms of the power granted. Both the Orders in Council and the legislation made under them will have to be drafted very carefully indeed. The Assembly itself will have to be highly conscious of the potential of litigation, if the role of the lawyers in Wales is not to be inflated. We might now see the reasoning behind the resurrection of the position of Counsel General.

A more philosophical objection to Peter Hain's compromise is that it greatly increases the complexity of the National Assembly's operation. Indeed, it follows the incremental pragmatic mechanisms of change instigated in the 1998 Act, giving the impression of continued a crab-like shuffle towards Welsh domestic autonomy, rather than the confident step contained in the Scotland Act of that year. We already have six sources of Welsh-related legislation (see the following chapter). This adds another three and is not designed to aid the understanding or involvement of the citizens of Wales who are already less than enthusiastic about becoming involved.

The White Paper contains a further, far reaching proposal for a referendum at some future unspecified time, that if successful, would result in the transfer of primary powers. Such a referendum would be triggered if two-thirds of the Assembly voted in favour. It is a somewhat innovative proposal in constitutional terms since it is designed to avoid the need to seek further legislation from a successor Parliament. As the White Paper puts it:

“The Government has no current plans for such a referendum but, in order to avoid the necessity of a third Government of Wales Bill, it proposes to provide for the possibility in this legislation.”

However, it is difficult to envisage circumstances in which such a process could be gone through without there being pressure for additional legislation. For instance, the Richard Commission made a powerful case that gaining primary powers should also entail an increase in AMs from 60 to 80 together with a more proportional electoral system, steps that the White Paper rules out.

Despite all these caveats, the White Paper probably represents the best that we could hope for in present circumstances. Certainly they testify to Peter Hain's brilliance in negotiating some pretty difficult rapids between the high ground of the Richard Commission and the lower reaches of his own backbenches. It may be a clever political fix, but a fix it remains. It is unlikely to last very long unless a steady stream of Orders in Council empowers the Assembly to make distinctive Welsh law. How likely is that?

DEVELOPING PRINCIPLES FOR PRIMARY LEGISLATION FOR WALES

Keith Patchett

Introduction

This submission concerns the mechanics of making law that applies to Wales. Many commentators²⁸⁴ have remarked upon the complexity of the legislative arrangements and the consequences that flow from that both for the law-makers and, importantly, for those who have to give effect to the resulting legislation. At the same time, what has been achieved in this respect should not be downplayed. Given the nature of the scheme that the law-makers have been obliged to operate, we should acknowledge the innovative and progressive development of procedures and statutory devices to make the scheme effective. From the start there were problems to be solved – how new legislative functions should be conferred on the Assembly, how they should be formulated, how the Assembly could feed its requirements on legislative projects that affect Wales into the Whitehall/Westminster machinery and so on. By and large workable solutions have been found. But these have too often been reached, under the pressure of needing to move forward, through pragmatism and with too little regard for principles.

²⁸⁴ For example, Keith Patchett, “Principle or Pragmatism? Legislating for Wales by Westminster and Whitehall”, *Devolution, Law Making and the Constitution*, c.4.

Yet it is from a platform of principles that a system that is consistent, coherent and predictable should be built.

The Richard Commission enquiry and indeed its final report²⁸⁵ can be seen as an opportunity to move the law-making system as it affects Wales onto more principled ground. The White Paper²⁸⁶, giving Government's response to the Commission's recommendations, promises important amendments to the original settlement. This submission focuses upon those proposals in the White Paper that concern law-making, in particular to see how far in this respect they facilitate or call for the development of a more principled approach.

The longer-term outcome?

Patently, conferment upon the Assembly of primary powers to legislate in the form found in the Scotland Act 1998 would remove many of the current anomalies and constitute a more coherent basis for making Welsh-related legislation. Faced with Labour party opposition for such a step, the Government's plan is ingenious – to include in the promised Bill provisions that enable a referendum on the issue to be held at some future date when more auspicious circumstances exist. This neatly offers something to both opponents and proponents. It is also implicit recognition that the Assembly itself may not be suitably equipped or experienced for a while to assume such responsibilities. Very pragmatic!

But this proposal is somewhat lacking in clarity. For it is by no means clear what precisely the Bill will contain in this respect. The White Paper tells us:

- 2 to avoid a third Government of Wales Bill, the forthcoming bill will provide for the possibility of a referendum²⁸⁷;
- 3 the referendum will be a post-legislative referendum²⁸⁸;
- 4 the option of primary powers will be provided for in the bill⁵;
- 5 the bill will specify the conditions that will trigger the referendum²⁸⁹.

In all probability it will be necessary for the forthcoming bill to make provision for the scheme of primary law-making in the devolved fields, except, as in Scotland, for such excluded matters that are reserved to Parliament. The Scotland Act 1998 contains extended and detailed provisions in this regard²⁹⁰. Presumably similar provisions, tailored to the more limited responsibilities of the Assembly, will be required for Wales²⁹¹. Will these be included in the forthcoming bill? If not, how and when will they be provided? By Order in Council “when the time is ripe”? Is it feasible to assume that the circumstances at some indefinable future date will not demand further primary legislation? Without the finished detail, on what basis will it be possible to hold a post-legislative referendum? But if they are included, will this Part of the bill not require those with more immediate concerns to devote preparatory and legislative time to settle the detailed terms in what, in some respects would be a hypothetical exercise or at least one that may be viewed differently when a new Parliament and new Assembly are in place? How will such provisions fare in Parliament where, we know, there is opposition to such an extension of powers? One hopes that the presence of such a scheme in the bill does not detract from the attention that the more immediate amendments will require.

Enhanced legislative powers

The Government proposals with respect to enhancing the Assembly's present legislative powers are designed to meet a number of existing concerns, in particular:

²⁸⁵ *Report of the Commission on the Powers and Electoral Arrangements of the National Assembly for Wales*, Spring 2004.

²⁸⁶ *Better Governance for Wales*, Cm 6582, June 2005.

²⁸⁷ Para.3.23.

²⁸⁸ Para.1.26.

²⁸⁹ Para.3.24.

²⁹⁰ Ss.28-36; Schedules 4 & 5.

²⁹¹ Para.3.26.

- 2 the welcome promise of greater consistency in drafting legislation affecting the Assembly powers,²⁹² though exactly what improvements will be instituted is not spelled out;
- 2 broader and more permissive secondary legislative powers in bills enabling the Assembly and the Assembly Government to provide implementation provisions in their final form⁹;
- 2 conferment by Order in Council of powers to modify, repeal or to add new provisions to existing legislation with regard to matters specified in the Orders²⁹³;
- 2 greater scope for the Assembly to develop procedures and structures for the scrutiny of legislation²⁹⁴.

These will be welcome developments, which will contribute to the Assembly's capacity to develop as a legislature. At the same time, one cannot help commenting that they smack of the same pragmatism that has led to the present complexity. Rather than reducing that complexity, in some respects they appear to add to it, as may be seen in relation, first, to the modes of allocating legislative powers and, secondly, to the form of the sources of those powers.

Allocation of legislative powers

At present legislative powers are conferred on the Assembly at large, by three main devices:

- 2 Transfer of Functions Orders, under which specified Ministerial powers in existing legislation are transferred to the Assembly, sometimes in their entirety, sometimes subject to limitations;
- 3 provisions in Acts of Parliament (or exceptionally subordinate legislation) authorising the making of secondary legislation to give effect to specified features of the particular Act or instrument (hitherto expressed in a bewildering variety of drafting devices);
- 4 Designation Orders under the European Communities Act 1972 authorising the Assembly to make regulations implementing community obligations on specific topics within the devolved fields.

The White Paper proposes a number of changes that may add further complexity to these arrangements:

- 2 most existing implementation powers will become the responsibility of Assembly Government Ministers, but the Assembly will retain these in some cases (described as "important" functions²⁹⁵). Will there be some criteria by which this division between Assembly and Assembly Government, which will require adaptations to a mass of provisions, will be worked out? When powers are retained by the Assembly, will further delegation to Ministers be ruled out?
- 2 future allocations will typically confer the legislative powers directly on the Assembly Government Ministers, though again presumably in important cases they will go to the Assembly. Again, will there be some principles by reference to which this will be determined? Again, will further delegation by the Assembly to Assembly Ministers be prohibited?
- 2 how will the proposal to achieve greater consistency in the way that these wider powers to legislate implementation provisions are drafted be secured? Will there be guidelines that reduce the kinds of variation that we have seen in the past?
- 2 Orders in Council permitting the Assembly to modify or add to legislation on specified policy areas will not be confined, as they are at the moment, to the subject matter of the particular Act in which the power is granted. It is apparent from the White Paper²⁹⁶ that the powers could relate to policy areas within the devolved fields in terms that are broad or narrow, specific or

²⁹² Para.3.12.

²⁹³ Paras.3.16ff.

²⁹⁴ Paras.3.30-32.

²⁹⁵ Para.2.12.

²⁹⁶ Para.3.18.

general or extend to altering both existing and future legislation, as defined by the Order. But all will depend upon the form in which the powers are granted. Will there be guidelines that ensure that these powers are consistently deployed and are not unduly restricted or coupled with limitations that power retentive Whitehall departments consider to be necessary? The way the powers are cast will take on particular importance if increased possibilities of judicial review of their exercise are to be avoided.

Sources of Welsh-related legislation

Disregarding legislation in non-devolved fields and instruments that are not general subordinate legislation, at present there are six main sources of legislation affecting Wales:

- 2 Wales-only Acts.
- 3 Provisions of Acts applying to Wales specifically.
- 4 Acts applying to England and Wales as a single jurisdiction.
- 5 General subordinate legislation made by the Assembly under Acts or exceptionally under Whitehall subordinate legislation.
- 6 Subordinate legislation made by Whitehall specifically for Wales.
- 7 Subordinate legislation made by Whitehall for England and Wales as a single jurisdiction.

Under the Government's proposals, we are likely to have three further sources:

- 2 Measures made by the Assembly under Orders in Council modifying or supplementing existing legislation.
- 3 General subordinate legislation made by the Assembly Government under provisions of Acts.
- 4 General subordinate legislation made by the Assembly Government as delegated under Assembly Measures made under Orders in Council.

Does this not add further problems of the accessibility of the law, which is a continuing concern of Welsh lawyers in particular? These can only be compounded by potential difficulties in tracking down whether and in what ways particular provisions in Acts have been modified or supplemented under Assembly Measures. Reference to an Act and to the instruments made under it can no longer be guaranteed to establish the legal position operative for Wales. What one sees on the traditional can is not necessarily what one has to use. It could be necessary to find out whether another can is required, whether its contents have to be applied and to mix them with those in the principal container. Clearly some principles are required to ensure that those who need to can obtain statute law as it relates to Wales in a coherent form. The Department for Constitutional Affairs' Statute Law Database, which, we are told, is intended to provide on-line up-to-date legislative texts with Welsh modifications incorporated, cannot become available soon enough.

Benefits and implications

We must accept that these pragmatic developments may be inevitable, given where the reforms must start. However, in principle, we should welcome the decision to institute arrangements that enable the Assembly to become more fully engaged with the final version of the legislation that the Assembly Government must execute. Enhancement of its legislative powers patently brings the Assembly closer to becoming a thoroughly parliamentary institution.

The Order in Council mechanism

In particular, the Order in Council mechanism is an ingenious extension of the original interim 13.2 device suggested by the Richard Commission²⁹⁷ and the First Minister's 13.2 plus.²⁹⁸ Effectively used, it has two particular advantages:

- 2 It obviates the need to compete for a place for Wales-only bills in the Government's legislative programme and it can substitute for Welsh-specific provisions in combined bills. The Wales Office has identified a dozen matters that have been or are being dealt with in

²⁹⁷ Op. cit, n.2, above, paas.3-13-3.20.

²⁹⁸ Welsh Labour Party, *Better Governance for Wales*, 2004.

those ways that could have been enacted by the new procedure²⁹⁹. This suggests that Wales-only bills in devolved fields may in due course become features of the past.

- 2 It would enable the Assembly to bring coherence to policy areas where the legislation is at present fragmented or lacking provisions necessary for integrated policy development.

The Wales Office examples relate in the main to the institution of new agencies or restructuring of existing administrative schemes. However, the White Paper recognised the possibility that powers of a “general and continuing” nature could be conferred in specific policy areas³⁰⁰, which presumably could extend to powers to amend or repeal provisions in future Acts of Parliament. Depending on how these powers are drafted, this could allow the Assembly not only to rationalise the law in Wales relating to a policy area, but it could enable the Assembly to pursue very different policy objectives from those of central Government. Again, one must ask whether there is here too need for some principles as to the circumstances for which such potentially far-reaching powers are likely to be granted.

Such possibilities point up how important the terms of the powers conferred by the Orders in Council will be. But the proof will be in the eating. In the past, the content of the various instruments has been influenced, again pragmatically, by considerations and compromises consequent upon detailed negotiations. It is difficult to imagine that in particular cases similar factors will not come into play in determining the extent to which lead Whitehall departments are prepared to see legislative competence on policy-related issues pass to Wales. Concerns have been already been expressed, especially about extended use of Henry VIII style powers.³⁰¹ Past experience suggests that Whitehall might not always readily accede to proposed changes when the modes of conferring legislative competence on the Assembly and the Assembly Government are under consideration. This could be particularly the case were administrations of different political colours to be in power in Cardiff and London. Parliament, and in particular Welsh MPs, may have reservations about the loss to the Assembly of legislative responsibilities for specific policy areas.

The need for principles

It will be important then how the new forms of conferring legislative powers are developed. Scrutiny of such powers would be strengthened if there were agreed principles as to their use and form by which new powers could be assessed. It is worthy of note that though the Rawlings principles, even after being approved by the Assembly, were somewhat cavalierly regarded in London, the White Paper reflects several of them – to use a phrase “their time has come”. It could be helpful to evolve further principles governing the operation of legislative functions in the new circumstances. For example, they might provide:

- 2 Guidance as to when Orders in Council rather than permissive provisions should be used, and vice versa.
- 2 That Henry VIII clauses (including repeals and amendments) in bills should only be used for transitional and consequential provisions necessitated by legislation already in existence.
- 2 That powers to add, or make modifications to, substantive provisions or conferring prospective repeal and amendment powers be confined to Orders in Council;
- 2 Revocation or variation of Orders in Council should require the agreement of the Assembly.³⁰²

²⁹⁹ *Bills and Bill provisions which could have been enacted by the Assembly under a new Order in Council*: information deposited in the libraries of the Houses of Parliament, June 2005.

³⁰⁰ Para.3.21.

³⁰¹ Patchett, *op.cit.*, n.1 above at 147-149.

³⁰² As in the case of Transfer of Functions Orders: Government of Wales Act 1998, s.22(4)(b).

- 2 guidance as to when legislative powers in bills should be conferred on the Assembly rather than Assembly Government Ministers.

Perhaps a place could be found for them in the Devolution Chapter of the Cabinet Office's Guide to Legislative Procedure³⁰³.

The need for Assembly scrutiny

Arguably, the formulation of new powers calls too for substantial involvement by the Assembly in influencing and monitoring the content of the permissive legislative powers and the Orders in Council. Problems have been encountered in the past in ensuring that the voice of the Assembly is heard at the most opportune times during the preparatory and deliberative processes³⁰⁴. Some difficult issues will have to be addressed in the new Standing Orders. For example, will Assembly requests for Orders in Council powers derive from a legislative programme formulated by the Welsh Assembly Government or will the Assembly have a right of initiative?

At the Parliamentary level, some problems in enabling Assembly views to be taken into account during the Parliamentary stages occur from limitations in current Parliamentary procedures. The White Paper makes only passing reference to such matters as "the principle of mutual recognition between the legislatures"³⁰⁵ and the "rebalancing of legislative authority" between them³⁰⁶. In this context of new and wider powers, will Parliament develop its procedures to facilitate more of a partnership approach? Indeed, will Government support and encourage such a trend?

Concluding observations

Two final observations of a rather different nature may be offered.

1. Wales as a jurisdiction³⁰⁷

Perhaps we need to pay more attention to the almost incidental emergence of a growing body of Welsh law (much of it concerned with administration and executive powers) – an almost unique example of a distinct body of law for a sub-jurisdiction within a single law jurisdiction. Under existing practice, no Act or bill may formally extend to Wales alone. For that reason, even Wales-only statutes apply to England and Wales³⁰⁸. But surely some limited extent provision will be needed to confine the Assembly's legislative capacity to Welsh related circumstances.

It is true that in most instances, problems do not arise, as jurisdictional limits are commonly defined for the Welsh executive bodies that put the law into effect. But the more that legislation in Wales differs from that of England with respect to substantive matters affecting persons or regulating their activities, the more important it will be to establish when Welsh rather than English law applies or indeed whether the Assembly or the Assembly Ministers have been authorised to legislate for disputed cases. Connecting factors may need to be spelled out in individual instruments.³⁰⁹ Are more principles required here?

³⁰³ *Cabinet Office Guide to Legislative Procedure* (2004), c.12.

³⁰⁴ Patchett, *op.cit.*, n.1, above.

³⁰⁵ Para.3.37.

³⁰⁶ Para. 3.7.

³⁰⁷ TH Jones & JM Williams, "Wales as a Jurisdiction" [2004] PL 78.

³⁰⁸ Fifteenth Report of the House of Lords Select Committee on the Constitution, *Devolution: Its effect on the Practice of Legislation at Westminster* (2003-4, HL 192), para.6: CMG Himsworth, "The General effects of Devolution upon the Practice of Legislation at Westminster", *Op. cit.*, Appendix, para.25.

³⁰⁹ E.g. the connecting factors used to indicate which "older people" are within the ambit of the Commissioner for Older People (Wales) Bill: cl.17.

2. Giving effect to the White Paper

The final point relates to the form of the legislation that will implement the White Paper. Such a statute will need to make wide-ranging changes to the contents of the Government of Wales Act 1998. There will be general agreement that it would be highly undesirable for the constituent legislation for the Assembly to be spread across two Acts that require amendments to be read across from one to the other. However, drafters are usually reluctant to include in a bill provisions that re-enact important statutory features without change, since this opens up the possibility of debate on issues that Government will not wish re-opened³¹⁰. In this case doubts may be expressed as to whether the Government would wish to have debate on such matters as the number of AMs and the electoral arrangements. However, the alternative would be the rather unusual course of following an Amendment Act with a Consolidation Bill that does no more than consolidate the two Acts (and other amendments that have been made since 1998) into a single Act. Such a bill would have to go to the Joint Select Committee but would pass all the Parliamentary stages without the possibility of further amendment. One hopes that the principle of a single Act for what is essentially a constitutional instrument will be adhered to.

BGW2 EV10

JOHN MAREK, CHAIR OF HOUSE COMMITTEE

EVIDENCE TO THE COMMITTEE ON THE BETTER GOVERNANCE FOR WALES WHITE PAPER
6 July 2005

Dr John Marek, Chair of House Committee and Deputy Presiding Officer

Background

1. Standing Order 18 contains the terms of reference of the House Committee, the relevant part is attached as **Annex 1**. The House Committee's representations in respect of the content of the White Paper prior to its publication are attached as **Annex 2**. The Chair's correspondence with the First Minister and the Secretaries of State for Wales and for Constitutional Affairs is attached as **Annex 3**.
2. This evidence will concentrate upon those elements of the White Paper's proposals of particular relevance to the House Committee's functions, and will deal with relevant areas where the White Paper is silent.

The New Corporate Body

3. The White Paper is silent as to the form the Assembly's corporate body may take. Some form of incorporation will be necessary to allow the Assembly to hold property, employ staff and enter into contracts and other legal relationships. The House Committee believes that the new legislation should contain provision similar to that in the Scotland Act 1998 Section 21. This states that "*There shall be a body corporate to be known as "The Scottish Parliamentary Corporate Body" ...to perform the functions conferred on the corporation by virtue of this Act or any other enactment*". This body would replace and perform the functions of the current House Committee, together with other functions as the Assembly sees fit.
4. Section 21 and Schedule 2 of the Scotland Act go on to set out, in general terms, the role of the Corporate Body and its relationship with the Assembly as a whole. These provisions are enabling in nature and widely drafted. In particular, Schedule 2 of the Scotland Act provides that "The corporation may determine its own procedure"³¹¹ and allows it to delegate functions

³¹⁰ G Thornton, *Legislative Drafting* (London, Butterworths, 4th ed, 1996), 414.

³¹¹ Scotland Act 1998 Schedule 2 Paragraph 6(2)

to either the Presiding Officer or the Clerk³¹². Currently, House Committee may formally delegate only to the Clerk.

5. The Assembly's corporate body should be placed in the best position to secure effective and flexible support for the Assembly, whilst allowing the Assembly to govern its own internal affairs without further reference to Westminster.

Financial Arrangements

6. Paragraph 2.18 of the White Paper outlines the proposals for determining and allocating the resources of the Assembly. The Committee does not take issue with these proposals, but believes that the arrangements for the distribution of the Welsh Consolidated Fund should be similar to those in place in Scotland. The Assembly Corporate Body would then be in a position to prepare its draft budget and open it to whatever form of scrutiny and approval the Assembly determines (in Scotland, this is by way of a Finance Committee). The other calls on the budget, including that of the Government, are dealt with in the same way in Scotland. The Assembly would consider and approve the budgets.
7. It would be helpful to have a specific power for the Corporate Body to charge for goods or services, invest and borrow (the latter subject to the Assembly's approval). This would allow it to function more effectively, and is similar to the powers of the Corporate Body in Scotland.³¹³

Members' Salaries, Allowances and Pensions

8. The House Committee has responsibility for making recommendations to the Assembly on this matter. The current statutory scheme for Members' salaries and allowances is broadly satisfactory. In framing the new legislation, care should be taken to allow the Assembly to continue to change the Members' pensions scheme, as in Scotland, due to an omission in the Scotland Act, the Westminster Parliament is the only body competent to change the scheme.

Assembly Staff

9. The White Paper proposes that the Assembly, as the legislature and scrutiny body, will employ its own staff (currently the APS) who will no longer be civil servants. The Assembly "would be expected to maintain terms and conditions for staff broadly comparable to those applying to Assembly Government civil servants"³¹⁴. The staff would have continued membership of the Civil Service Pension Scheme. These proposals are welcomed.
10. We believe that APS staff should have terms and conditions aspiring to those of other legislatures elsewhere within the United Kingdom and are at least equivalent to those of the Civil Servants working for the Welsh Assembly Government. However, to allow the Assembly to recruit and retain staff more effectively, it may be necessary to offer different terms to staff of the Assembly post-separation, in order to reflect the constraints of working in a parliamentary environment.
11. The Committee believes that the new Corporate Body should have the authority to arrange for the appointment of staff solely on merit, following open competition. This would allow the potential for freedom of interchange between APS and Welsh Assembly Government staff, which will be necessary to maintain individual career development and a good spread of experience.
12. In Scotland, the position of the Clerk is recognised in statute, and it would appear to be appropriate to recognise this position in Wales also.³¹⁵

Support for the Legislature

³¹² Scotland Act 1998 Schedule 2 Paragraph 5

³¹³ Scotland Act 1998 Schedule 2 Paragraph 4

³¹⁴ Better Governance for Wales Paragraph 2.20

³¹⁵ Scotland Act 1998 Section 20

13. The House Committee supports the ability of Members to pass or to reject the legislation proposed by the Welsh executive. The Committee is responsible for making sure that Members have the facilities and support to enable them to scrutinise, amend and challenge legislation, and would like to understand fully the nature and extent of the facilities required. The White Paper is not entirely clear in this area, my views on this are as follows.
14. The Assembly should have the ability to set its own procedures in terms of how it addresses legislation, building upon the six years' experience of its Members and staff. There should be scope within the legislation for the Assembly to decide how and to what extent it should produce, consider and scrutinise legislation, including the ability to propose amendments in Committee.
15. In particular, Assembly Members should retain the ability to produce "private bills", the current Assembly Standing Order 31 procedures allow this at present, and the ability of the ordinary Member to propose legislation should be enhanced in parallel to the enhancements in the devolution process proposed by the White Paper. There may also be scope for the legislation to allow the Assembly to take ownership of "Private Bill" type provisions which are private in nature and which relate only to land or property in Wales.
16. To secure the best support for Members in this context, the Assembly Corporate Body will need to ensure that properly experienced staff are in place in advance of the legislation.

Support for Committees

17. The House Committee is responsible for the support given to Members in their Committee roles and is aware that the restrictive nature of the Government of Wales Act 1998 has caused difficulties in providing the most effective scrutiny, particularly in Subject Committees. The Committee therefore welcomes the proposal that the Assembly will be free to make its own arrangements for Committees.
18. I find it surprising that the White Paper contains the suggestion that there will be a legislative requirement for the Assembly to have an Audit Committee, on the basis that in my view it is inconceivable that the Assembly would not appoint such a Committee. It seems to be unnecessarily prescriptive to require such a Committee, especially as the Scotland Act does not appear to include such a requirement, nor do the provisions in respect of local government in Wales. I am in favour of a strong audit committee, but believe that the Assembly should be able to provide for this itself.

Assembly Standing Orders

19. Being aware of the individual knowledge and experience of Members and responsible for the provision of experienced staff who advise Members on the content and interpretation of Standing Orders, the Committee supports the proposal to remove most of the restrictions and requirements in respect of Standing Orders from the legislation. This will allow those who have the greatest knowledge of the operation of Assembly procedures, the Members themselves and those who support them, to determine their own procedures.
20. The Committee does not, therefore, support the White Paper proposal that the Secretary of State should make the Standing Orders of the new Assembly, with advice from an advisory committee. It believes that the Assembly itself, with its six years experience of working with its standing orders and supported by its experienced staff, is the only body capable of making rules to govern its proceedings.

ANNEX 1

Terms of Reference of the House Committee – Standing Order 18

The House Committee has delegated authority from the Assembly to discharge the following functions, as set out in Assembly Standing Order 18:-

18.2 Subject to the following provisions of this Standing Order, the Committee is responsible for:

(i) the provision to and for Members (including when acting in proceedings of the Assembly) of facilities, accommodation, staff and such other support services as are reasonably necessary for the better performance by Members of their position as Members of the Assembly, including in its capacity as a legislative body;

(ii) the provision of translation services between English and Welsh for proceedings of the Assembly;

(iii) the preparation of guidance to Members on matters within the Committee's responsibilities;

(iv) the provision of advice to the Assembly on matters relating to its terms of reference and to Members' salaries, allowances and pensions;

(v) the preparation of a draft budget for the expenditure to be incurred by it and for the administration of the approved budget; and

(vi) the provision of such other services to and for Members of a similar nature to those described above including responsibility for any extension to the building where the Assembly normally meets in plenary, as the Assembly may from time to time authorise by resolution in plenary.

18.3 Nothing in Standing Order 18.2 shall make it part of the Committee's terms of reference to have responsibility:

(i) in any field in which the Assembly has functions (within the meaning of section 57 of the Act); or

(ii) in respect of proceedings of the Assembly Cabinet

ANNEX 2

House Committee representations prior to the publication of the White Paper

In considering its views upon matters likely to be included in the White Paper, the House Committee resolved on 19 April 2005 as follows:-

Members agreed that the House Committee should be consulted in detail about any proposals. The Committee further expressed its broad acceptance that the following principles should be contained in any White Paper:

- *the Assembly should have the power to pass or to reject the legislation proposed by the Welsh executive;*
- *a Welsh Consolidated fund should be created, on the model of the Scottish Consolidated fund, with similar procedures;*
- *there should be a mechanism for the dismissal of a Government if Members have no confidence in it;*
- *the responsibility for writing the Standing Orders of the new Assembly should be the responsibility of Members of the current Assembly;*
- *a statutory National Assembly Commission should be created as a body corporate to provide the property, staff and services required by the Legislature, and to employ its staff;*
- *staff of the Legislature should be appointed solely on merit, following open competition; they should have terms and conditions which aspire to those of other legislatures elsewhere within the United Kingdom and are at least equivalent to those of the Civil Service; and should remain within the Principal Civil Service Pension Scheme.*

A majority of Members agreed that the Chair should write immediately to convey the views of the House Committee to the Secretary of State for Wales, the First Minister and the Secretary Of State for Constitutional Affairs.

ANNEX 3

Correspondence between the Chair of the House Committee and the First Minister, Secretaries of State for Wales and Constitutional Affairs

* The following letter to the First Minister has the same text as those sent to the Secretary of State for Wales and the Secretary of State for Constitutional Affairs

Dr John Marek
Dirprwy Lywydd, Deputy Presiding Officer

Ffon 029 20 898912
Tel 029 20 898912

Rt Hon Rhodri Morgan AM
First Minister for Wales
The National Assembly for Wales
Cardiff Bay
Cardiff
CF99 1NA

21st April 2005

At its meeting this morning the House Committee considered its approach to any White Paper or Bill which follows the Assembly's resolution of 16 March 2005 that there should be a Bill in the next session of Parliament to "abolish the 'corporate body' status of the Assembly and establish a constitutional structure for Wales on traditional Whitehall/Westminster lines, creating a Welsh executive distinct from the Assembly but accountable to it".

The Committee agreed that the following principles should be contained in any White Paper:

- the Assembly should have the power to pass or to reject the legislation proposed by the Welsh executive
- a Welsh Consolidated fund should be created, on the model of the Scottish Consolidated fund, with similar procedures
- there should be a mechanism for the dismissal of a Government if Members have no confidence in it
- the responsibility for writing the Standing Orders of the new Assembly should be the responsibility of Members of the current Assembly
- a statutory National Assembly Commission should be created as a body corporate to provide the property, staff and services required by the Legislature, and to employ its staff
- staff of the Legislature should be appointed solely on merit, following open competition; should have terms and conditions which aspire to those of other legislatures in the United Kingdom and are no worse than those of the Civil Service; and should remain within the Principal Civil Service Pension Scheme.

It was decided that, as Chair of the Committee, I should convey these views to you and to the Secretary of State for Wales and the Secretary of State for Constitutional Affairs and Lord Chancellor

The Committee also decided to press for the full involvement of the House Committee, and of the staff of the Assembly Parliamentary Service, as the separation legislation is developed.

I am copying this letter to Secretary of State for Wales and the Secretary of State for Constitutional Affairs and to the Presiding Officer.

Yours sincerely

Dr John Marek

Ysgrifennydd Gwladol Cymru
Secretary of State for Wales
Rt Hon Peter Hain MP

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Our ref: 05/POH/43/27

Dear John

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London SW1A 2ER
Swyddfa Ysgrifennydd Gwladol Cymru
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29th April 2005

IMPLICATIONS FOR PROPOSALS FOR CHANGE OF CORPORATE STATUS OF THE ASSEMBLY

Thank you for your letter of 21 April giving me the views of the Assembly's House Committee on what should be included in any White Paper which made proposals to change the corporate status of the National Assembly for Wales and create a separate legislature and executive. I understand that you wrote to Charlie Falconer in similar terms and I would be grateful if you would take this letter as a reply from us both.

I can assure you that we will take full account of the points made by the Committee in preparing any White Paper or any legislation that might be proposed. As you know, a White Paper tends to describe the policy without going into the detail of how it will be implemented. In the light of that, I am not sure whether it would be appropriate to discuss the mechanics of funding or of owning property and employing staff in such a document; important as they are, they might be better left for the detail of the legislation.

I am grateful for the Committee's interest and for this helpful contribution to the debate.

Yours

Peter

ANNEX A - Letter from Rhodri Morgan

15 June 2005

Dear John

You wrote to me on 21 April, setting out the House Committee's preferred approach to the content of the White Paper on devolution. While it was not possible to provide you with a substantive reply to the six matters you raised in advance of its publication, I am pleased to do so now that the White Paper is in the public domain.

The matters raised in your letter are all listed below, with the proposed way of dealing with them in italics:

- "The Assembly should have the power to pass or to reject the legislation proposed by the Welsh executive". This will certainly be the case in respect of legislation made under the Assembly's new enhanced legislative powers. So far as exercise of the Assembly's existing delegate legislative powers is concerned, these will in future generally be exercised by Ministers, but will be subject to either negative resolution or affirmative resolution procedure.
- "A Welsh Consolidated Fund should be created, on the model of the Scottish consolidated fund, with similar procedures". Although the technical term "Consolidated Fund" does not actually appear in the White Paper, we are making provision for the creation of such a fund in the Bill, together with appropriate procedures based on Scottish and Northern Irish precedents.
- "There should be a mechanism for the dismissal of a Government if Members have no confidence in it". There will be appropriate provision in the Bill. There is no specific reference to this in the White Paper, although it is implicit in the description of the new arrangements.
- "The responsibility for writing the Standing Orders of the new Assembly should be the responsibility of Members of the current Assembly". The White Paper says that the Secretary of State will make the new Standing Orders with the support of an advisory committee. We may well need to return to this issue.
- "A statutory National Assembly Commission should be created as a body corporate to provide the property, staff and services required by the Legislature and to employ its staff". We are making provision for this in the Bill, although there is no specific reference in the White Paper to a Commission as such
- "Staff of the Legislature should be appointed solely on merit, following open competition; should have terms and conditions which aspire to those of other legislatures in the United Kingdom and are no worse than those of the Civil Service; and should remain within the Principal Civil Service Pension Scheme". Provision for all of this will be in the Bill, and the position is described in general terms in the White Paper.

I hope this is helpful. There will of course be an opportunity to discuss these matters further when the Secretary of State makes his statement on the White Paper.

I am copying this letter to Peter Hain and to the Presiding Officer.

Yours,

Rhodri

LORD ROBERTS OF CONWY

BGW2 EV11

Annwyl Dafydd,

I thank you for your invitation to comment on the White Paper.

You will know that I commented as the Opposition Front Bench Spokesman on Welsh Affairs on the day of publication and in response to the Government's Statement which was repeated in the House of Lords (see Hansard 15 June).

I would only draw your attention to one further point at this stage, namely the Government's intention (paragraph 3.12, page 21) that there "should be a more consistent approach to drafting legislation for Wales". Implicit in the White Paper and Ministerial replies is that such legislation should allow greater scope for secondary legislation promoted by the National Assembly.

You will know that there is substantial opposition to such delegated powers and that the House of Lords has a special committee - the Delegated Powers and Regulatory Reform Committee - which examines all Bills and draws the attention of the House to Henry VIII clauses that confer such powers in areas and in ways that might cause difficulty. (See for example the Committee's critical comments on the Commissioner for Older People (Wales) Bill where it is proposed that the Commissioner should be appointed by the Assembly on terms decided by that body but should nevertheless have the power to review the Assembly's discharge of certain functions or failure to do so. HL Paper 17, page 2)

While it can be argued that Henry VIII clauses give rise to problems only occasionally, nevertheless they are rightly disliked by legislators because of the uncertainties attached to them and the uses to which they may be put. If there is to be more "framework" legislation, it is likely that there will be more Henry VIII type clauses and sooner or later the validity of the entire concept of "framework" legislation will be severely questioned. I do not have a ready made answer to the problem but it would be unwise to ignore it.

I am copying this to the Wales Office.

Yn gywir iawn

Wyn

Roberts of Conwy

BGW2 EV12

JEREMY COLMAN

BETTER GOVERNANCE FOR WALES: SCRUTINY OF WHITE PAPER

I am writing in response to your invitation to submit evidence on the Government's White Paper "Better Governance for Wales". As you will appreciate, I have confined this submission to issues of finance, audit and accountability, as it would be inappropriate for me to comment on the proposals for primary legislative powers and modified electoral arrangements.

Summary

The budget setting, accounting and audit arrangements in the Government of Wales Act 1998 reflect the Assembly's existing constitution as a single body corporate with responsibility for legislative/scrutiny and executive functions. Chapter 2 of the White Paper outlines a number of difficulties caused by this constitution and proposes the creation of a separate Ministerial executive authority that is legally distinct from, but accountable to, the National Assembly.

As Auditor General for Wales, I welcome this proposal. With the appropriate underpinning primary legislation, it should strengthen considerably the arrangements for financial management and accountability in the devolved Welsh public sector. The remainder of this submission suggests a number of related, more detailed, provisions that could be included in the forthcoming Bill that will be needed to bring about the separation of the legislative and executive arms of the Assembly.

Budget setting process

The existing budget setting arrangements are governed by Section 80 to 86 of the 1998 Act and the Assembly's Standing Orders. In essence, the annual budget submitted to Assembly Members for approval is a subdivision of the annual Welsh block budgets agreed following the Comprehensive Spending Review. It consists of capital charges (depreciation and interest) as well as the revenue expenditure to be incurred by the Assembly, its sponsored and related public bodies, and local health boards

It is not possible for Assembly Members to see an audited statement of outturn against the budget that they were asked to approve. This is because the Assembly's budget contains items (e.g. capital charges) that will (correctly) be brought to account by other public bodies. The Assembly's own accounts will only contain the annual cash funding provided to those bodies.

The resource budgets submitted to the House of Commons by UK Government departments contain the estimated revenue expenditure and capital charges to be incurred by those departments together with the cash requirement (i.e. the amount needed to meet amounts falling due for payments less expected receipts). Similar arrangements exist for the devolved administrations in Scotland and Northern Ireland.

An important principle of public accountability is that the elected representatives should be able to consider the budgets prepared by Ministers, and that those representatives should be provided by audit assurances on how the approved budget was utilised.

I recommend that the legislation creating a legally separate Ministerial executive authority for Wales should require Ministers to prepare an annual budget on a resource basis for approval by the Assembly Membership. That budget should include details of the expenditure to be incurred by Ministers (including amounts needed to fund other public bodies), the estimated income to be appropriated in aid of that expenditure, and the cash required to meet amounts falling due for payment less expected receipts. The Assembly's approval of the annual budget should be seen as a statutory authority for the Ministers to incur expenditure.

The budgets should include expenditure and income items that will eventually be included in the accounts prepared on behalf of Ministers but not the items that would fall to be accounted by other public bodies. For example, the budgets will include grants in aid to sponsored public bodies (currently shown as expenditure in the Assembly's accounts) but exclude notional capital charges such as depreciation and interest (which do not currently form part of the Assembly's accounts). In this way, the accounts, when audited by the Auditor General and laid before the Assembly, will enable Members to see a statement of outturn which can be directly compared with the approved budget.

I also recommend that a Welsh Consolidated Fund be created using the models in existence in Scotland, Northern Ireland and Westminster. The Secretary of State would transfer the supply provided by Parliament (less the expenses of his own office) into the Fund and amounts would be issued to Ministers based on the cash requirements submitted to and approved by Assembly Members as part of the budget setting process. The Auditor General should be given "comptroller function" requiring him or her to authorise the issue of amounts from the Fund at the request of Ministers. In effect, the Auditor General will be required to act in the interest of Assembly members by ensuring that those requests were supported by legally binding Assembly budget resolutions.

Financial arrangements for the reconstituted Assembly

Paragraphs 2.10 and 2.20 of the White Paper suggest that a new corporate body will need to be established to manage the affairs of the reconstituted Assembly. Like the House of Commons Commission and the Scottish Parliamentary Corporate Body, it will not be subject to Ministerial control. It will, however, need to prepare its own annual budgets for approval by Assembly Members and be able to draw supply direct from the Welsh Consolidated Fund. The legislation establishing the body will therefore need to provide for a budget setting and approval process similar to that for Ministers, for the appointment of an Accounting Officer, and for appropriate audit arrangements.

Audit Committee

We welcome the proposal in 2.16 of the White Paper to retain the existing statutory requirement for an Assembly Audit Committee. It performs an essential non-party political role in holding the public sector to account and helping to improve the delivery of public services. Key to its success is a close working relationship with the Auditor General for Wales and the Wales Audit Office.

Standing Order 12 currently requires the Welsh Assembly Government to respond to recommendations made by the Audit Committee within 30 days. We recommend that this requirement be carried over into the new arrangements and that, if it is not possible to include such a requirement within the new standing orders, then provision be made in the primary legislation.

Matters relating to the Auditor General for Wales

Paragraph 2.19 of the White Paper proposes that, following the creation of a legally separate Ministerial authority, the Auditor General for Wales should be appointed by Her Majesty on the nomination of the Assembly (rather than the Secretary of State for Wales as at present). Existing arrangements reflect the Public Audit Forum's "Principles of Public Audit" which, amongst other things, suggest that public bodies with responsibility for executive functions should not be able to appoint their own external auditors. The reconstituted Assembly will not have "executive" functions, and would therefore be an appropriate authority for recommending such an appointment. However the legislation, like that in place for Scotland, Northern Ireland and Westminster, should ensure that the Auditor General, in exercising his or her functions, is not subject to the direction or control of Ministers or the Assembly. For this reason, the Wales Audit Office should also receive its financing direct from the Welsh Consolidated Fund (rather than from Ministers) following Assembly approval of the annual budget prepared by the Auditor General.

The 1998 Act currently requires the Assembly's Audit Committee to seek the advice of the Secretary of State if it wishes to modify the Auditor General's budget. This safeguard, included because the Assembly is currently constituted as a single corporate body, has not been needed to date. Given the separation proposals, the Secretary of State's "backstop" role could safely be dropped in favour of a more consultative approach between the Auditor General and the Audit Committee as has been the case in practice.

Schedule 17 to the 1998 Act lists a number of public bodies that fall within the Auditor General's remit. This list can only be amended by Order by or with the consent of the Secretary of State. Given the proposed separation, it would be appropriate for the reconstituted Assembly to be given primary powers to update this list as and when necessary.

I hope the above thoughts are helpful to the Scrutiny Committee. The Wales Audit Office is grateful for the support given to its work by all parts of the current National Assembly for Wales. We would, of course, be very pleased to advise further as required on the financial aspects of the forthcoming legislation.

JEREMY COLMAN

Wales Council for Voluntary Action

Paper for Assembly White Paper Committee, 7 July 2005

- 2 *The Better Governance for Wales* White Paper describes the way forward for a formal separation between the Assembly and the Welsh Assembly Government to avoid confusion and improve effective scrutiny. As a result, duties laid on the Assembly as a corporate whole by the Government of Wales Act would be discharged in future by Ministers.
- 2 One such duty of the Assembly is the requirement to make a scheme setting out how it proposes, in the exercise of its functions, to promote the interests of relevant voluntary organisations. This has led to the National Assembly for Wales Voluntary Sector Scheme (“the Scheme”).
- 2 Through the Scheme, the Assembly maintains:
- A policy on working in partnership with the voluntary sector;
 - arrangements for consulting the voluntary sector;
 - a policy on volunteering;
 - a policy on community development; and,
 - a Code of Practice for funding the voluntary sector which is published as a separate document
- 2 The Scheme provides the following formal means of dialogue with the voluntary sector:
- The Voluntary Sector Partnership Council (VSPC), chaired by the Minister with responsibility for the voluntary sector, and whose membership comprises voluntary sector members whose appointment is facilitated by WCVA; and Assembly members, reflecting party balance, appointed by the Assembly;
 - six-monthly meetings between Ministers and relevant voluntary sector networks, reports of which should be provided to the appropriate Assembly subject committees
- 2 The current arrangements have a number of distinctive benefits that it is hoped can be maintained, namely:
- The ownership of the Scheme by the full Assembly – through its adoption, plenary debate on the Scheme’s annual report, and review following each election;
 - the membership of the VSPC – bringing together the Assembly Government, Assembly Members (all parties), and representatives of the voluntary sector;
 - the respect for the sector’s independence, and its right to determine the membership of the VSPC and representation at Ministerial meetings and other partnerships and joint working groups;
 - the role of subject committees in receiving, and debating if they so wish, reports of the ministerial meetings;
 - the commitment of the Assembly Government, and its willingness to act positively on issues raised by the VSPC (for example, to address sector’s needs with regard to criminal records checks);
 - the role of the VSPC in scrutinising Assembly Government compliance with the Scheme.
- 2 The VSPC has strengthened its scrutiny role by the creation of the Funding and Compliance sub-committee. This reflects recommendations by the Independent Commission that reviewed the Scheme after the 2003 elections, which highlighted the need for more robust monitoring of the consistent application of the Scheme across all parts of the Assembly Government and its public bodies. The sub committee has created a mechanism to monitor compliance with the Scheme by the Assembly Government, ASPBs or third party grant schemes, and to investigate cases of non-compliance. The involvement of both AMs and the sector’s representatives demonstrates the committee’s independence in undertaking its duties.

- 2 These benefits have contributed to the practical demonstration of an inclusive Assembly, and have demonstrated cross-party support for and interest in the work of the sector. .
- 2 In order to maintain and build on these benefits, it is proposed that the changes to the Government of Wales Act include the following:

- **Voluntary Sector Scheme**

The current duty of the Assembly to make and maintain the Voluntary Sector Scheme should become a duty of the Welsh Assembly Government. The responsible Minister should have a duty to consult the voluntary sector, including through the Voluntary Sector Partnership Council, before making, remaking or revising the Scheme; and to seek the advice of the Voluntary Sector Partnership Council on the development, implementation and review of the Scheme. The scope of the Scheme, arrangements for review and for an annual report for consideration by the legislature should remain as specified in clause 114 (4) of the Government of Wales Act, with the addition of the requirement for each minister to meet twice a year with the relevant voluntary sector networks.

- **Voluntary Sector Partnership Council**

The Voluntary Sector Partnership Council (VSPC) should be explicitly identified. The VSPC should be established by the legislature. Its membership and arrangement for appointing members should reflect the current arrangements – *i.e* it should be chaired by the responsible minister, the legislature should appoint Assembly Members reflecting party balance, and WCVA should facilitate the selection of voluntary sector members. The VSPC would provide a forum for discussion between the Assembly Government, the legislature and the voluntary sector; it would advise the Assembly Government on the development, implementation and review of the Voluntary Sector Scheme; and provide a mechanism for scrutinising compliance with the Voluntary Sector Scheme.

- **Assembly subject and other committees**

Provision should be made for Assembly Committees, with advice from the VSPC, to co-opt or invite to meetings representatives of relevant voluntary organisations able to provide expertise and advice to assist with their scrutiny and legislative functions.

- 2 The Committee is asked to take these issues into account in its examination of the White Paper, and consider the recommendations in paragraph (8) above.

WCVA, 12 July 2005

BGW2 EV14 JENNY RANDERSON AM CHAIR OF THE BUSINESS COMMITTEE

EVIDENCE TO THE COMMITTEE ON THE BETTER GOVERNANCE FOR WALES WHITE PAPER
10 July 2005

Background

1. The terms of reference of the Business Committee are set out in Standing Order 13 (**Annex 1**).
2. This evidence will concentrate upon those elements of the White Paper's proposals of particular relevance to the Business Committee's roles, and will deal with relevant areas where the White Paper is silent. The views expressed are those of the Chair, and do not necessarily reflect the views of the Committee.

Scrutinising Ministers

3. The proposal that the Assembly should generally be able to establish such committees as it sees fit, having regard to party balance is welcome. The current requirements are too detailed and inflexible and have restricted the ability of the Assembly's committees to evolve. The removal of unnecessary statutory restrictions will enable the Assembly to decide how it should organise its own committees to ensure effective scrutiny. However, there is a danger that committees will be seen simply as a vehicle for scrutiny of Ministers and draft legislation. There are many good things in committees' current ways of working, in terms of conducting creative and proactive policy inquiries and engagement with the public, and the Assembly should not abandon these strengths lightly.
4. Although there is no need to have statutory provision for a business committee, the business programming and procedural roles it currently performs will assume even greater significance. An Assembly with enhanced legislative competence will need an effective means of considering its business programme, including the timetabling of legislation. One of the strengths of the Business Committee is the opportunity it provides for all the political parties to play a part in shaping the Assembly timetable, ensuring proper scrutiny of legislation and safeguarding time for other activities including Ministerial scrutiny and non-executive business. There will also be a need for an effective mechanism for considering the practice and procedures of the Assembly, including proposed amendments to Standing Orders. At present the combination of these two roles in one committee works well and there has been no conflict between them. The current remit of the Business Committee emphasises the inter-relationship between business programming and procedures and allows its members to develop concentrated expertise and experience. This will continue to be an important consideration in an Assembly with only 60 Members.

Legislation

5. The proposal that Members should be able to pass or to reject the legislation proposed by the Welsh executive is welcome. The Assembly should have the ability to set its own procedures for the scrutiny and passage of legislation, building upon the experience of its Members and staff since 1999. There should be scope within the legislation for Assembly Members to bring forward non executive legislation, either as "private Members" legislation or committee legislation.
6. The proposals to allow Her Majesty to make Orders in Council to give the Assembly powers, in specified areas of policy, to modify the provisions of Acts of Parliament in their application to Wales or to make new provision are interesting. The Business Committee look forward to commenting on the detailed proposals in due course. There will need to be clarity from the outset about whether the Assembly or the executive will be responsible for communicating proposals for Orders in Council to the UK Parliament. There should be a process by which non-executive proposals for legislation can be agreed by Assembly Resolution and passed by the Assembly to the Secretary of State, with a requirement for onward transmission to the UK Parliament. Similarly, an executive proposal which was supported by a majority vote in the Assembly might be regarded as carrying greater authority in the UK Parliament than one which came solely from the executive.
7. In the light of the Business Committee's recent discussions with our counterparts in the Bureau in Edinburgh, the proposal to introduce a similar procedure to the Scottish Sewel Motions to enable Westminster to legislate for Wales on occasions when it would be more efficient to do so is welcome. Clarity as to whether proposals will be made by the Assembly, as the democratic legislature, or the government will be necessary.

Time Pressures

8. Whilst welcome, the proposals for enhanced legislative competence will require the Assembly to re-consider how we use our time. During the First Assembly only 3% of Committee time and 9% of Plenary time was devoted to consideration of legislation. Even these figures disguise the fact that consideration of a draft order often took the form of a broad debate about

the principles of the draft legislation and the policy behind it. Consideration of detailed textual amendments was very rare. The Report of the Richard Commission show the leap that we will have to take. Over 25% of the time in the Scottish Parliament is taken up with consideration of legislation. The Richard Commission Report gives an example of a relatively short, uncontroversial Bill (the Scottish Public Services Ombudsman Act 2002) which took over 7 hours of committee time and 2 hours 15 minutes in plenary. The implications of the requirement for the Assembly effectively to scrutinise draft legislation in both English and Welsh simultaneously should not be under-estimated.

9. The need to perform proper legislative and Ministerial scrutiny, will provide a significant challenge to the capacity and ingenuity of our 60 Members. A comprehensive and holistic review of our procedures, including the number of sitting weeks, sitting times, balance of committee and Plenary time, size and membership of committees and the consequences for staffing, will be essential and I expect that the Business Committee will play a full part in this.

Subordinate Legislation

10. The proposal in the White Paper that Ministers will be able to exercise many of the Assembly's existing powers to make secondary legislation, subject to scrutiny by the Assembly is welcome. At present the Business Committee has a dual role in relation to subordinate legislation. The Committee advises the Business Minister on the route by which each piece of draft legislation should pass through the Assembly, and thereby the level of scrutiny that it receives. The Committee has also adopted responsibility for the scrutiny of the Government's compliance with the procedural requirements in statute and Standing Orders.
11. The proposal to give the Assembly freedom to decide how to exercise its scrutiny function in relation to subordinate legislation is welcome. The principle that the Assembly should be able to decide the degree of scrutiny which it wishes to give to individual draft orders, based on their merits and taking into account all of the circumstances at the time, is an important one. Therefore, decisions about the procedure by which individual orders should be considered by the Assembly should ultimately be in the hands of Assembly Members themselves, and not the prerogative of Assembly Ministers or the UK Parliament.
12. Our current procedures for making and scrutinising subordinate legislation are too long and unwieldy and require supplementary mechanisms, such as the Legislation Protocol agreed in the Business Committee to enable them to work effectively. The opportunity to devise new procedures will be welcome.
13. It will be necessary to consider the future role of the Legislation Committee so that the role of ensuring that draft orders comply with statutory and procedural requirements, which the Business Committee performs by default, continues as part of the essential function of technical scrutiny of draft subordinate legislation. The public needs to be confident that all legislation made in Wales is of the highest technical standard.

Assembly Standing Orders

14. At present the Business Committee is responsible for considering and making recommendations to the Assembly about proposals to amend Standing Orders. As a Committee we have given detailed consideration to hundreds of proposed amendments since 1999 and, as individual Members and supporting officials, we have built up considerable knowledge and experience of Standing Orders and Assembly practice and procedures. The proposal to remove most of the restrictions and requirements in respect of Standing Orders from the legislation is welcome. This should provide an opportunity to allow those who have the greatest knowledge of the operation of Assembly procedures, the Members themselves and those who support them, to determine their own procedures.
15. Therefore, the proposal that the Secretary of State should make the Standing Orders of the new Assembly, with advice from an advisory committee is not appropriate. I believe that the

Assembly itself, with its six years experience of working with its Standing Orders and supported by its experienced staff, is the appropriate body to make rules about its own proceedings. If this is the case, I would anticipate the Business Committee taking a lead in developing and drafting new Standing Orders in readiness for the Third Assembly.

ANNEX 1

Terms of Reference of the Business Committee – Standing Order 13

Title and Terms of Reference

13.1 There shall be a Business Committee, which shall:

- (i) advise the Business Minister on the management of the Assembly's business;
- (ii) advise the Deputy on the exercise of his or her functions under Standing Order 24 (subordinate legislation procedures); and
- (iii) make such recommendations to the Assembly as it thinks fit on the general practice and procedure of the Assembly in the conduct of its business (including any proposals for revision of Standing Orders).

Membership

13.2 The Assembly shall elect to the Committee one Member from each political group in the Assembly, together with another Member to chair it. If a Member other than the Deputy is elected to chair the Committee, the Deputy shall be entitled to attend meetings of the Committee.

13.3 A member of the Committee may, having given advance notice to the chair, be represented at a meeting, or a part of a meeting, of the Committee by another Member from the same political group who has been identified in advance. In giving such notice, the Member shall indicate the reason for the need for substitution. The nominated representative may participate in the meeting of the Committee in all respects as if he or she were a member of it.

Meetings

13.4 The Committee shall meet each week that the Assembly holds a plenary meeting. It shall meet in private.

13.5 Provisions in these Standing Orders relating to quorums for committees or voting in committees shall not apply to the Committee.

RUSSELL DEACON

BGW2 EV15

Ymgyrch Senedd i Gymru / Parliament for Wales Campaign

Judicial devolution based on the new Welsh Primary Legislation procedures

The increase in legislative powers will obviously create for Wales a legislative system that increasingly differs from that of England. This will need to be reflected in the judicial process, which in turn will have to be adapted for Wales from that that currently exists. When the Royal Commission on Assizes and Quarter Sessions (The Beeching Commission) published its report on the reorganisation of the courts in England in Wales, it was envisaged that one of the reasons for retaining the Wales & Chester Circuit was the likelihood of administration and government in Wales being devolved to a Welsh government at some future date.

The present position is the staff that runs the courts deal with the High Court, Crown Court and County Court business are part of the Courts Service Agency. (CSA)

It is with staff of the CSA that members of the public first come into contact when involved in litigation and it is with them that the public maintain contact during the stages leading up to it and even during the trial. The PFW Campaign would like to see the staff and work of the CSA to be transferred to the Welsh Civil Service and that staff working on behalf of the CSA in Cheshire be transferred to the Northern Circuit.

The judiciary, on the other hand, should remain under the 'umbrella' of the Lord Chancellor for England & Wales who will continue to be in charge of judicial appointments subject to consultation and approval with the minister in the National Assembly Government responsible for Justice. There should also be established a Welsh section of the Supreme Court of Legislature for England and Wales. This section or court to be known as the Court of Great Sessions for Wales.

There is ample accommodation available for the Court of Great Sessions in Cardiff and in Mold. There is a precedent as it occurred in Cardiff before at a time when the amount of work being done by the Court of Appeal was much lighter than at present.

The transfer of the functions of the Lord Chancellor's Department in matters relating to the administration of Magistrates courts and of the Home Office in matters relating to prisons and penal establishment, the probation service and the police should also be transferred to the Welsh Civil Service. It is anticipated that the funding currently given to the Home Office will be reflected in an adjustment to the Welsh block grant

Dr. Russell Deacon
Chair, PFW Campaign

Better Governance for Wales

The legislative process

There should be three types of Bills.

1. *Executive Bills*, those produced by the Welsh Assembly Government in order to maintain its policy agenda or to implement European law.
2. *Committee Bills*, those produced by the Parliamentary Committees in order to implement its own findings on various scrutinises or reports.
3. *Private Members Bills*, those produced by non office holding members or 'back bencher' members of the Assembly. The Campaign believes that the production of 'back bencher' legislation or rather the lack of it has been a disappointment to many individuals and voluntary organisations.

Bills could normally go along the following procedures.

Pre-legislative phase- wide spread consultation with interested parties and with the public advertised about the bill.

Legislative phase one – the Welsh Civil Service checks to ensure that the proposed Bill does not conflict with reserved powers. There is consultation with the Secretary of State for Wales over the provisions.

Legislative phase two – if the Bill passes phase one then it goes before a National Assembly for a plenary debate on the general provisions of the Bill.

Legislative phase three- the relevant Committee now discusses the Bill line by line. Evidence is taken and the Committee may make amendments or additions to the Bill. If this were a Private Members Bill then it would include that member.

Legislative phase four- the committee now presents the Bill to the whole Assembly for further scrutiny. Votes are taken on the whole Bill and /or further amendments.

Legislative phase five- the Bill now goes before the National Assembly's law officers. They vet the Bill to ensure that there is no conflict with reserved powers. The Secretary of State for Wales and the relevant Whitehall & Westminster legal departments further vet the Bill. The Bill is now passed to MPs for approval.

If there is a dispute that cannot be resolved then the matter can be resolved by the Judicial Committee of the Privy Council. If after a set period (four weeks) the Bill were cleared by legal officers & the

Houses of Commons & lords the Presiding Officer would present it for Royal Assent. It would then become an Act of the National Assembly for Wales.

Dr. Russell Deacon
Chair, PFW Campaign

BGW2 EV16 TRADE UNION SIDE OF THE NATIONAL ASSEMBLY FOR WALES

TRADE UNION SIDE SUBMISSION TO THE BETTER GOVERNANCE OF WALES WHITE PAPER COMMITTEE

Thank you for inviting the Trade Union Side (TUS) of The National Assembly for Wales to give evidence to The Better Governance of Wales White Paper Committee on 7 July.

Following a meeting of members who work in the Assembly Parliamentary Service (APS) on 11 July, I write to confirm the key points which the TUS wish to make to inform the Committee's deliberations.

We broadly welcome the White Paper. Separation of the executive and the legislature will remove confusion on roles, responsibilities and lines of accountability. The development and enhancement of legislative powers will increase the status of the Assembly and should make the devolution settlement work more effectively. We note that much detail is missing in the White Paper, for example on who would discharge each Assembly function in the future, and respective roles in making different types of legislative orders. Nevertheless, whatever the shape of the future Assembly, we are confident that our members will give their full commitment to making the new arrangements work.

More legislation, and more significant legislation, being made by the Assembly clearly has workload implications for both staff and AMs. For example, additional expertise and capacity would be needed to handle the instructing and drafting of major pieces of legislation as well as the specialised translation work of proposed amendments to orders. An assessment should be made in the near future of the staffing implications for both the Assembly Government and APS. This assessment should include estimating the numbers of additional staff required and training needs.

We note that the Assembly will employ its own staff, but we would like to see the option of existing civil servants retaining their civil service status, for example through some kind of loan or secondment arrangement. Furthermore, any staff transferring to their new employer should have protection under TUPE arrangements.

We strongly advocate arrangements to facilitate two-way transfers in the future, for the purposes of career and professional development, and to allow staff to broaden their experience. A system of continuing two-way secondments would be desirable, as would the ability to apply for internally advertised posts. The Civil Service Commissioners have recently opened up the opportunity for freer movement of staff as between the Civil Service and Non-Departmental Public Bodies.

The statement that Assembly staff would continue to be eligible for membership of the Civil Service Pension Scheme is very much welcomed. We would urge strongly that there should be full integration into the Civil Service Scheme, rather than having a separate "by analogy" scheme. If it is the latter we could have real concerns, because of the potential problems of funding and underwriting pensions. We also wonder if the Assembly would have any say if future changes are proposed to the Civil Service Scheme.

The statement that the Assembly would be expected to maintain terms and conditions broadly comparable to those applying to Assembly Government civil servants is also welcomed. We suggest that something on the face of the Bill along the lines of Section 2 of the House of Commons (Administration) Act 1978 should be considered. We would advocate some kind of

analogue arrangements on pay and grading, in order to facilitate two-way secondments. In addition, we would expect the Assembly to continue to recognise the existing Trade Unions and to honour collective agreements with staff until they are re-negotiated. In particular, we would expect the commitment to family-friendly policies to be maintained.

It will be important to have mechanisms in place to guard against political interference in staffing issues such as recruitment and advancement. A document similar to the Civil Service Code would be required, and it would be important for the following documents to be updated: “Code of Conduct for Assembly Members”; “Code for Members of the House Committee”; “Protocol for Relationships between Assembly Members and Assembly Staff”; “Code of Practice on the Provision of Information to Assembly Members”; and “Code of Conduct for Discussion of Assembly Business between Staff of the Presiding Office and other Assembly Staff”. In addition, appointing some kind of recruitment commissioner should be considered, or alternatively getting the Civil Service Commissioners to youchsafe procedures (although their powers would need to be extended in order to do so).

Finally, we are very grateful for your offer of assistance should we want any issues raised in Parliament during the course of the Bill. We await the publication of the Bill with great interest.

Yours sincerely

GRAHAM POGSON
TRADE UNION SIDE CHAIR

BGW2 EV17

IEUAN WYN JONES

Paper to the Assembly Committee on The Better Governance for Wales White Paper by Ieuan Wyn Jones AM Group Leader Plaid Cymru-The Party of Wales in the National Assembly

Introduction

The White Paper stage 2 proposals for enhanced legislative powers (the use of Orders in Council) fall substantially short of what my party called for in our evidence to the Richard Commission, namely the creation of a Parliament with primary law making powers, limited powers to vary taxes, and an extension of the fields of competence. Whilst the stage 3 proposals envisage primary powers after a referendum, it is clear that the UK government does not see this as an option to be considered for a number of years. The thrust of my comments in the first part of this paper will therefore be a critique of stage 2.

It is hardly necessary to repeat the arguments as to why the new constitutional settlement proposed by us would be a vast improvement on the current settlement. These were well rehearsed and, in the main recognised by the Richard Commission itself. However, it may be opportune to remind ourselves that the main advantages are

clarity, in that the Assembly’s functions would be based on discrete policy areas rather than on what might be contained within pieces of legislation, and **the ability** through greater autonomy to move from policy development to legislation without seeking the consent of the Secretary of State for new laws or fighting for legislative time at Westminster. It would also in our view raise the status of the Assembly as improve its standing as a body which ‘could get things done’ in the eyes of the electorate.

The legislative proposals

The White Paper stage 2 proposals are a sort of half-way house between the current settlement and primary powers, but contain some major defects and drawbacks. I acknowledge that a novel approach to legislation is proposed through the use of Orders in Council to circumvent the legislative logjam at Westminster. However it is not clear how the Secretary of State would exercise his powers of veto over

the proposed legislation, and the extent to which both Houses of Parliament would react to a piece of legislation which they objected to on policy grounds or with which they had philosophical differences. I will deal with these issues later.

It seems to me that this half way house approach is born not of a desire to find a settled constitutional arrangement, but rather as in the case of the original Government of Wales Act, it represents political expediency.

In our evidence to the Richard Commission, we referred to the fact that the proposals which became enshrined in the Scotland Act had been subjected to rigorous appraisal before reaching a broad cross-party consensus in a National Convention. Had such a Convention been set up in Wales prior to the 1998 legislation, or immediately following the Richard Commission many of the shortcomings of the current settlement or the proposed amendment to it could have been overcome.

Although the plan to use Orders in Council is an 'enhancement' of the Assembly's current legislative powers, they do not deal explicitly with one of the main drawbacks of the current settlement, namely the lack of clarity in the Assembly's areas of responsibility.

The White Paper refers to this in para 3.5 when it describes the existing powers as being 'too fragmented'. Yet the enhancement provisions do not deal effectively with this problem, in that the kind of new legislation envisaged (paras 3.9-3.13) are similar to those which have been secured through the present arrangements. The only difference appears to be in that the new procedure adopts a simpler and quicker method of legislating and possibly a more liberal approach to the drafting legislation to give the Assembly greater scope.

The White Paper proposals include a limiting provision in para 3.17 which prevents the Assembly from being given the powers to legislate in whole fields of competence. This is a major drawback in that the Assembly would have to seek Orders in Council for every legislative proposal within the field. If this limitation were removed, it would begin to address, but not entirely eliminate the fragmented nature of the Assembly's powers.

The proposed Orders in Council will need the prior consent of the Secretary of State and be subjected to the Affirmative Resolution in both Houses of Parliament. In addition, it is envisaged that the Orders would need to be considered (presumably a form of prior scrutiny) by parliamentary committees or a joint committee of both Houses prior to the Affirmative Resolution debate. The Order would also be subjected to considerable scrutiny in the Assembly as well. The introduction of a double Westminster veto, and the kind of pre-legislative scrutiny envisaged would mean that it would take a considerable period of time before policy initiatives were enacted.

The White Paper (para 3.33) envisages greater use of joint Assembly/Parliamentary Committees to scrutinise legislation. I have considerable doubts about the practicality of this proposal given the additional legislative responsibilities of Assembly Members and our current limited numbers. It could also operate in practice as a brake on the Assembly's freedom to innovate and be flexible.

One could make a reasonable case in support of the Order in Council procedure where governments of the same political party are elected in Cardiff and London. However, where there are governments of different political parties or coalition in one place and a majority government in another, the advantages become less clear. The procedure has so many checks in place that one could easily envisage a Westminster government, if it chose, using delay and prevarication to frustrate the programme of an elected Assembly government. That situation could of course lead to endless constitutional wrangling, and call into question the value of the mandate secured by an incoming Assembly government.

I am working on the assumption that in the run up to the 2007 Assembly election all parties will be preparing manifestos which will contain a number of pledges that could only be implemented through legislation. If one takes para 3.20 at face value, then an incoming government might take the view that a Secretary of State would be prepared to give his consent to the vast majority. Nevertheless, there are many ways in which a Secretary of State, whilst not appearing to be outwardly hostile to a particular proposal could make it extremely difficult for it to be enacted. He could, for example, call for extensive 'consultation' before a request is approved, and even after approval, there could be considerable delays

in securing 'parliamentary time' for pre legislative scrutiny by a joint committee. The opportunities for prevarication and delay are there aplenty.

In short therefore, the White Paper, in its stage 2 proposals for enhanced legislative powers fails to address the lack of clarity issues in the current settlement, and whilst the Order in Council procedure is undoubtedly an advance on the current position, it could well lead to conflict between governments of different parties. Such a constitutional stand-off would demonstrate that such a settlement would be unstable and could only be a temporary hiatus until full primary powers are granted albeit subject to a referendum. I am tempted to conclude that the White paper proposals in this area have been framed on the basis that Labour remains in power in London and Cardiff well beyond 2007 and 2009. No such political certainty exists.

The stage 3 proposals, i.e. full primary powers can only happen following a yes vote in a referendum. My party accepts that a referendum is a political necessity. But the trigger to move to a referendum is a two-thirds majority in favour in the Assembly and a simple majority in Westminster. The First Minister seems to accept that such a requirement has no constitutional precedent. In our view, a simple majority in the Assembly is all that is required as a trigger. Surely, a government elected in the Assembly on the promise to hold a referendum is entitled to give effect to its promise.

Ending the Corporate Body

The proposals to end the corporate body status of the Assembly carry a number of substantial benefits. It enables the Assembly to have a distinct and separate parliamentary service, and its staff would no longer be civil servants. It clarifies the role of the executive and legislature, although I believe that the continuing use of 'Welsh Assembly Government' rather perpetuates the current confusion in the mind of the public. I still receive letters addressed to me as a member of the 'WAG' even from organisations who should know better. My preference is for the adoption of the term 'Welsh Executive'. The proposals strengthen the role of Assembly Members in scrutinising Ministers. When Ministers are no longer automatic members of committees it is easier to adopt a collegiate approach to scrutiny, something that has been missing to date.

Nevertheless, the benefits from separation come at a significant cost. A major weapon available to the opposition, namely the withdrawal of the First Minister's delegated authority will have been sacrificed. Whilst this weapon would only ever be contemplated in exceptional circumstances-no such attempt has been made to date-it could serve as an useful 'backstop' when a government simply refused to listen to the will of the Assembly on an important issue. In addition, the role of Assembly Members in the introduction of subordinate legislation is being reduced, with Ministers acting as pre-devolution Secretaries of State. Whilst there is a case for this in a body with primary powers, the case is less clear cut in with the current stage 2 proposals.

I agree with the proposal that the Assembly itself should determine the number of committees it wishes to set up. Given the enhanced legislative programme envisaged, and the need for extensive scrutiny of such legislation, the workload of individual Assembly Members will increase substantially. It is doubtful that such scrutiny would be effective with a large number of committees. I would suggest (and this is a personal view) that some committees would need to embrace more subject areas than the rather prescriptive approach which pertains at present. Not only would there be fewer committees but it would also lead to more collaboration across policy areas and a better crosscutting approach. There are many approaches to grouping policy areas, but I believe that we could cut the number of scrutiny committees to four or five. It seems to me that the only subject area which would need a dedicated committee is Health and Social Services.

Standing Orders

I cannot understand the requirement that the Secretary of State should hold the responsibility for agreeing the Assembly's new Standing Orders. Assembly Members, with their experience of the workings of the existing arrangements, and a clear appreciation of the practical drawbacks of many of the current SOs are best placed to undertake this task.

Electoral Issues

I do not intend to dwell on the proposal that candidates cannot stand for election both in constituencies and on the regional lists, save to say that it should be quietly dropped.

**Ymgyrch Senedd i Gymru / Parliament for Wales Campaign
Response to Better Governance for Wales** Dr John Cox

Implement and enable

The Richard Commission has made three major recommendations to improve the governance of Wales:

- 2 A legislative Assembly with more powers – the Commission judged the current settlement to be “unsustainable”.
- 3 To raise the number of AMs to 80 - the current 60 being judged (already) too few for effective scrutiny and for the anticipated future extra duties.
- 4 To replace the unpopular and discredited AMS electoral system by STV.

If subject to the same rules as Councillors, MPs would be duty-bound to act on its unanimous recommendations or face a threat of surcharge for the money wasted on the commission’s work. But MPs have their own views and make up the rules.

To be charitable, many reservations are about the timing - not the principles. Assuming, as a working hypothesis, that their concerns are genuine and have merit, the challenge is to legislate for the non-contentious proposals without foreclosing those that the MPs currently consider premature.

This could be done by “**enabling legislation**” – to allow the National Assembly, at its leisure, to decide when each provision is activated - following the precedent set for Scotland that enables their Parliament to decide when or if to activate tax-varying powers without requiring further permission from Westminster.

In principle, the new Government of Wales Act could “enable” the National Assembly to activate any section of the Richard Commission package that is not to be implemented immediately. However, it will be prudent to add a proviso be added that two thirds of the AMs must be in favour to activate any specific “enabled” power.

A two-thirds majority

A two-thirds majority is a political statement disguised as a numerical hurdle. It ensures that the leading political party controls the pace of devolution – but does not allow any single minority party to block its progress.

Once the Commission’s proposals are on the statute book, awaiting activation by a two-thirds consensus in the National Assembly, there will be no need for more legislation. Particularly in case a future London government may be unsympathetic to Welsh aspirations, this will strengthen the hand of the National Assembly if it has the right, already on the statute book, to activate this additional legislation.

This legislative strategy could take much heat out of the current debate.

It would aid the passage of non-contentious legislative proposals by designating all contentious issues as requiring a two thirds majority before they can be activated. This ought to be politically acceptable to all but those implacably opposed to devolution.

Assembly Members

The number of AMs also could be dealt with by “enabling legislation” – leaving it at 60 for the next Assembly election but, empowering the National Assembly, when a two-thirds majority agree from their experience that more are needed, to increase the number up to 80. The alternative (freezing the number at 60) could prove disastrous.

If, as the Commission suggests, a National Assembly of 60 members proves inadequate to cope with their extra duties and needs to ask Westminster for legislation to raise the number, it could take two more terms to enact. With the public less than impressed already by the National Assembly, delay could prove fatal to its credibility.

The low public esteem of politicians is, without doubt, why no-one dare call for more AMs in an election year – even though this proposal may prove essential to help overcome the problem. The Commission identified the existing workload as a reason for the AMs' current under-performance and it is improbable that any improvement is possible whilst they have to spread their talents over 4-6 subject committees.

Electoral implications

There is no impediment to having 80 AMs elected by the current system (AMS) - but the consequences would be unpalatable for the Labour Party. Unless their votes jump from 38% to 48% on the regional lists, Labour cannot hope to win an overall majority. It so happens, however, that the adoption of STV would be advantageous to Labour and, although not a valid argument in favour of STV, it is a pragmatic reason why Labour may prefer STV over the AMS alternative.

In a nutshell, STV is likely to increase voting turnout – an unsung advantage of STV that ensures that the votes cast better represent the political will of the electorate. In the context of Welsh politics, this will increase the voting share of the Labour Party and has the potential to improve its prospects of winning an overall majority.

Voting turnout

Low voting turnout is not a side-issue for devolution: it undermines its most compelling justification – to redress the democratic deficit from 18 years of rule by “unpopular” Westminster governments. It is ironic that the “unpopular” governments all won 22-25% of the Welsh electorate vote - half as much again as the 16% who voted for “our” Welsh Assembly Government (In 2003 Labour won 42% of the vote on a 38% turnout).

By the criterion of popular mandate, Rhodri Morgan has even less legitimacy than John Redwood. Unless this is addressed, the continued existence of the National Assembly and a devolved Welsh government must remain in doubt. The Richard Commission recommendation for STV is a prerequisite for increased voting turnout (though not itself a guarantee that it will materialise). The wonder is, on examining the nature of our current voting systems, that even a paltry 40% bother to vote.

In the recent General Election, as for the National Assembly, the results were foregone in all but (at the most) 8 constituencies (for 80% of the electorate). For the National Assembly elections, every regional vote for Labour was wasted whilst, in the constituencies, over 60% voted for losing candidates!

In short, over 80% might just as well have stayed at home and, for those who did vote, more than 60% will be disappointed with the outcome. Our current voting systems might have been designed to discourage participation.

STV addresses both these issues. It ensures, for 3+ member constituencies, at least 25% of the voters will vote for a winning candidate (and thus take some comfort from the result) and that there is a genuine contest in every constituency (even in Cynon Valley and Merthyr Tydfil and Rhymney!). It is no accident that the turnout in the 24 ‘safe’ Labour seats was, on average, 10% less than the 16 ‘contested’ seats.

This is illustrated by the chart, listing the Welsh constituencies in their sequence from the lowest turnout (Alyn & Deeside, below 25%) to the highest (Ynys Môn, above 50%). The shaded horizontal bars show (on the right) which party won the seat and, only if the contest was close, the runner-up party (on the left).

Of the top ten for turnout, Labour won only two (Rhondda and Cardiff North): in contrast, only two of the bottom thirty constituencies were won by the opposition (Cardiff Central and Wrexham). The inescapable conclusion, unpalatable as it may be for the opposition parties, is that the votes understate Labour's true support - because, over most of Wales, its supporters have no incentive to vote.

Whilst it is usual to blame our disproportional voting system for giving Labour too more seats, a fairer criticism would be that it gives Labour too few votes. What both Labour and Welsh democracy needs, is a voting system that encourages more people to vote – not only those fortunate enough to live in a marginal constituency.

Representative democracy

Whilst at the last election over 60% voted for losing candidates, we also have an extraordinary outcome in that the leading party is unrepresented over 70% of Wales – with their AMs being confined to local constituencies. In contrast, the opposition may cherry pick issues and target constituencies for the next election – this injustice being inherent in our flawed AMS voting system.

The fundamental defect of AMS is that it creates two antagonistic types of AM. Unfortunately, Labour is so obsessed with the “Clwyd West anomaly” that it may be content to stamp out this relatively trivial nuisance and fail to grasp the opportunity, afforded by the Commission, to scrap AMS completely.

Given that Labour has not won an overall majority, even using AMS and with the opposition in disarray, it is astonishing that Labour remains unconvinced of the advantages (for Labour) of STV. It eliminates every anomaly of AMS, not just the current obsession. It could be adopted for the 2007 election for a 60-member National Assembly and, *whisper it quietly*, is more likely to allow the party to win an overall majority. Labour certainly has nothing to lose and both the credibility and legitimacy of the National Assembly would be enhanced by a higher voting turnout.

Sadly, to ensure unanimity, the Commission fudged their recommendation in relation to its implementation. Rather than base the STV constituencies on the local authority boundaries – thus allowing the National Assembly to decide the timetable, they left open an alternative option of utilising obsolete Westminster constituencies – thus leaving the unelected Boundary Commission in control of its implementation.

To simplify the legislation and speed up the process, the new legislation only has to specify that all STV constituencies are to elect 3-6 members according to five simple rules, to administered by the National Assembly:

- 2 Divide the latest total Welsh electorate by the pre-determined desired number of AMs to obtain the average electorate/AM **ratio**.
- 3 Divide each local authority electorate by this **ratio** to obtain the **entitlement** to AMs of each authority ('rounded' to the nearest whole number).
- 4 For authorities whose **entitlement** is above 6, **sub-divide** this authority into two roughly equal constituencies based on local ward boundaries to return 3-6 AMs.
- 5 For authorities whose **entitlement** is below 3, **pair** with a nearby local authority to create a single STV constituency to return 3-6 AMs.
- 6 If the total number of AMs calculated above does not match the number desired by the National Assembly (due to 'rounding' errors), adjust the **ratio** until it does.

Using this enabling legislation, the next National Assembly could be elected by STV for any number of AMs between 60 and 80 and would not require extra updated legislation whenever the Boundary Commission alters a Westminster constituency.

The table illustrates what is feasible using the local authority boundaries if, in their wisdom, the National Assembly decided to retain 60AMs or increase the number to 67, 73 or 80. Once the latest electoral rolls become available, the allocation of AMs to each STV constituency may be calculated in microseconds.

<u>STV constituencies</u> (illustrative)	<u>Electorate</u> [^]	<u>Assembly Members</u>			
Newport	104,240	3	3	3	4
Torfaen & Monmouthshire	137,429	4	4	5	5
Caerphilly	132,864	3	4	4	5
Merthyr & Blaenau Gwent	96,345	3	3	3	3
Rhondda, Cynon, Taff	162,323	4	5	5	6
Cardiff	238,894	6	7*	8*	8*

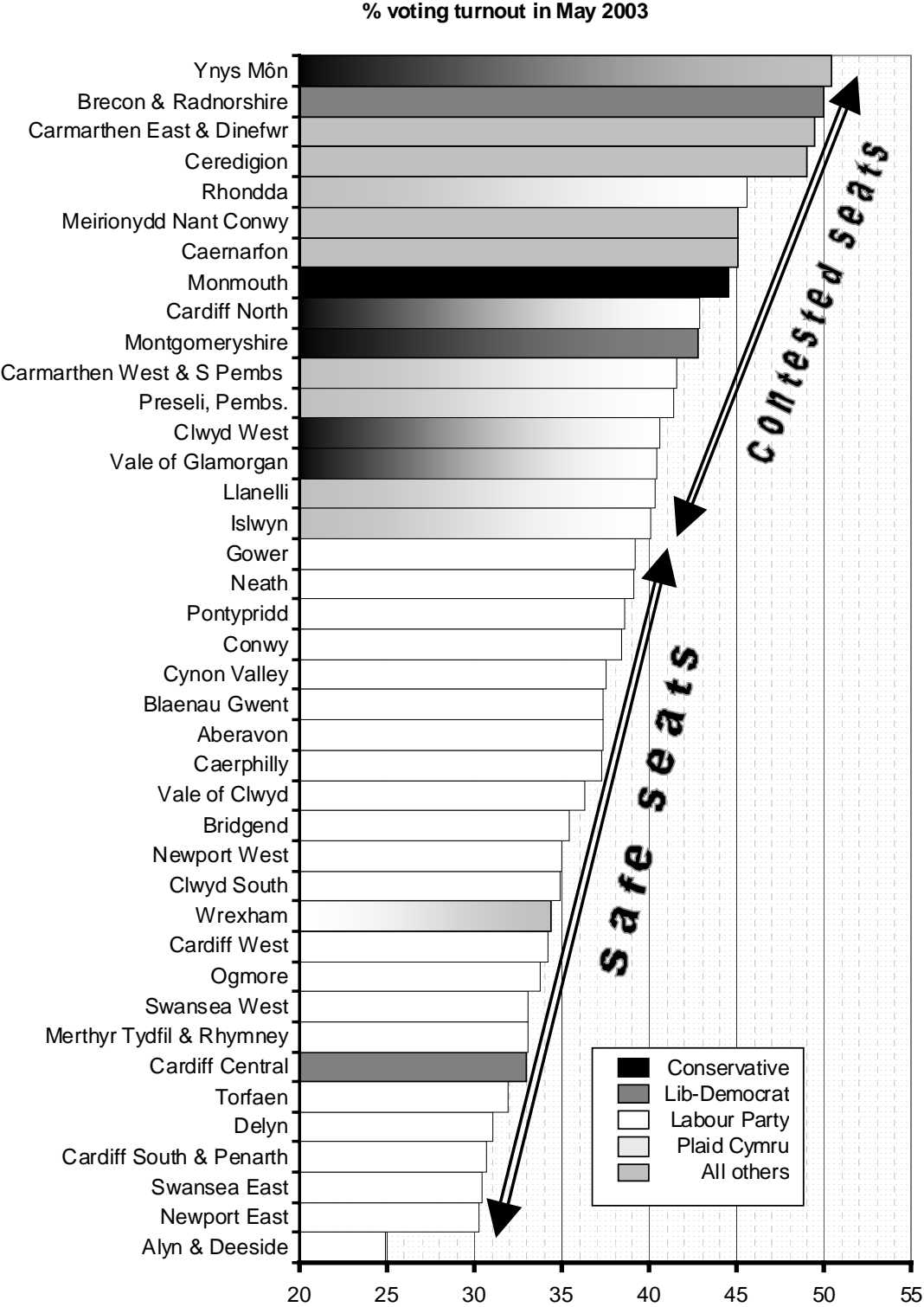
Bridgend♥	101,675	3	3	3	4
The Vale of Glamorgan♥	88,994	2♥	3	3	3
Neath Port Talbot	107,566	3	3	4	4
Swansea	177,105	5	5	6	6
Carmarthenshire	134,487	3	4	4	5
Pembrokeshire & Ceredigion	142,252	4	4	5	5
Gwynedd & Isle of Anglesey	141,991	4	4	5	5
Denbighshire & Conwy	154,899	4	5	5	6
Flintshire	114,932	3	4	4	4
Wrexham	96,835	3	3	3	3
Powys	100,371	3	3	3	4
Totals	2,233,202	60	67	73	80

Notes:

- ♠ These figures are no longer current
- * Cardiff has to be sub-divided when the entitlement exceeds 6
- ♥ The Vale of Glamorgan has to be paired with Bridgend if its entitlement is less than 3

The legislative process will be much simplified if, rather than rewriting the recommendations of the Richard Commission and second-guessing what may be a future consensus on implementation priorities, the recommendations are all included in the new legislation for implementation either immediately or when by a two-thirds majority, the National Assembly determines the time is right.

This approach could remove the bitterness of some recent debate and restore the remarkable unanimity achieved by the Richard Commission.



CHANGES TO THE GOVERNMENT OF WALES ACT – STANDARDS OF CONDUCT ISSUES

The Committee on Standards of Conduct is responsible for keeping under review and advising the Assembly on its Standing Orders and guidance as they relate to the conduct of Assembly Members. The Committee has asked me to write to you to outline its views on possible changes to the Government of Wales Act's provisions on ethical standards and to ask that you consider including them in the proposed Bill to amend the Act.

The Committee contains Members from the four main political parties in Wales and operates in a non-partisan manner. The Committee has unanimously agreed the proposals set out in this letter.

Background

Over the last 6 years, the Assembly has adopted a range of changes to its ethical standards arrangements based on the Committee's recommendations. Among the more significant of these have been a more robust procedure for considering complaints against Assembly Members and the establishment of the post of Assembly Commissioner for Standards. However, other changes that the Committee considered desirable could not be introduced because of the constraints of the Government of Wales Act.

Without the opportunity offered by the proposed Bill, it seems unlikely that time would be able to be found in the legislative programme to address these issues.

Requested Changes

In the light of the Queen's Speech, the Committee considered whether changes to the Government of Wales Act should provide for the Assembly to have greater control over the regulation of procedures relating to its Members' standards of conduct. The Committee's overall conclusion was that changes to the Act in this area are desirable.

The Committee agreed that, rather than specific measures to address particular issues, changes should be drafted as permissively as possible to allow the Assembly the autonomy in future to frame its own procedures in respect of ethical standards. Although the White Paper "Better Governance for Wales" had not been published when the Committee considered this matter, this approach seems to be very much in line with the UK Government's own proposals as described in paragraphs 3.30 and 3.32 of the White Paper.

Specific Issues

The Committee feels that the general approach of broad enabling provisions giving discretion to the Assembly to frame its own ethical standards is the right way forward. However, the Committee has identified two specific areas where it believes changes to legislation are currently desirable. These are set out below.

Statutory Commissioner for Standards

The Committee's main priority would be to give a statutory basis for the post of Commissioner for Standards and the powers he or she would exercise. The Assembly has recently established the post of Standards Commissioner within the Assembly's current Standing Orders. Although this innovation has been welcomed, the Committee believes that the Commissioner might usefully be given the following powers:

- to be able to call (within defined parameters) for persons, papers and records;
- to have the right to determine when and how to carry out any investigation;
- to compel witnesses to co-operate;
- to clearly establish privilege against defamation for all reports, statements and communications on a complaint;
- to deal with complaints against Members according to procedures agreed by the Assembly; and
- the power for the Assembly to place such other duties and limitations on the Commissioner, in relation to ethical standards as it agrees in Plenary. (For instance, promoting ethical standards and advising the Assembly on ethical matters.)

The current complaint procedure and Standing Orders provide the Commissioner with some authority and protection in each of these areas but this is predominantly a moral authority underwritten by the authority of the Standards Committee. There is no right to call for “people and papers” and although there is a presumption that the Commissioner’s reports and investigations are privileged as part of the Assembly’s proceedings, this has not been tested before the courts.

Defence Against Failing to Register or Declare Interests

There is currently no clear-cut legal defence to the offences outlined in Section 72 of the Government of Wales Act. These provisions have already caused some difficulties for Members of all parties in relation to registration of interests. Members may have failed to register a particular interest despite having taken all reasonable steps and exercised all due diligence to comply with the requirements. However, the Member would still appear to be technically guilty of an offence without any defence, such as “due diligence” being available to them. The Committee believes that this is an area where the Assembly should be able to legislate to frame its own rules in the light of its specific circumstances.

Lobbying for Reward or Consideration (Paid Advocacy)

In addition to the two specific areas above, the Committee has also identified ‘Lobbying for Reward or Consideration’ (Paid Advocacy) as an example of an area where the Assembly’s ability to consider adjusting the rules on ethical standards may be frustrated by the rigidity of the provisions in the current Act.

The Scottish Standards Committee has identified this as a problematic area and has recommended changes to the Scottish Parliament’s rules to allow Members to receive assistance in connection with the preparation of a Member’s Bill, amendments to Bills or on matters relating to Bills. This is subject to the proviso that such assistance is neither accepted by, nor given to, the Member in consideration of the Member promoting that Bill or that matter. Such changes could be made by Act of the Scottish Parliament.

Section 72(4) of the Government of Wales Act contains very similar provisions prohibiting lobbying for reward or consideration. These provisions could impact on Members’ ability to receive expert assistance from voluntary and other specialist interest groups that may offer assistance to Members in drawing up legislation or other proposals. It might also prevent Members from receiving more general research and briefing assistance from stakeholder groups. Although this is not currently a major worry, it could become a bigger issue in future as the Assembly gains more legislative powers as a result of your proposals.

Conclusion

The Committee considered this matter before the publication of the White Paper. However, the approach outlined in the White Paper, allowing the Assembly greater freedom to make its own decisions on procedures, is one which, I believe, accords very closely with the Committee’s view that the Assembly should be given more general permissive powers to regulate the Standards of Conduct of its own Members.

I commend these proposals to you, therefore, and I would be grateful for your response in principle to them. If you require any further information or explanation I would be happy to provide this or to meet you if you think it would be helpful.

If your officials need to discuss any of the detailed points set out above, the Clerk to the Committee, Andrew George on 029 2089 8206 will be able to help.

I am copying this to the First Minister for information and to the Presiding Officer, in his role as Chair of the Assembly's advisory committee on the Better Governance White Paper.

Kirsty Williams
Chair

BGW2 EV20 BUSINESS WALES

SUBMISSION BY BUSINESS WALES TO THE NATIONAL ASSEMBLY FOR WALES
COMMITTEE ON BETTER GOVERNANCE FOR WALES

Introduction

Business Wales is pleased to be able to contribute to the Committee on Better Governance for Wales' considerations on the UK Government's White Paper that sets out the proposals for changing the devolution settlement for Wales (BGW).

Business Wales is an umbrella body for the main business representative organisations in Wales. Business Wales' main function is to co-ordinate the input of the business representative organisations into the National Assembly for Wales Business Partnership Council.

The membership of Business Wales comprises the Confederation of British Industry, the Federation of Small Businesses, Chamber Wales, the Institute of Directors, the Engineering Employers Federation, the National Farmers Union, the Institute of Chartered Accountants in England and Wales, the Homebuilders Federation, the Council of Mortgage Lenders, the Association of Chartered Certified Accountants, the Freight Transport Association, the Forum of Private Business, the Institution of Electrical Engineers, Community Enterprise Wales, Royal Institution of Chartered Surveyors and the Federation of Master Builders.

We note the contents of BGW and would make the following general comments.

As business organisations we believe that a sustainable future for the people of Wales is only possible if there is a thriving private sector. A thriving private sector can generate the wealth and employment that minimises the need for public sector intervention in society but provides a large enough tax base to allow good quality public sector intervention where appropriate.

Therefore our criteria for assessing the structures that govern Wales are based upon how well those structures assist in the development and sustainability of a thriving private sector economy.

Many of the business representative bodies that make up Business Wales have been a part of the devolution process since it started and have engaged constructively and effectively in the birth of the new parliamentary body, the National Assembly for Wales.

Business Wales recognises that there is a desire by many to improve and increase the autonomy of action of the National Assembly for Wales but we believe that it is important, particularly in a time of the globalisation of the economy, that an increasingly differentiated Wales does not become so differentiated from the rest of the United Kingdom that businesses are less inclined to set up or do business within Wales.

We would therefore urge caution in the use of additional powers in Wales and would hope that such legislative powers are used to benefit the wealth creating part of society and not to hinder it.

Structure of the National Assembly for Wales

In respect of the new parliamentary structure proposed for the National Assembly for Wales, Business Wales recognises many of the issues that have prompted the desire to create a formal split between the National Assembly for Wales and the Welsh Assembly Government.

The establishment of a separate Ministerial executive authority, which derives its powers directly from the Crown, is much clearer and more efficient than the present process of delegation of authority from the National Assembly to the First Minister and onward from there.

Business Wales believes that it is appropriate for the National Assembly for Wales and the Welsh Assembly Government to have separate legal status and therefore agrees with the proposals made in BGW on this issue.

Business Wales is not persuaded that there is a need for salaried deputy Ministers which, at present appointment levels, means that the 'payroll vote' in the Assembly is 21.7% of all members, which we believe is too high for a democratic institution.

Given that the National Assembly for Wales will have a greater role as a legislature and scrutinising body we are concerned that the running costs of the National Assembly for Wales will rise which will diminish funds available for the provision of services by the Welsh Assembly Government.

Although Business Wales recognizes that an effective legislature must be adequately resourced we believe that there must be a strong emphasis on the National Assembly only doing what it needs to do, not what it can do.

Executive functions

Business Wales notes that the executive functions of the National Assembly will transfer to Ministers, including the powers to make subordinate legislation. We believe that this is appropriate provided that there is an adequate mechanism for ensuring that potentially controversial legislation or legislation that is of particular importance to business can be properly scrutinised in a timely fashion.

The statutory duty presently laid on the Assembly to establish partnership or consultative arrangements with business will become the responsibility of Ministers. The present statutory duty to consult with business is not as strong as the requirement to consult with local government or the voluntary sector.

Under s.113 and s.114 of the Government of Wales Act 1998 the National Assembly for Wales has statutory requirements to establish schemes with local government and the voluntary sector. In the case of s.113 there is a statutory duty to establish a Partnership Council with local government.

The present Business Partnership Council is not a statutory body and there is no requirement to provide a report to the business community on the activities of the National Assembly for Wales on an annual basis.

We believe that the Welsh Assembly Government should be required to set up a scheme for consultation with business and that there should be a statutory requirement for the establishment of a Business Partnership Council that has a formal role with the Welsh Assembly Government. This would give proper weight to the key role that business has in generating the wealth of Wales and sustaining the ability to create wealth into the future.

There should also be an annual report on the Welsh Assembly Government's consultation scheme with business in the same way that at present there are annual reports on the working of the local government scheme and the voluntary sector scheme.

We approve of the proposal to make the appointments to the posts of Auditor General for Wales and the Public Ombudsman for Wales Crown appointments to ensure their independence from executive authority in Wales.

The Legislative Process

Legislative powers can be used well or badly. Business Wales recognises that there is an important role for the National Assembly for Wales in passing good quality legislation for the people of Wales. Business Wales also recognises that there is a danger that legislation can be passed that can damage the competitive position of Wales in the world and which can have a long term deleterious effect on the Welsh economy and people.

The main concern of Business Wales is that legislation is only passed where there is a definite need and not passed merely to demonstrate that the National Assembly for Wales can legislate.

This is of particular importance in the commercial area where businesses of all sorts, from the smallest farm to the largest multi-national, already have to deal with a huge volume of regulation, which threatens to kill at birth the entrepreneurial spirit that Wales must engender if Wales is to have a sustainable prosperous future.

Given that BGW has outlined a route for greater legislative powers for the National Assembly for Wales and that this route is likely to be followed at a greater or lesser speed, Business Wales believes that it is vitally important that within the National Assembly's legislative processes there are strong mechanisms in place to ensure that the effect of legislation on business has been vigorously assessed.

We believe that there is a role for a liaison body between the National Assembly for Wales and business which would have the dual role of advising the legislature of the changing needs of business in Wales and of providing an umbrella body for smaller groups that could be brought together to consider specific legislative matters as they are dealt with within the legislative process of the National Assembly.

We believe that these sorts of arrangements would help improve the quality of legislation passing through the National Assembly and be more effective in providing a clear statutory framework for business in Wales.

The existing split of powers between the Assembly and Parliament is not clear due to the nature of the original devolution settlement. There is a great danger that the change of balance between the Assembly and Parliament may not increase clarity in the legislative process and may even decrease it.

We believe it is extremely important that the legislative process is as transparent as possible to ensure that the legislative process retains the confidence of the business community and society at large.

We would also reiterate our caution against differentiating the legislative landscape in Wales too much from the rest of the United Kingdom as this could easily act as a disincentive to businesses wishing to invest or expand in Wales.

Conclusion

In summary we believe that the proposals of the White Paper provide an opportunity to improve some aspects of the original devolution settlement. We believe in having a government structure for Wales that is efficient, effective and provides the framework for a thriving prosperous Wales.

To assist in achieving that goal we believe that the experience and concerns of business should have a strong voice in guiding the policies of the Welsh Assembly Government and the legislative processes of the National Assembly for Wales.

For partnerships to work there must be a sense of shared goals and an agreement on how to achieve those goals. We look forward to such a partnership with both the Welsh Assembly Government and the National Assembly for Wales in the future.

WALES TUC BGW2 EV21

SUBMISSION BY THE WALES TUC TO THE NATIONAL ASSEMBLY FOR WALES COMMITTEE ON BETTER GOVERNANCE FOR WALES

Introduction

The Wales TUC is pleased to be able to contribute to the Committee on Better Governance for Wales' considerations on the UK Government's White Paper that sets out the proposals for changing the devolution settlement for Wales (BGW).

The Wales TUC is the umbrella body for the trade unions in Wales. Amongst our roles is that of co-ordinating the input of the trade unions we represent to the National Assembly of Wales and in doing so to ensure that the interests of Wales' half a million trade unionists are properly represented in the whole range of Assembly decision making.

We note the contents of BGW and would make the following comments.

The Wales TUC welcomes and supports the proposals as summarised in the conclusion to the report:

2 To create a new executive structure for the Assembly

The Wales TUC recognises many of the issues that have led to the desire to create a formal split between the National Assembly for Wales and the Welsh Assembly Government and welcomes the clarity and enhanced efficiency which the establishment of a separate Ministerial executive authority, which derives its powers directly from the Crown, will bring.

Further the Wales TUC believes that it is appropriate for the National Assembly for Wales and the Welsh Assembly Government to have separate legal status and therefore agrees with the proposals made in BGW on this issue.

The Wales TUC notes that the executive functions of the National Assembly will transfer to Ministers, including the powers to make subordinate legislation. We believe that this is appropriate provided that there is an adequate mechanism for ensuring that legislation can be properly scrutinised in a timely fashion.

The statutory duty presently laid on the Assembly to establish partnership or consultative arrangements with business will become the responsibility of Ministers. The present statutory duty to consult with the social partners - the trade union and business organisations in Wales - is not as strong as the requirement to consult with local government or the voluntary sector.

The present Business Partnership Council, at which trade unions and business are represented, is not a statutory body and there is no requirement to provide a report to the social partners on the activities of the National Assembly for Wales on an annual basis.

We believe that the Welsh Assembly Government should establish Business Partnership Council that has a formal role with the Welsh Assembly Government. This would give proper weight to the key role that trade unions and business has in generating the wealth of Wales and sustaining the ability to create wealth into the future.

2 To give the Assembly enhanced legislative powers

The Wales TUC warmly welcomes the proposal to enhance the legislative powers of the Assembly. The Wales TUC would wish to see that in practice the processes enable the Assembly to take prompt action in areas of policy which benefit the people of Wales. The Wales TUC would also wish to see processes which enable greater clarity as to where the National Assembly's powers begin and Westminster's end, and vice versa.

2 To amend the current electoral system

The Wales TUC welcomes and wholeheartedly supports the proposals to prevent individuals from simultaneously being candidates in constituency elections and being eligible for election from party lists.

BGW2 EV22 LEGISLATION COMMITTEE

Dear Dafydd

LEGISLATION COMMITTEE'S CONTRIBUTION TO THE WHITE PAPER COMMITTEE

Since I gave oral evidence to your Committee on the 4th July, the Legislation Committee has discussed the matter further. The following points emerged -

1. The work currently carried out by the Committee would still be necessary following the changes, but as most subordinate legislation would be made by Welsh Ministers under a negative procedure, there would inevitably be a change in the way such legislation is approached. In particular the Memorandum of Corrections procedure, that is currently extensively used, would generally cease to be available. Accordingly the Government would need to put in place tighter quality control arrangements in relation to such legislation.
2. An issue will arise as to the procedures to be adopted in relation to new powers to make subordinate legislation. In relation to the "measures" procedure, there would be a need for particular scrutiny of whether any consequential subordinate legislation should be made by Welsh Ministers under a negative procedure or by the Assembly under an affirmative procedure, or indeed whether such matters were appropriate to be dealt with by subordinate legislation.
3. Similarly, there would be a need to scrutinise Westminster Bills granting further powers to Wales (as well as proposed Transfer of Functions Orders) to ensure that the powers were appropriately allocated to Ministers and to the Assembly.
4. Such functions could be given to a strengthened Legislation Committee, as is the case in Scotland.
5. The general view was that an enhanced Legislation Committee should be established, but it was not generally thought necessary that it be enshrined in primary legislation. Indeed, there was considerable frustration, as I explained in my evidence, at the restrictive provisions contained in the Government of Wales Act in relation to functions of the Legislation Committee. The Committee considered that the Assembly should be able to give the Committee such powers and duties as the Assembly thinks appropriate.
6. Members nevertheless expressed support for current arrangements for party balance on the Committee and the appointment of its Chair.
7. The Committee was therefore generally content with proposed removal of provisions regarding the Committee from primary legislation.
8. The Committee will wish to be consulted further on the preparation of procedures and Standing Orders in readiness for 2007.

Yours sincerely

Glyn Davies AM

Chair, Legislation Committee

NICHOLAS BOURNE

BGW2 EV23

Dear Colleagues

I wish to say something about the proposals in the Better Governance for Wales White Paper:

1. I welcome the proposed formal separation between the Assembly and the Welsh Assembly Government
2. I believe the proposals with regards to the electoral system whereby candidates are forced to chose between the regional list and a particular constituency are malicious and spiteful. The Secretary of State's claim that there were many submissions to the Richard Commission on this issue is bizarre as Richard makes no mention of it. This proposal represents an unnecessary interference with the electoral system and the right of candidates to stand where they wish.
3. I generally welcome the idea of framework legislation providing powers for the Assembly. However there is a need for a referendum before there is any change in the status of the Assembly.A

I thank you for the opportunity to respond to these proposals.

Yours sincerely

Nicholas Bourne

Leader of the Welsh Conservatives in the National Assembly

BGW2 EV24

LORD LIVSEY

Introduction

The Government has chosen this particular time to review the working of the National Assembly for Wales and make proposals for reform. I welcome the opportunity, as former Leader of the Welsh Liberal Democrats, and as the Party's spokesman on Wales in the House of Lords, to comment on the Governance for Wales White Paper.

We originally proposed a review of the existing legislation in the 1998 Act, which set up the National Assembly. The conclusions of the subsequent all-party Richard Commission set out a template for the National Assembly to become a Parliament with full primary legislative powers, and 80-member Assembly elected by STV, more effective scrutiny of legislation and a separation of the Cabinet Executive and the Assembly Legislature. It must be added that this was aligned to a practical and realistic timetable.

I regard the conclusions of the Richard Commission proposals as entirely the correct procedure to give Wales effective power within the United Kingdom. The report maps out how Wales can achieve its rightful status within the UK. The response from the people of Wales would be far greater national self-confidence, and the creation of a much more dynamic society in Wales.

Comment

Frankly, the White Paper "Better Governance for Wales" does not measure up to these objectives. There are no primary legislative powers granted - only some dim and distant possibility of this occurring if subjected to an extraordinary Westminster obstacle course. Power will still continue reside at Westminster. There will remain a 60-member Assembly, so scrutiny will be inadequate. STV is rejected, presumably in favour of closed party lists for elections. I welcome proposals for the separation of the executive from the Assembly legislature but even here, it will place more power in the hands of the executive Ministers by taking it away from the Assembly itself. The issue of a timetable hardly surfaces, and has effectively been kicked into touch.

Briefly, I will comment on three of the main proposals in the White Paper to enlarge upon my comments as above.

1. Executive Powers - Corporate Status

Clearly, it was a mistake in the 1998 Wales Act to incorporate both Executive and Legislative functions into one corporate body - the National Assembly for Wales. I agree with the conclusion of the White Paper that there should be a clear separation between the Assembly Minister on one hand, and on the other, the Assembly itself. This also applies to staffing, with civil servants serving Ministers and the Assembly having its own separate staff.

However, the Assembly is not able to engage in primary legislation, and further, if the Assembly is to lose its executive functions, then the balance of power will have moved decisively in favour of Ministers. This, combined with inadequate scrutiny powers for Assembly Members, alters the balance between the Assembly and government Ministers. Primary Legislative powers for the Assembly would require an 80-member Assembly, and enable much more legislative scrutiny, as recommended by the Richard Commission.

The overall conclusion must surely be an efficient Assembly Government called to account by an effective Assembly legislature with the powers and resources to do the job properly.

2. Legislative Powers and Legislative Enhancement.

The advent of devolution for Wales and the creation of a National Assembly has assisted the democratic process and improved accountability.

The Assembly, however, only possess secondary legislative powers. I have been a spokesman for Wales in the Commons and the Lords for the entire period since Wales achieved its Assembly in 1999. I am dismayed that only six "All-Wales" Bills have passed through Parliament between 1999 and 2005. This, I know, has also been very disappointing for the Assembly, and demonstrates the legislative log-jam at Westminster. In contrast, the 17 England and Wales Bills which have passed through at the same time have highlighted the different priorities in Wales and England. Welsh clauses have littered these bills, where an "All Wales" Bill would have been far better. The case has now been made for "All-Wales" Bills, and has been accepted. Primary Legislative powers in the Assembly would, however, produce good Bills, tailored in Wales for Wales. Moreover, the throughput of Bills would be much higher and would meet urgent needs in Wales. In comparison with the new Scottish Parliament, the Welsh Assembly has only been able to pass a fraction of the number of Bills in the same time frame.

A number of issues in the White Paper are proposed to further the legislative process. Enhanced legislative powers are to be given over an undefined period of time. The vehicle employed would be the Assembly's secondary legislative powers, but these would be subject to veto both by the Government and both Houses of Parliament at Westminster.

Great emphasis has been placed on the use of "Orders in Council" to make new provisions, or to amend, repeal or extend Acts of Parliament within the Assembly's current areas of jurisdiction. Although this would be a useful move forward, it is still subject to the same caveats as secondary legislation, in that Orders of the Council can be rejected at Westminster. One does not have to use much imagination to envisage the impact of rejection of legislation by an unsympathetic Westminster government on public opinion in Wales!

Reference is also made to the Assembly being given in the "long term" (undefined) general powers to make primary legislation in those areas where functions have already been devolved. This would be subject to a referendum. The reason for this appears to be that the Government thinks that there is no consensus on this in Wales at present. Yet opinion polls in Wales in the past 12 months unequivocally favour the granting of Primary Legislative powers for the National Assembly. The real reason for the rejection of the Primary Legislative proposals in the Richard Commission report is clearly a result of differences of opinion on the issue by Welsh Labour MPs in Westminster.

3. Electoral System

There appears to be no desire in some quarters to discuss the proposed electoral system. The Richard Commission was clear in proposing an STV system of election. I believe that two Members should be elected per Welsh constituency by STV. This would provide a choice and election by the majority of electors.

The proposal for a combination of first past the post and a closed Regional list, even with different candidates in each category, does not fulfil the advantages of an STV system operating in existing constituencies.

CONCLUSION

The proposals in the White Paper do move matters forward, but eventually are likely to result in deadlock and dissent between the National Assembly and Westminster. Ultimately, this will fan the flames of Welsh Nationalism.

There will never be a better time to reform the Assembly and replace it with a Parliament similar to the Scottish model. I think that MPs should show far more vision and realise that the granting of Primary Legislation to the Assembly does not undermine their roles. They would have a choice of standing for the Assembly, or concentrating on the affairs of the UK State at Westminster. Surely, there is plenty of scope in Foreign Affairs, the Treasury, Defence and other areas of the state to carve out a Parliamentary career.

There will be a vibrant alternative in the Assembly with Parliamentary powers. This will provide a clear and strong Welsh voice with an effective Welsh Parliament.

There may be fewer Welsh MPs in Westminster, but more power would reside in Wales for the benefit of all our people. The reduction in the number of Welsh MPs should not occur unless and until Primary Legislative powers are vested in the Assembly. The post of Secretary of State must remain right through the establishment of Primary powers. The two issues of Block Grant negotiations and the reform of the Barnett Formula make it imperative that the position of Secretary of State for Wales continues. A possible review of this position would be made if these two latter issues become resolved.

The model of democratise governance proposed in this White Paper is an unsustainable compromise, and would perpetuate the production of a hybrid England and Wales Bills. There may be modest increase in "All-Wales" Bills but the reality would result in the Assembly being unable to produce clear, coherent legislation for Wales. The original 1998 Wales Act was a compromise; these proposals incorporate yet another. Time is not on our side, and Wales deserves better!

BGW2 EV25
WALES

PETER CLARKE, CHILDREN'S COMMISSIONER FOR

Dear Lord Dafydd Elis-Thomas

Re: **Better Governance for Wales White Paper/ Children's Commissioner for Wales**

I am writing to you in your capacity as Chair of the Committee to ask if I might discuss with the Committee relevant matters concerning my office.

I am concerned that whatever arrangements eventually come into force as a result of the planned legislation, they ensure and strengthen the intention in the Care Standards Act (2000) and the Children's Commissioner for Wales Act (2002) that my office should be:

- i. Clearly independent of (Wales) government, and insulated from political interference and
- ii. Empowered to scrutinise the policy making and executive functions of the National Assembly for Wales/Welsh Assembly Government to ascertain how far they acting in the interests of Welsh children
- iii. Financed in a way that is consistent with (i) above

It would appear that the position of my office is perhaps closest to that of the Auditor General and/or Public Services Ombudsman for Wales in terms of the relationship with the newly proposed structures. As set out in 2.19 of the White Paper it is proposed that these bodies/officer be appointed by the Crown. My colleague, the Children's Commissioner for Scotland, is already established and appointed in this way. If the Children's Commissioner for Wales were to follow this model it would give me a similar capacity to "assist the Assembly in holding the Welsh Assembly Ministers to account. If the same model is not adopted, I can envisage no arrangements that would give the same level of assurance "that appointments to these offices should be seen to be entirely independent of executive authority in Wales" (White Paper 2.19). I am also concerned that any other arrangements might weaken the real and perceived independence of my office. If we are instead dealt with as an 'Assembly Sponsored Public Body' or even 'Non-Governmental Organisation' we will be much more vulnerable to executive interference.

As Commissioner I have had concerns that discussions and decisions about my budget have taken place without any public debate, and, that the presentation of my Annual Report has not been an easy 'fit' within current arrangements.

The proposed legislation could clarify and strengthen the independence of my office and if you deem it appropriate, I would welcome the opportunity to discuss these matters with the Committee.

Yours sincerely

Peter Clarke
Children's Commissioner for Wales

WILLIAM GRAHAM AM

BGW2 EV26

Anwyll Dafydd,

Re: White Paper on Legislative Powers For the National Assembly

Following the above proposals I wonder if I might share with you and your committee some considerations regarding the impact of further legislative powers upon the Assembly.

Having been privileged to join the recent visit to the Edinburgh Parliament I spoke particularly to Murray Tosh and to Bill Aitken who gave me their impressions of the enormous pressure of dealing with legislation which the members of the Scottish Parliament are coping with and no doubt you will have the statistical information regarding frequency of sittings from APS.

I have spoken to a convenor and Committee members of some of the smaller subject Committees dealing with this rather frequent legislation and they impressed upon me the enormous commitment in terms of time which often prevented attendance at other committees or the Plenary Session.

The very much reduced number of our members will probably increase this pressure further and I am very keen that your committee should try and find a solution which would probably entail APS finding a much different method of scrutiny.

You will know that for many years Public Works Bills have been often put out to public enquiry and I wonder whether this could not be one avenue of approach even for relatively uncontroversial matters of legislation. A hybrid of this form could be entrusted to suitably qualified officials who would make representations to Committee at an early stage in the development of the particular bill.

Selection of appropriate amendments should be more closely examined particularly with regard to the necessary time element under which scrutiny will take place.

I hope that you will agree the re-routine guillotining of amendments in Parliament is not ideal and that the Scottish system is an improvement. Any attempt at live scrutiny should surely be resisted.

The National Assembly has a Nascent Institution has developed a relatively unique committee structure enabling both adequate scrutiny of party executive and being able to devote time to policy formation.

The taking of evidence in a general fashion could certainly be refined by the use of working parties so that more evidence could be obtained from representative groups and private individuals. Some of these suggestions were given during the last Assembly review but did not find favour with the majority.

If greater legislative competence is to be granted to the Assembly even in the hybrid form as presently proposed, members will be very reliant upon the APS and no doubt your committee are already considering employment descriptions for the very necessary skilled staff we will require.

I trust that the above will be of some assistance to you and your committee if only to initiate further discussion and consideration of a point you have already observed.

Yours, William

Committee on the Better Governance For Wales White Paper

Transcripts of Oral Evidence

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336	Thursday 21 July	(QQ512-563)



Cynulliad Cenedlaethol Cymru
Pwyllgor ar y Papur Gwyn—Trefn Lywodraethu
Well i Gymru

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

Dydd Mawrth, 28 Mehefin 2005

Tuesday, 28 June 2005

Aelodau o'r Cynulliad yn bresennol: Dafydd Elis-Thomas, y Llywydd (Cadeirydd), Lorraine Barrett, Jocelyn Davies, Jane Hutt, David Melding, Carl Sargeant, Kirsty Williams.

Swyddogion yn bresennol: Paul Silk, Clerc y Cynulliad.

Gwasanaeth Pwyllgor: Siân Wilkins, Clerc.

Assembly Members in attendance: Dafydd Elis-Thomas, the Presiding Officer (Chair), Lorraine Barrett, Jocelyn Davies, Jane Hutt, David Melding, Carl Sargeant, Kirsty Williams.

Officials in attendance: Paul Silk, Clerk to the Assembly.

Committee Service: Siân Wilkins, Clerk.

*Dechreuodd y cyfarfod am 5.30 p.m.
The meeting began at 5.30 p.m.*

Cyflwyniad ac Ymddiheuriadau Introduction and Apologies

Y Llywydd: Croeso i gyfarfod cyntaf y Pwyllgor ar y Papur Gwyn—Trefn Lywodraethu Well i Gymru. Nid oes ymddiheuriadau.

The Presiding Officer: Welcome to the first meeting of the Committee on the Better Governance for Wales White Paper. There are no apologies.

Dull Gweithio a Rhaglen Waith Approach to Working and Work Programme

Y Llywydd: Mae papur gerbron ar ein dull gweithio. Af drwy'r papur fel ag y mae. Gwelwch destun y cynnig yn y paragraff cyntaf sy'n amlinellu diben y pwyllgor, y dull gweithio a'r rhaglen waith. Efallai mai'r peth pwysig i'w bwysleisio ar y dechrau yw bod dau ymgynghoriad yn digwydd ar yr un pryd, mewn ffordd. Mae ymgynghoriad yn codi o'r Papur Gwyn ei hun, sy'n cael ei gynnal gan Lywodraeth y Deyrnas Unedig drwy Swyddfa Cymru, ac yna byddwn ni yn dilyn ein cylch gorchwyl ni, fel y nodir ym mharagraff 5, sef ystyried y cynigion a'u perthnasedd i strwythur newydd arfaethedig y Cynulliad a'r pwerau deddfwriaethol arfaethedig, a chymryd tystiolaeth. Efallai y dylwn bwysleisio y byddwn yn

The Presiding Officer: There is a paper before us on our approach to the work. I will go through the paper as it stands. You will see the text of the motion in the first paragraph, which outlines the purpose of the committee, the approach to the work and the work programme. Perhaps the most important point to emphasise at the outset is that there are two consultations taking place at the same time, in a way. A consultation arises from the White Paper itself, which is being undertaken by the UK Government through the Wales Office, and then we will be following our remit, as set out in paragraph 5, namely to consider the proposals and their relevance to the proposed new structure for the Assembly and the proposed legislative powers and to take evidence. Perhaps I should emphasise that we will

'Cymryd tystiolaeth gan sefydliadau ac unigolion sydd â diddordeb uniongyrchol yn strwythur newydd arfaethedig y Cynulliad'.

'Take evidence from organisations and individuals with a direct interest in the proposed new structure of the Assembly'.

Felly, yr awgrym yw na fyddwn yn cynnal

Therefore, the suggestion is that we will not

ymgyngoriad eang iawn, ond y byddwn yn ceisio darparu a chysoni tystiolaeth ar ran y Cynulliad. Pwysleisiaf, yng nghyswllt yr hyn a ddywedais yn y Cyfarfod Llawn heddiw wrth ateb pwynt o drefn, nad ydym yn ymwneud â phennod 4 y Papur Gwyn ac na fyddwn yn gwneud unrhyw gyfeiriad ato. Os byddwn yn derbyn tystiolaeth ar bennod 4, awgrymaf ein bod yn ei nodi ond nid yn ei drafod, os yw hynny'n briodol.

hold an extensive consultation, but that we will try to provide and reconcile evidence for the Assembly. I emphasise, in the context of what I said during Plenary today in answering a point of order, that we will not be discussing chapter 4 of the White Paper or making any reference to it. If we receive evidence on chapter 4, I suggest that we note it but do not discuss it, if that is appropriate.

Ar bwynt 6, y bwriad yw ein bod yn adrodd i'r Cynulliad erbyn 19 Medi fan bellaf. Bydd hynny'n golygu y bydd ein hadroddiad wedi ei gwblhau ond na fyddwn wedi adrodd i'r Cynulliad o fewn amserlen sy'n cyd-fynd ag amserlen ymgyngoriad Swyddfa Cymru, sy'n dod i ben, os cofiaf yn iawn, ar 16 Medi.

On point 6, it is intended that we report to the Assembly by 19 September at the latest. That will mean that our report will be completed but that we will not have reported to the Assembly within a timetable that coincides with that of the Wales Office consultation, which concludes on 16 September, if I remember rightly.

A oes unrhyw sylwadau ar y papur hyd yn hyn?

Are there any comments on the paper so far?

Lorraine Barrett: Regarding point 7 on committee meetings, where it says that the quorum of the committee will be three Members, do you think that we could make that at least one from each party, instead of just three Members, so that each party is represented?

The Presiding Officer: I was very keen for us to be able to have the opportunity to hear evidence. Obviously, when we come to deliberate, I would hope that we will all be here. Therefore, the intention of the relatively small quorum—although I do not think that it is really small in a committee of this size—would be to allow the evidence to be taken. There will be no deliberation at those meetings that have a minimum quorum, if it is helpful that I give you that assurance. I do not want us not to be able to go ahead with our programme of evidence because someone is unable to attend. That was my concern.

Kirsty Williams: I think that concerns regarding the quorum could perhaps be overcome if the next part of the sentence was changed. If people were allowed to send substitutes, then that would not be so much of an issue. I think that the issue arises from the fact that we have a potentially very heavy load of committee meetings to get through a big section of work against a tight timetable. People's concerns could be addressed if we could allow substitutions in exceptional circumstances because of an inability to attend. I think that would be a sensible provision and a sensible way forward.

The Presiding Officer: I will call Carl, but I will respond to that first by saying that you said 'in exceptional circumstances'. I would like to see this being a close working committee. Regular substitution, from my experience of the Assembly review of procedure, often prolongs the period of work because people who are not present do not pick up on what may have happened before and so on. I would argue that the evidence-gathering sessions are precisely that, and all the evidence will be on record. I do not see why substitution is necessary if we are listening to evidence. The difficulty might be that if you allow a substitute for any of the hearing meetings, you could end up in a situation where you would have a substitute for a deliberative meeting at the end. That might cause difficulties. I do not see this as a party committee. I appreciate that we are all members of parties; I am acting in

my role as Presiding Officer and will, therefore, not be voting, but I hope that we can move forward in a way that reflects the maturity of the institution.

Carl Sargeant: In support of my colleague, Kirsty Williams, there is undoubtedly full commitment from colleagues here with regard to the importance of this White Paper committee. I do not think that there was ever any doubt about our commitment. However, given the short timescale that is being imposed on a small committee, substitutes would be helpful and appropriate, although I understand your point. Although you recognise that we should be mature and that the party element should not come into it, it may creep in now and then. It is important that we maintain party balance, and I support Kirsty Williams's point about substitutions where appropriate.

The Presiding Officer: Is that the view of you all? If so, I shall have to modify what I said earlier.

Jocelyn Davies: For the Assembly review of procedure, we did not have substitutions. The leaders and business managers were members, but the leaders tended not to attend. I do not think that it was necessarily to the detriment of the committee, but, bearing in mind the short timescale, it would be helpful if we could have substitutes. However, when we come to discuss the report, we would obviously expect the original members of the committee to attend.

David Melding: I think that Jocelyn has hit the nail on the head. The deliberative session would be weakened if the membership as constituted here is not present. I anticipate being able to attend all the meetings, but I am aware that I serve South Wales Central and I do not have any difficulty travelling. Some flexibility for other Members may be quite useful. I hear what you say about being able to read up on the evidence, but, if all the parties are tied in to the process and able to ask questions of witnesses, a substitute may not be a bad idea. However, you are quite right that we do not want that to be frequent practice where one of the Members cannot attend a single meeting in the course of several planned. I do not anticipate having to call on a substitute but, given the circumstances, it is a reasonable request.

The Presiding Officer: This will require a change to the Standing Order, but I understand that the Business Committee has discussed that already.

Jane Hutt: This has been a useful discussion. The matter was brought to the Business Committee this morning, and I agreed that I could table this for next week. However, the discussion has clarified the point that that provision would be for exceptional circumstances. We need to aim to be present for the deliberative meetings, although that takes us beyond the timetable in the sense that it would be the end of the term, and into September. We should try to secure our availability before we firm up the final dates for meetings. Kirsty has already mentioned that some leave will be taken during the beginning of September, but there is some flexibility. If we could have a bit more time to firm up the final dates in early September, I think that we could fulfil both your views and the views of the Members here.

5.40 p.m.

The Presiding Officer: I concur with that arrangement. Perhaps it would be useful if we had a short note indicating the committee's agreement with substitution in exceptional circumstances, plus expecting that all of us will be there for the deliberative session. I am happy with that.

I ddychwelyd at y papur, a pharagraff 7, a oes unrhyw sylw eraill, Glerc, ynglyn â'r tystion a'r cyfarfod nesaf, a'r ymateb yr ydym wedi ei gael hyd yn hyn? To return to the paper, and paragraph 7, are there any other comments, Clerk, on the witnesses and the next meeting, and the responses that we have received to date?

Mr Silk: Would you like me to speak on the witnesses that we have so far, Chair?

The Presiding Officer: Yes, and if you could possibly tie them in with dates, if we are in a position to do that.

Mr Silk: We have been in touch with all the people on this list, and, with one exception—Richard Wyn Jones—they are either ‘possibles’ or ‘definites’. We have tentatively arranged several dates, subject to the committee’s agreement, with these people. I do not know whether you would like me to mention some of those dates?

The Presiding Officer: Yes, please.

Jane Hutt: Before we get on to that list, would it be all right if we just went back to the issues about who should be invited—we have done the meetings of the committee—and go back to paragraph 9 for a moment, recognising that these papers will be in the public domain? It struck me that I suggested last week that the committee should seek evidence from the business, local government and voluntary sector partnership councils. I wondered whether the previous sentence should be removed, because that was there in an earlier informal version, and it suggests

‘that the Committee should not invite evidence from wider Welsh society such as the social partners, WLGA, ASPBs, civil society groups, legal professions etc.’.

Is that slightly contradicted now by the fact that we agreed, at an informal session, to seek evidence? Just for clarity for the outside world, should we just delete that previous sentence? Other Members may think that it is all right—that one leads to the other—but it is slightly contradictory.

The Presiding Officer: The distinction is between specifically inviting and a broad invitation of evidence. My understanding is that we, as an Assembly, have broadly invited evidence. Indeed, there will be an invitation on our Assembly website.

Jane Hutt: That is fair enough.

The Presiding Officer: We have specifically requested individuals with a specific interest. I thought that what is in the paper is a fair reflection of what we discussed last week, as this was added, or discussed informally, before this committee was constituted; I should not have said it like that, because what I mean is that anything that is discussed informally is reflected in this paper.

Jocelyn Davies: I thought that, when we met informally last week, we agreed that we would make representations to the media, because it broadcasts our proceedings, and that we should invite specific individuals.

The Presiding Officer: I understand that media representatives have been approached.

Jocelyn Davies: I could not see it in the paper.

The Presiding Officer: However, they cannot yet decide which of them is to appear.

Jocelyn Davies: Have we approached someone from the Welsh-language media?

The Presiding Officer: Yes, we have.

Jocelyn Davies: I think that we just named one individual last week.

The Presiding Officer: I think that we have approached the BBC. I am sure that it can provide someone if we need to have both, although I do not see much difference between them—they all seem to be able to misreport us, or they have in the past anyway.

David Melding: On the previous point, when we have the partnerships in, we intend to discuss with them whether there is a parliamentary partnership, as well as a governmental one, because, at present, the corporate nature is that it is done by these partnerships, but that is the crucial question, so it is very focused. If we go to the wider society, we are just replicating what the Wales Office will be doing in its consultation. Therefore, we need to be very focused when we get the partnerships in and to make them aware that this is what we will be seeking to discuss with them.

The Presiding Officer: It is basically the issue that these are established by the Act, and what happens then when there is no statutory basis to them, I think. Also there is the extent to which they have felt that they have been of value. This was the point that you made when we previously discussed this informally.

Carl Sargeant: For clarity, I would like to make two points. First, Jane Hutt mentioned paragraph 9, which states:

‘For these reasons it is suggested that the Committee should not invite evidence from wider Welsh society’.

It then goes on to say that the committee will seek evidence from the business and local government partnership councils. Would it not be clearer to remove the earlier line in the paragraph? Also, paragraph 7 states that,

‘The schedule of witnesses for these will be arranged by the Clerk, in conjunction with the Chair’.

Would it not be reasonable to include the Chair and committee and discuss the evidence partners within this forum?

The Presiding Officer: That is what we are about to do.

Carl Sargeant: I accept that, but would it not be clearer if that was said in the paper?

The Presiding Officer: Well, in fact, the Clerk and I have already been discussing this list informally before we come to this formal view. This paper brings us to where we are now; it is not a paper that is going anywhere else. Therefore I was not trying to focus on amending this paper because it is an information paper. It sets the direction in which we are going; it is not anything that will appear as part of our evidence, if you are happy with that.

If there are, however, points that have come out in the paper that I have not covered, please call me to order.

Kirsty Williams: Before Paul goes into his list, as outlined in 13 (D), I would like to return to paragraph 11, and the issue that,

‘Two separate oral evidence sessions could then be held, one with the First Minister, and one with the other party leaders.’

You will recall that in the informal meeting that we had, I expressed doubt about whether that would be the appropriate way of doing it. Having given it further thought, I think that it would be necessary for each of the party leaders to have a separate slot. First of all, there are very real differences between how each party leader will approach this. Also, there is the question of diary commitments. I would imagine that it would be impossible to get a single date at which all three opposition leaders would be available. Thus a session for each party leader individually would be preferable.

The Presiding Officer: That is what has happened, in fact.

Are we happy to move on to Paul’s draft timetable?

Lorraine Barrett: I have one tiny point. You have the Chairs of the House Committee, Business Committee, Committee on Equality of Opportunity and Legislation Committee listed, but what about the Committee on European and External Affairs, and the Audit Committee?

The Presiding Officer: I understand from the White Paper that the Audit Committee will remain unchanged. The Committee on European and External Affairs is not a statutory one; it is represented through the Panel of Chairs. It has not yet been decided how the Panel of Chairs will present evidence, and that will not be decided until the panel’s next meeting. Obviously, I do not want to be presenting evidence to myself; I prefer to ask the questions rather than present the evidence.

Kirsty Williams: The only other committee that is not written down, or has not been mentioned, is the Committee on Standards of Conduct. This committee has already considered what it would like to see in the Government of Wales Act with regard to changes to the standards regime. The most obvious is the long-standing belief that we should have a statutory commissioner for standards. I am in a difficult position, as I chair the Committee on Standards of Conduct and am a member of this committee, but I am anxious that the work that has already been done—I think that there is already a paper, or one is being worked on by officials—with regard to what the Committee on Standards of Conduct thinks should be in the Government of Wales Act, should be presented to this committee at some point.

The Presiding Officer: We will certainly note that. So, we need to think of a way that both the Panel of Chairs and the Committee on Standards of Conduct can give evidence to us, despite the fact that we are both members of this committee also.

Kirsty Williams: The Committee on Standards of Conduct has concrete requests.

Y Llywydd: A oes unrhyw bwyntiau eraill ar baragraffau 11, 12 neu 13? Gwelaf nad oes. Symudwn ymlaen felly at y rhaglen waith.

The Presiding Officer: Are there any further points on paragraphs 11, 12 or 13? I see that there are not. We will therefore move on to the work programme.

5.50 p.m.

Mr Silk: As has already been said, the three party leaders are not able to come on one day in any case, so one will come on one day and two will come the next day, I believe. The First Minister has said that he is willing to come. We have not heard anything from the Secretary of State. The Chairs of the House Committee, Business Committee, Committee on Equality of Opportunity and Legislation Committee have all given times when they are available. We also have a provisional slot for the Permanent Secretary and staff representatives. Of the list of experts, most have been contacted and most have said that they are willing to give evidence, although some cannot. We are trying to fit those, as far as possible, into one or perhaps two sessions.

On paragraph 14, if the committee agrees, the Presiding Officer will send a letter after this meeting to all Welsh Members of Parliament and peers and also to Assembly Members. One outstanding question is whether any former Assembly Members who are not peers should be invited.

As far as the partnership councils are concerned—and, of course, the chair of each partnership council is a Minister—we have contacted the officials who work for the partnership councils to see whether anybody wishes to represent that partnership council, whether that be the Minister or another member.

Y Llywydd: A oes unrhyw sylw ar hynny? **The Presiding Officer:** Are there any comments on that?

Kirsty Williams: The list is very long and we are in a difficult situation because, if these people have already been approached, we cannot rescind the invitation, as that would be ungracious and impolite, but I wonder, in reflection, whether it is necessary to have all of these people, some of whom represent the same institutions and work in the same departments as each other. We might have missed a trick by inviting some of these people and then not inviting others. For instance, the constitution unit at University College London has done considerable work on devolution across the piece, and it might have been useful to have a perspective from somebody from UCL. The paragraph says that we would invite people with a direct interest, and I wonder about the directness of the interest of some of the people who have been invited here. I do not know about the Bevan Foundation. It obviously has an interest, but I do not know whether it would be more direct than that of other organisations.

The Presiding Officer: I believe that these are people who have specifically studied our activity and have written on it, in most cases, which is why we thought that they had a direct interest. However, if there are further names, please add them today so that we can approach them at the same time.

David Melding: I know that the Institute of Welsh Affairs has co-operated with UCL, and probably still does. It may be possible to ask Robert Hazell, who headed up the unit. I think that it would be quite useful to have that outside dimension. The unit has done a lot of work in looking at the way in which we operate.

The Presiding Officer: Dr Alan Trench would be the other possibility, because he has done most of the specific work involving Wales. He may be around tomorrow.

Mr Silk: There is a conference on the White Paper, on 11 July, which the Institute of Welsh Affairs and University College London are organising at the Wales Millennium Centre. They have said that they would like members of this committee to attend that.

Kirsty Williams: When is it?

Mr Silk: It is on 11 July.

Jocelyn Davies: Could you circulate details of that?

Mr Silk: Yes.

The Presiding Officer: It is not suggested that we take evidence in the Wales Millennium Centre, is it? It is a bit large for that.

Lorraine Barrett: I support David's suggestion. Could we have another day to put a few more names through if there are some people that we want to suggest? We have MPs and peers, could Members of the European Parliament be included? That is paragraph 14.

The Presiding Officer: The reason for not including MEPs is because they do not have a direct involvement with the legislative process related to this place—they do have an involvement, clearly, when they draft European legislation, but we are obliged to make that into law anyway, whereas MPs and peers will be specifically involved with the White Paper and with the subsequent Bill. That was the idea, I think.

Lorraine Barrett: But they would have the opportunity, in any event, to send in written submissions, as anyone would. I would just make the point that I not particularly keen on inviting former Members, although it would be open to them to submit their views, like any other member of the public.

Jocelyn Davies: I support Lorraine on her point about MEPs, because they are invited to our meetings of the Committee of European and External Affairs. I am not sure that they are able to attend, but they do have an open invitation to attend those meetings. So, they can take part in our proceedings at the moment.

The Presiding Officer: Okay, shall we add them to the list, then?

Jocelyn Davies: Well, to write to them.

Jane Hutt: I would just like to clarify whether, if other names are proposed over the next 24 hours, we could submit them. I am thinking of Robert Hazell, as David suggested, who might be our connection with UCL. However, can I clarify whether we are saying that all of the people on this list of experts have been invited now to submit written and/or oral evidence? How have they been approached? Can I have that clarified?

Mr Silk: If it would be helpful for the committee, I can tell you precisely what the status is for each of them.

Jane Hutt: That would be helpful.

Mr Silk: Roger Sands has been approached informally, and he is willing to give oral evidence, but not to submit written evidence. Paul Grice is happy to give oral evidence, but it would have to be by video link. I do not have a final answer from Sir Christopher Jenkins yet; I know that he has some interesting views on the White Paper. Sir Michael Wheeler-Booth is willing to submit a paper and to come to give evidence. I have not been able to speak to Vernon Bogdanor. Laura McAllister is willing to give evidence. Richard Wyn Jones is not

able to give evidence.

The Presiding Officer: However, he is prepared to send a paper.

Mr Silk: I have not been able to contact Roger Scully. David Miers is willing, in principle, to give evidence. Rick Rawlings is also willing, in principle, to do so.

Jane Hutt: This is oral evidence, yes?

Mr Silk: Oral evidence, yes.

Keith Patchett is willing to give evidence. I do not know about Ann Sherlock. David Lambert is willing to give evidence. I am not sure about Victoria Winckler.

Ms Wilkins: We have not had a decision yet, but we have made contact.

Mr Silk: Also, John Osmond is prepared to do so. However, none of these people would be distressed if the committee decided that it did not want to hear from them.

Jane Hutt: I think that it is more a question of managing time, and we would certainly want written evidence from all of them. It is probably more a matter of ensuring a balance of oral evidence, and whether we would have the opportunity to look at that when we look at timings and so on, and anybody else who has been added subsequently.

Kirsty Williams: Given that we have written to all Welsh MPs and peers, is it then our intention to select some of those MPs or peers to give oral evidence, or will written evidence be sufficient?

The Presiding Officer: I think that the answer to that is that it depends on what they say in their written evidence, does it not? I am on dangerous ground now, but it depends on whether anything they say requires further clarification, I suppose. That would be one way of looking at it. If Members will allow the Clerk, Siân and me to continue to work on the timetable, we will, obviously, receive any further suggestions that you have in the meantime.

A oes unrhyw fater arall yn codi o'r papur? Are there any other matters arising from the paper?

Kirsty Williams: With regard to annex B and the schedule of meetings, it would be extremely helpful to look at possible dates in September. I know that it is your intention to have the deliberative meeting that we have talked about previously in September. I have supplied dates to Siân in terms of my availability in September. It would be extremely helpful to be able to clarify, for my own peace of mind and my diary, what could be done in September and also on 7 July. Is it our intention to meet for all of those slots? Will we be meeting all day or will we simply meet for a portion of the day on Thursday 7 July?

6.00 p.m.

The Presiding Officer: At present, we will be meeting for most of the day on 7 July, as far as I can see.

Mr Silk: To clarify, we are grateful for what Members have said about their availability. We have at least five Members who will be available for all of those slots on 7 July. Unless Members want it, we would not anticipate having each of those slots filled by evidence.

Kirsty Williams: I think that Members would appreciate an early indication of what you would require of us on that day.

Mr Silk: The certainty is that the first of the sessions on that day is the only one that the Permanent Secretary can attend. The others are sessions that we hope the academics, experts and others will attend. Therefore, that is what better suits the committee rather than the witnesses.

Kirsty Williams: And in respect of September?

The Presiding Officer: We are up against the time limit of 16 September, therefore, in terms of deliberating, the sooner we meet in September, the better. The date for initial deliberation is 12 July, so that means that we will have started the work of deliberating before we deliberate and agree the final report in September. How early in September could Members make it?

Kirsty Williams: I can do 1 September and 2 September if you want to meet early in September.

Jocelyn Davies: The first week in September?

Kirsty Williams: No; 1 September, 2 September and 12 September.

The Presiding Officer: If you could indicate to Siân your availability in September, we will find a date that suits us all because we have all agreed—for which I am very grateful—that we will try to be here. I will be here, God willing, if I may say that in a secular institution.

Lorraine Barrett: God and our partners willing.

The Presiding Officer: God and our partners willing. I am sorry, I am addressing a member of the National Secular Society. [*Laughter.*] I always get into trouble. I apologise to faith communities and others.

A oes unrhyw gwestiynau neu faterion eraill i'w codi? Gwelaf nad oes. Are there any further questions or issues to raise? I see that there are none.

6.03 p.m.

Dyddiad y Cyfarfod Nesaf Date of Next Meeting

Y Llywydd: Awn ymlaen felly at ddyddiad y cyfarfod nesaf. Felly, dyma gyhoeddiad nid ar gyfer y Sul nesaf, ond ar gyfer y cyfarfod nesaf. **The Presiding Officer:** We will, therefore, move on to date of the next meeting. So, this is an announcement not for next Sunday, but for the next meeting.

Mr Silk: Chair, for Monday of next week, we hope that Mike German, Glyn Davies and Sir Michael Wheeler-Booth will be able to give evidence between 9.00 a.m. and 11.00 a.m. On Tuesday—at this time next week—the leader of Plaid Cymru and the leader of the Welsh Conservatives will give evidence, one after the other.

Jocelyn Davies: Glyn Davies is giving evidence as Chair of the Legislation Committee.

The Presiding Officer: He is not giving evidence as an assistant leader of the Conservative Party; it is all right. [*Laughter.*]

Diolch yn fawr am eich hynawsedd. Thank you very much for your co-operation.
Edrychaf ymlaen at gydweithio gyda chi hyd I look forward to our collaboration between
at ddiwedd y gwaith hwn. Diolch hefyd i'r now and the culmination of this work. I also
Clerc a'r swyddogion. thank the Clerk and officials.

Daeth y cyfarfod i ben am 6.04 p.m.
The meeting ended at 6.04 p.m.

Cynulliad Cenedlaethol Cymru
Y Pwyllgor ar y Papur Gwyn—Trefn Lywodraethu Well i Gymru

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

Dydd Llun, 4 Gorffennaf 2005
Monday 4 July 2005
QQ 1 - 52

Aelodau o'r Cynulliad yn bresennol: Dafydd Elis-Thomas, y Llywydd (Cadeirydd), Lorraine Barrett, Jocelyn Davies, Jane Hutt, David Melding, Kirsty Williams.

Tystion: Glyn Davies, Cadeirydd y Pwyllgor Deddfau; Michael German, Arweinydd Grwp Democratiaid Rhyddfrydol Cymru; yr Athro Laura McAllister, Comisiwn Richard; Syr Michael Wheeler-Booth, Comisiwn Richard.

Swyddogion yn bresennol: Paul Silk, Clerc y Cynulliad.

Gwasanaeth Pwyllgor: Siân Wilkins, Clerc.

Assembly Members in attendance: Dafydd Elis-Thomas, the Presiding Officer (Chair), Lorraine Barrett, Jocelyn Davies, Jane Hutt, David Melding, Kirsty Williams.

Witnesses: Glyn Davies, Chair of the Assembly Legislation Committee; Michael German, Leader of the Welsh Liberal Democrat Group; Professor Laura McAllister, the Richard Commission. Sir Michael Wheeler-Booth, the Richard Commission.

Officials in attendance: Paul Silk, Clerk to the Assembly.

Committee Service: Siân Wilkins, Clerk.

Dechreuodd y cyfarfod am 9.18 a.m.
The meeting began at 9.18 a.m.

Cyflwyniad ac Ymddiheuriadau
Introduction and Apologies

Y Llywydd: Bore da, a chroeso i sesiwn dystiolaeth gyntaf y Pwyllgor ar y Papur Gwyn—Trefn Lywodraethu Well i Gymru.
The Presiding Officer: Good morning, and welcome to the first evidence session of the Committee on the Better Governance for Wales White Paper.

Papur Gwyn—Trefn Lywodraethu Well i Gymru: Tystiolaeth
Better Governance for Wales White Paper: Evidence

[1] **Y Llywydd:** Mae'n bleser gennyf groesawu arweinydd Grwp Democratiaid Rhyddfrydol Cymru i fod yn dyst cyntaf. Croeso, Mike German.

[1] **The Presiding Officer:** It is my pleasure to welcome the Leader of the Welsh Liberal Democrat Group to be the first witness. Welcome, Mike German.

Michael German: Thank you for the welcome, Presiding Officer. I am sorry that my report has been produced at the last minute, but given the shortness of time and the speed with which this committee was established, it was not possible to give it out beforehand. So, I will spend more time than usual in going through the text of the paper.

I have made clear in the paper what I regard as the shortcomings of the White Paper, and some of the major differences between the unanimous recommendations of the Richard commission and the White Paper. In relation to this committee, the issues that are particularly relevant are the fifth bullet point, in which the Richard commission proposed to match enhanced legislative powers with enhanced scrutiny, but the White Paper places legislative power largely in the hands of the Executive, without matching enhancement of the Assembly's scrutiny capacity. I will start from that point, but all of the points are relevant. However, I am trying to be constructive about a White Paper which I find has major shortcomings, and I therefore believe that it is important to manage with what you have, rather than what you might perhaps like to see.

9.20 a.m.

The White Paper is a model for Executive government—it provides a model for the Government of Wales, but it does not provide a model for the legislature of Wales, or a Welsh parliament. It is largely silent on those matters, hence the point I made just now about the loss of effective scrutiny, because the paper itself does not address those issues. It is worth looking at the capacity of the National Assembly to deal with what will effectively be a primary legislative route—though it will not be called that—after 2007. The Scottish Parliament, with 129 Members, has so far managed to deal with 72 Bills in six years. If you take out the Home Office and justice matters, which are not within the responsibility of the National Assembly, and are not proposed to become so in the White Paper, it would be reasonable to suggest that we might have seven Bills a year, which would give us an average of 42 Bills in a six-year period. If that is the case, and around 70 to 75 per cent of the legislative energies of the National Assembly would be taken up with Bills of this kind, then there is a clear need to scrutinise in the way that the Scottish Parliament has been able to do. The White Paper falls short in terms of answering that particular question. I will come back to that in a moment when I come back to legislative scrutiny.

Turning to the second page of my paper, I talk about motions for an Order in Council. I have made the point very clearly in Plenary that the important feature of this White Paper seems to be the breadth of the Orders in Council that are asked for. The White Paper itself lays out three proposals: narrow, medium and broad. The very broadest would allow you, as I indicated when I questioned the Secretary of State for Wales in Plenary, to seek the powers to legislate in areas as broad as the structure of local government, the structure of the health service and so on. The way in which those motions are dealt with inside the National Assembly is crucial, because it is the National Assembly—which would, in effect, become a parliament—asking for the powers to legislate in very specific areas or very broad areas. I am sure that we would want some form of debate on that in the National Assembly.

The first issue that we have raised is whether the proposals within the National Assembly should be closed or open; a closed model would, presumably, be where the Executive puts a motion before the National Assembly that is unamendable, on which you vote for or against. There are two suggestions here for more open models, one via a private Member's Bill, which would be the normal route by which Members could put down motions, and the other for opposition parties through their minority party debate time. If we were given the opportunity to do that, then we would have three routes for requests for Orders in Council to be made in Westminster. Related to that is whether it is amendable and whether the requests

for more powers are scrutinised. If a motion goes through the subject committee route and is amendable in Plenary, then that presents opportunities for the terms of the motion to be amended informally through comments in committee and also formally by amendments in Plenary. If the Executive motion were the way in which it went forward, then, clearly, we would have much more of an Executive model rather than a legislative preserve, which is what would be normal in parliamentary democracies of this type.

I will move on to legislative scrutiny, and I repeat the point that with less than half of the membership of the Scottish Parliament, we are being asked to take on about 75 per cent of its legislative workload. That will place enormous pressures upon individual Assembly Members, our voting procedures and upon our committee structures. The change will be dramatic. As you know, the Scottish experience is that it has struggled to keep up with its standing committee structure without its having an adverse impact on the rest of its parliamentary structure of plenary sittings, subject committee meetings and so on.

Turning to the third page, the only way to bring together sufficient Assembly Member power, as it were, to be able to deal with the legislative processes would be to increase the number of Assembly Members. If you have 30 Assembly Members on average in opposition and 30 in Government, which is the practice that we seem to have arrived at, whether there is one party, or two or more parties in Government, or one party or two or more parties in opposition, then those who are in opposition already have enormous responsibilities. On top of that you have to scrutinise the proposals from the Welsh Assembly Government. Some of the committees that we have here have greater legislative demands placed on them than others, and that will be exacerbated when we get to scrutinise what will, effectively, be the equivalent of primary legislation.

In the House of Commons, a standing committee might devote anything up to 100 hours of scrutiny to a single Bill. Some Members here will have visited the Scottish Parliament and will know that, on some occasions, committees there have had to meet daily, as well as more than weekly. I think that the disparity between some committees and others here will be enormous. For example, culture—although it might be slightly different for the Welsh-language issues—would have a lighter burden than health or education and so on. We are bound to have to have much more flexible committee timetables, but I do not see, with perhaps one or two Members on each committee carrying out the ongoing work of the committee, and the burden of scrutiny of legislation, how that intensive extra work pattern could be carried out. That is especially the case as it is our belief that, in order to represent the broader interests of the Assembly across the political parties, we would need to extend membership and make sure that all committees had no fewer than eight Members. That would provide for proper balance and experience across all committees. I say that not just because of the position of our party; other parties may be in that position in the future. Although one cannot predict the outcomes of electoral systems, we know that there are changes that happen between the roles of political parties and their members. Therefore, it is important that the experience and the breadth of opinion across political parties are represented.

The White Paper did not touch upon private Bills. We would also have to consider that. That is part of the problem for the Scottish Parliament: it has private Bills that add to its legislative burden. Already, without touching upon the process of private Bills, I think that I have demonstrated that an enormous burden will be placed upon Assembly Members here and the Assembly's structures. Private Bills on top of that would add to that burden. Therefore, perhaps the committee might like to consider how it will involve private Bills in the Welsh legislature after 2007.

I think that we will need something in the place of Sewel. We might want to call it something different, but we need a device by which we agree to allow the UK Parliament to pass

legislation that will be devolved to Wales. We need a similar mechanism for Wales in order to cope with some of the more difficult measures across the piece.

While the White Paper is clear on the need for a Counsel General in Wales, I think that there is a need for an equivalent office within the UK Parliament, and I wonder whether it is in the remit of this committee to look at that. It would be a similar role to that of the Advocate General for Scotland, whereby whether a piece of legislation is appropriate for the Scottish or the UK legislature—in our case for the Welsh or UK legislature—is considered. That matter needs to be policed on either side. While, according to the White Paper, we would have the Counsel General, there is no proposal for how that might be managed on the UK side.

I turn now to Standing Order No. 31, which is on private Members' Bills. Throughout all of this, the committee structure and the Members will need an enormous amount of increased support in order to be able to draft legislation. I would have thought that there would be significant changes to Standing Order No. 31, which will be necessary in order to provide opportunities for Members to present their private Member's legislation. The extra burden would be quite considerable upon an individual Member, and I would have thought that legal expertise, draughtsmanship and policy help would be needed from the Assembly Parliamentary Service. Equally, that increased support would be needed for Members on standing committees and in Plenary. So, a high level of extra support will be needed from the Assembly Parliamentary Service as it stands.

9.30 a.m.

Since everyone will have discretion regarding the requests for Orders in Council, that the Secretary of State should be an additional gatekeeper over what should be laid is rather unusual. For example, the Assembly will have the right, presumably, to judge and vote upon what it wishes to ask for in terms of Orders in Council. Members of Parliament would vote upon it, and, as it would be unamended, one would assume that it would be passed straight through. So, there is a question mark, in my view, over what the approval of the Secretary of State would mean, and whether that would present an unnecessarily high threshold for the National Assembly.

Moving on to the programme, the Queen's Speech issue would certainly be raised. There will now be opportunities, under the new proposals, for the Government of Wales to provide a Queen's Speech in which it lays out its legislative proposals, and the Orders in Council it proposes to ask for. By the time some Orders in Council have been reached, let us say, for example, on the structure of the health service, it could be taking a second route for legislating in that area, for which it does not need to seek an Order in Council because it already has it. I believe that there is now room for a proper and full Queen's Speech debate to be held within the year, and time should be made available for that in Plenary.

On access to the law—I am on the last page—an area in which the White Paper is largely silent is how lawyers and individual citizens look to the law, and most, on finding the law, go to volume 1, which is the primary legislative rack of books, occupying a much smaller bookshelf than volume 2, which would be the detail of the secondary legislation and which would be a much more extensive row of books. In our case, we would be, effectively, making primary legislation through a secondary-legislation route. This would mean that we would be adding to the second volume of books, and, somehow or other, the Assembly would have to deal with this matter. The work done by Cardiff Law School to make information available efficiently has been very helpful in this matter. However, this is an area where we will have to look even further to see how we would assist those who manage the maintenance of the law in Wales.

I come to my final point, Presiding Officer, and I am aware that I have been long, but I have been trying to go through the paper as I see it. The White Paper goes down a path that we would not have chosen as the way ahead. I have tried to illustrate the problems in a fairly constructive way, but I believe that an enormous amount of work will need to be done to put the legislature in place, even to effect minimal scrutiny. I believe that the White Paper, because it does not offer solutions to these matters, has created a much bigger problem, which I hope this committee will address.

[2] **The Presiding Officer:** I thank the leader of the Welsh Liberal Democrat group, for such a helpful paper that gets us off to a fine start.

[3] **Kirsty Williams:** Mike, you returned to the issue of the breadth of proposed powers, which is something that you raised with the Secretary of State when he came to the Assembly. Are you satisfied that there is a shared understanding of what would be appropriate to delegate to the Assembly?

Michael German: I do not think that the Secretary of State has a very firm view, but, having read his answer to me on the issue of local income tax, we would have the power to alter the structure of local government financing, but we would not have the power to deal with areas outwith the current boundaries of our responsibilities. Since that would involve the Inland Revenue, he said that we would, therefore, not be able to work within that area, although I believe that there may be an area, for example, where you could contract the Inland Revenue to do the work for you. However, given his response, you can only interpret—and I am not certain that my interpretation is accurate, because he did not make it explicit—that you could ask for anything within the National Assembly’s current powers or boundaries. However, he did not say whether he would approve it or not, which is the crucial point that I raised earlier, and whether the Secretary of State has the right to veto what would have been a passed motion by the National Assembly. That is the interesting point.

[4] **Lorraine Barrett:** You have touched on my question in your introductory paper, Mike. The White Paper suggests that, under the model proposed, the Assembly’s role will be primarily legislative. What do you envisage to be an appropriate legislative load for the future Assembly?

[5] **Michael German:** I have done a back-of-the-envelope job on the basis of what the Scottish Parliament has done. A thorough analysis of the 72 Bills that Scotland has done may be useful, by putting them into categories of those Bills that are to do with areas that are outside of our responsibilities, such as home affairs and justice. My subtraction exercise came to the conclusion that we would probably be looking at about seven Bills a year, which would be about par with the Scottish Parliament, minus the functions that we do not have, namely home affairs and justice.

[6] **Lorraine Barrett:** Many people talk about the fact that we need 80 Members, and that there will be an increased workload. However, no-one has touched on the hours that may be worked in this place. From the beginning, we set down the so-called family-friendly hours—which are not friendly if you live in north or west Wales and work in Cardiff—or sensible hours, as some people would call them—the sort of 9 a.m. to 5.30 p.m. model. Without an 80-Member Assembly, do you see that we would have to consider extending the hours and perhaps the days that are worked here?

Michael German: Yes, I would have thought so—both are inevitable. If you have more committees doing more work, and some of them meeting more frequently—as is this committee, which is meeting on a Monday because it is very difficult to find the time to fit it

in—I would have thought that committees will probably be going on most days of the week, and I am certain that we would have to extend the hours in which those committees meet. That will probably place an inordinate burden on the 60 Members, because all of us also have a job to do in managing constituency work and in looking after the interests of our constituents. I would have thought that that pressure will become enormous and it will be almost seen, down the track, as having been the only way to move forward in order to do the work that has been given to us to do.

[7] **Jocelyn Davies:** On that point, when we visited the Scottish Parliament, we discovered that some of the committees are bogged down with a huge amount of legislation. They are not carrying out any policy development, and they are not scrutinising the Executive, so two thirds of their role is being neglected because of their concentration on legislation. Some committees, as you mentioned, will not have legislation to deal with; we have some policy areas where legislation is few and far between for committees, such as economic development probably, and, as you mentioned, I think, culture and sport, and so on. Therefore, just because the Scottish Parliament has dealt with over 70 Bills—and the vast majority, by the way, Mike, are Executive Bills, not private Member’s Bills or committee Bills—how can we avoid making the mistake of just working away at the Executive’s legislation instead of doing things that perhaps committees would want to do?

Michael German: In an ideal world, and in a proper legislative world, you would have standing committees separate from the legislation committees dealing with specific pieces of legislation. However, the connection between the two is very important. Much legislation goes through in local government here, and if you were an expert in local government and had been following and working on that committee for several years, it would be almost expected that you would sit on the local government legislation scrutiny committee when it was needed. Therefore, in an ideal world, you would have a policy standing committee, which would take forward policy and would perhaps also be the body responsible for bringing forward its own committee legislation.

9.40 a.m.

Alongside that, you would have the legislative scrutiny standing committee for the piece of legislation associated with it. Whether they had joint membership, similar membership, some joint membership or some similar membership would be important. Whether you can accommodate that in the time that is available in this National Assembly, with 60 Members, I doubt.

[8] **Jocelyn Davies:** My other point was that the Executive can escape scrutiny by filling the committee timetable with legislation.

Michael German: Yes. That is the point that I was making; you need to have a policy of having a standing committee, as we have here, as well as a legislative scrutiny committee. You need both, but it is important to have cross-membership so that people have similar experience. However, that is in an ideal world, and I am afraid that we are not faced with an ideal world. If you wanted to look for, say, eight Members from a standing committee to sit on a legislative committee, those people would have to be prepared to give up an inordinate amount of time to carry out their work. However, I think that that is what the UK Government is dictating for us.

[9] **David Melding:** Mike, I think that you have answered the point that you would see standing committees as being the ideal model, rather than following the Scottish experience of using what we would call subject committees to do all that. I agree that it is better to have

the Westminster system, where standing committees look at what they call the Committee Stage. We would have to look at the workload of subject committees. For example, the Health and Social Services Committee may have to become two committees. Do you see that as likely? That committee has about 40 per cent of the current secondary legislative workload. I cannot see standing committees simply being constituted from subject committees. We would need a wider expertise base among Members. More people would have to serve on committees looking at health and social services. That situation would apply in a couple of other areas, as you have mentioned.

Michael German: The uniformity of the approach would obviously change. The reason that I raised my questions and doubts about the culture, Welsh language and sport portfolio is because we have the Welsh language. We may want to legislate in the area of the Welsh language in a way that would not, perhaps, be appropriate in the Scottish Parliament. In terms of economic development, the experience is of having varying amounts of legislation. The committee structure will have to reflect the workload that is placed upon it, and that will be the case with health, education, local government, and presumably environment and agriculture. The committees for these four areas already have quite an extensive legislative workload, and they would clearly need to have a policy development role and a legislative role, with some common membership. The level of common membership would obviously be a matter for political parties, but it would be ludicrous to suggest that none of the people scrutinising a Bill on health would have experience on the policy development standing committee or subject committee. There must be some cross-membership. How that will work in timetabling terms, I marvel, because you are going to be faced with a terribly difficult problem of trying to timetable all this.

[10] **Jane Hutt:** I welcome the constructive spirit with which you are approaching this. You reflected to the Secretary of State that you felt that this was an ingenious move in taking forward the Orders in Council. How can we build the competence in the Assembly in order to deliver quality? The key message that is coming through is quality, not quantity, with regard to the legislative opportunities that we have. Competence is a key issue with regard to how we take this on.

Michael German: I would not necessarily disagree with you on the point about competence, but quality and quantity are not equally in measure. The issue is what Wales needs, and in determining what Wales needs, this National Assembly will determine the quantity that you output. That is why I have said, simply based on the experience of Scotland, that it should be seven Bills. There are many things that need to be done in Wales that people want to see done, and it is important that those things should be done. There is a run-up period to 2007, in which it is important that as many Members as possible receive some form of training in the Assembly, and for those who intend to put their names forward for continued election for the National Assembly post-2007, and to see other legislatures at work, to build upon the relationship that we have with Westminster for joint scrutiny, so that people understand processes by which you scrutinise legislation, and to encourage our Westminster colleagues to do more with us on these matters, so that we can gain expertise in those ways.

After 2007, there will be an enormous burden on the Assembly Parliamentary Service, whatever it, or we, might be called by then. It will have to provide so much additional support for Members, in draughtsmanship terms, in terms of looking at controversial issues and areas, pointing them out and letting Members make decisions about them—certainly in terms of pointing Members in the direction that line-by-line scrutiny might imply. All of that implies more training for Members, more capacity for the Assembly Parliamentary Service and more experience for Members, if we can also achieve that.

[11] **Jocelyn Davies:** Mike, you mention the Sewel motions in your paper. When the Scottish Parliament was set up, it was understood that Sewel motions would be required but that they would decrease over time. However, the opposite has happened—they have increased over time. You say in the paper that we would need a similar mechanism, but you do not say what that might be. You say that the device is between the Scottish Parliament and the UK Parliament, but many would argue that it has turned out to be between the Scottish Executive and the UK Executive, and that it is not something in which the Parliament can intervene. There is a suspicion then that you will ask the UK Government to legislate on things that are not all that popular, so that you can keep your popularity and that it can be unpopular. What kind of principles should underpin the use of something we could call a Richard mechanism, rather than a Sewel motion? Between whom should this arrangement be—the Assembly and Parliament, the two Executives, or maybe between the Assembly and the Executive?

Michael German: If you are going to separate the legislature from the Executive, the Executive must propose these matters, but it is the process by which it is scrutinised within the Assembly that matters. Whether that is amendable and open are the issues you need to address—whether it goes through the committee structure or to a Plenary debate as an amendable item. Those are the key issues, and I mentioned that earlier in terms of requests for Orders in Council. It seems that a similar process might be appropriate for Richard/Sewel-type motions.

[12] **David Melding:** Mike, you are completely right to look at the Orders in Council as being the most significant aspect of the White Paper. In effect, they give the Assembly primary law-making powers—I cannot see a heavy hand from Westminster in terms of their intervention working. It seems to me that we will, in effect, be passing primary legislation. However, is there not a danger with this route that effective scrutiny, in terms of some form of Committee Stage, will not be done at Westminster, but may not be done in the Assembly? Is that a danger? The Government has stressed that this is not its intention, and I do not doubt its good faith, but would the machinery allow for some fast and loose legislation to be passed, if a Government was so minded?

Michael German: You have highlighted the problem facing this committee. On the one hand, you will be seeking effective and efficient use of Members' time, and on the other hand, you will be trying to ensure that appropriate and proper scrutiny takes place. I see no way that you can avoid that conundrum, because you will have to come down on the side of effective and proper scrutiny of the legislation. That would be the duty imposed upon you by the people of Wales, and it is the duty imposed upon you by a parliamentary process. So, I am afraid the answer is that Members will work their little socks off. I do not see any different answer to that.

[13] **Kirsty Williams:** The issue of secondary legislation will also add to Members' workload, because if committees spend all their time looking at stuff that has come through by Orders in Council, what happens to the work that the Assembly has been used to doing, namely looking at secondary legislation? How will that be dealt with effectively in a potentially new system dominated by other legislative demands?

9.50 a.m.

Michael German: It just exacerbates it. We certainly cannot forget the route by which it is done. I suppose, in one way, we may be seeking a similar affirmative/negative route, as we currently have, in a way, with our Standing Orders, to secondary legislation. The Legislation Committee may need a secondary legislation committee in order to be able to effect more scrutiny, which means an enhanced and bigger role for it in looking at the work that is done,

not just in terms of simply checking whether they have the commas in the right places and the right words in the right order, but in terms of checking whether they have the policy right for the job that they are seeking to do. Perhaps you could continue to burden the subject committees with it, but I suspect that you will probably find that that is more difficult.

[14] **The Presiding Officer:** If I may ask a few questions—I was about to say just to wind you up, but I did not mean that.

Michael German: You would be very welcome to do that.

[15] **The Presiding Officer:** I meant to wind up the presentation. In your paper, and your helpful discussion of the paper, you mentioned an ideal world at various times. It could be argued that the White Paper places us in an ideal world, at least in terms of the organisation of our committees in that, apart from the Audit Committee, as I understand it, everything else may be reorganised in the new structure by the Assembly. You mentioned 30 Assembly Members as being in Government. However, they are not really in Government; there are only 15 people who are either elected or appointed to certain offices. Would you favour putting some upper limit on that in the new system, as we have under the current system? How might that work?

Before you answer, I will add another supplementary. If we then have 45 Members out of the 60 who are not in Government or elected to chair and preside and so on, could there be another way of running committees? I would revert now to a system that I was brought up with, namely the Westminster model, which has standing committees that are legislative committees looking at specific Bills. Members of the committees are selected, or elected, possibly, in our model, from among the Members just for that Bill. Then you might have a more traditional select committee under the Westminster model that would scrutinise, but not necessarily just for one department. It seems to me that if you have six or seven divisions in a Cabinet, setting up a select committee equivalent to scrutinise, or having a subject committee doing half of its work as it were, would be too much in terms of the number of committees. Do you have a view on that?

Michael German: You raised three issues, and I will deal with them in the order in which they were presented, if I may. First, I should have said, but neglected to do so, that the role of backbench Government Members is crucial because not only are they seeking to help the Government to get its business through, but, more importantly, they are seeking to defend the arguments and put the case for the Bill as it goes through legislative scrutiny. Having backbench Government Members on legislative scrutiny committees is absolutely crucial and they play a crucial role. Scrutiny is important no matter where you are, and I think that they have a much more important role than they may think that they currently have. That will actually help Government backbenchers a lot.

That brings me to the question of how many of those you might have, given that the so-called payroll vote, which was your second point, might be so high as to be more than a majority of the Government. Whatever happens, as a general rule of thumb, the payroll vote should not constitute the majority. However, that is an issue that will be raised more broadly.

[16] **The Presiding Officer:** Is that not rather generous?

Michael German: If there is a majority—and it depends on the size of the overarching Government or coalition Government—it has to be at least 30 as, generally speaking, it has to be more than half, and I think that 15 would be an upper limit on the number of people with a payroll vote if it was a Government of 30. It would be better if there was a majority against

the payroll. I think that that would also be in the interests of backbenchers on the Government side. Government minus one or minus two would probably be the more appropriate position.

I agree with you about the issue of having standing committees looking at expertise, and whether or not our subject committees could be amalgamated—I think that that is a summation of what you said—to cope with a much broader portfolio. So, could we amalgamate sport, culture and economic development, for example? That is a route that you could take and it would help with the timetabling process. However, would we get sufficient scrutiny of all of those issues in terms of both policy development and scrutiny of Ministers on their executive actions? That is the fundamental question that must be asked. Given that the current Standing Orders state that each subject committee has to follow the exact model of the role ascribed to Government Ministers, and given that the White Paper proposes Deputy Ministers who may have different portfolios and share different areas, I think that that must be revisited. However, I would not necessarily want to see prescribed amalgamations of subject areas at this stage. I think that I would like to examine that in more detail and the committee may also want to do so.

[17] **The Presiding Officer:** Can I ask you to comment on paragraph 2.6? Welsh Assembly Ministers, collectively, will be known as the Welsh Assembly Government. The whole logic of the paper argues about the confusion caused by the term ‘Assembly’ sitting alongside ‘Government’. After all, we do not have a Westminster Parliament Government—we have a Parliament and a Government. If we are looking to the Westminster and Edinburgh models, I put it to you—as a leading question—that this only perpetuates the confusion.

Michael German: I think that we should be known as a parliament, or a senedd, if you want it in Welsh. We would accept either word. I think that the Executive would be known as the Executive. Does that answer your question?

[18] **The Presiding Officer:** It does.

[19] **Lorraine Barrett:** What happens to our titles as Assembly Members? Do they have to change?

Michael German: Yes. ‘Members of the Welsh Parliament’ seems to be quite easy, or the Welsh title ‘Aelod Seneddol’ perhaps, although that might prove a little difficult.

[20] **The Presiding Officer:** It might cause a little confusion, as does the title ‘Prif Weinidog’ already.

[21] **Jocelyn Davies:** What is wrong with the term ‘Assembly’? There are assemblies all over the world. Why should we worry about the term ‘Parliament’?

Michael German: I think that if you are a full legislature in practice, then you should also be a full legislature in name.

[22] **Jocelyn Davies:** Is an Assembly not a legislature?

Michael German: Only in the case of the Northern Ireland Assembly.

[23] **Jocelyn Davies:** I am not just talking about the UK, but in a global context.

Michael German: We are in the UK context here. If we want to be seen on an equal basis

with Scotland, and on similar terms as our Scottish cousins, and able to manage our own affairs in the way that they do, I do not see why we should have a different name.

[24] **The Presiding Officer:** Before we bring down upon us the wrath of the Québécois and the French state, I think that we should—

Michael German: I was talking in a UK context.

[25] **The Presiding Officer:** I know. We will conclude unless there are any other questions from colleagues. I see that there are none. I am very grateful to you, Mike.

Mae'n bleser arbennig gennyf groesawu Syr Michael Wheeler-Booth a'r Athro Laura McAllister. It gives me great pleasure to welcome Sir Michael Wheeler-Booth and Professor Laura McAllister.

10.00 a.m.

[26] **Jane Hutt:** Welcome, Sir Michael, and thank you for your useful written contribution, which has informed our discussions in this committee. Thank you also for the two cheers that you gave to the White Paper. Your contribution, and that of Professor McAllister, to the Richard commission was formidable.

I would like to raise two points that arise from your written evidence. On point 12, it would be helpful if you could expand a little on your concerns about the role of the Counsel General. The White Paper approximates it to the law officers in Westminster, without saying that the law officer has to be a Member of this Assembly. I understand that the Lord Advocate of Scotland is in the same position. So, your comments on that would be helpful. Secondly, I am interested in your suggestions in paragraph 15 on looking at the role of Ministers. If we move away from what was described as cosiness, or the role of Ministers in committees, you are saying that we should not go to the other extreme and not look for a new relationship between Assembly Ministers and committees.

Sir Michael Wheeler-Booth: Thank you for your welcome; it is very nice to be back in Cardiff. It is salutary to be in the opposite position from that which I was in the last time that we met. I am in the dock, and you are the prosecutor, so to speak. On a preliminary point, I hope that my note did not sound at all snarky. I try not to be, but we did a lot of work, which was very much evidence-based. I started off thinking that there should be minimum change from the Government of Wales Act 1998, because I was quite aware that the Westminster Government was very unenthusiastic, so why go down that road? It was the evidence that moved us, and slowly moved us all to this view. It is coherent, and that is why I hope you will forgive me for sticking, effectively, to Richard. This is my semi-humorous reference to E.M. Forster's book: it is a way of saying that the White Paper advances us quite a bit, but it is not good enough.

On the point about the Counsel General, I rather agree with you. I think that there is no real insuperable problem about membership. What I had in mind—and I do not think that I expressed it very well, and, incidentally, I should have apologised for the fact that my note was done very quickly—was that I was keen that there should be independent, authoritative legal advice available to the National Assembly, as to the Welsh Assembly Government. I understand, and I think that this arose in evidence to the Richard commission, that there had been examples where you had different legal advice from different authorities—from the Presiding Office and from the Counsel General. That seems to me very undesirable. The other underlying point that I was making in that perhaps slightly ill-judged paragraph, was

that I am worried by the increasing role of lawyers and the law, which has been such a feature of the present Labour administration in London. The great left-wing, so to speak, administrations of the past, Campbell-Bannerman and Asquith, or Atlee, always tried to hold lawyers at bay on, for example, trade disputes. They said quite specifically in the Act that there was to be no recourse to the law.

Since 1997, we have seen the exact other direction—and lawyers must put up candles to the Prime Minister and his administration in gratitude for the enormous amount of work and responsibilities that they have been given. The background to that is my concern, for example, about what is happening in America at the moment, where one Supreme Court justice has just announced her retirement, and the most horrible political shenanigans are going on about who the next one should be. The Constitutional Reform Act 2005 seemed to me to be fundamentally misconceived. The idea that you have a complete separation between the legislative, the Executive and the judicial is based on Montesquieu's *L'Esprit des Lois*. Montesquieu wrote about the England of George II, but he completely misunderstood it. If you look at the relevant part—I think that it is chapter six of book three—his description of the English system then is with the fairies.

Was there another point? I got carried away.

[27] **Jane Hutt:** Others may wish to follow this through. Your points about consistency are key for us; we are small enough to ensure that that is the case, and we also take the point about over reliance on the lawyers. My second point was on your interesting observations about the role of Ministers in committees in part of your written evidence, suggesting that we do not want to go to the other extreme of them being ruled out of the committee system, necessarily. Interestingly, when we visited the Scottish Parliament last week, it was clear that Ministers rarely visit or engage with a committee unless they are proposing a statutory instrument, or, possibly, for a policy review—the scrutiny is done in the context of the Parliament. You thought that perhaps a new relationship could develop in relation to Ministers and committees in the Assembly, and I would be interested to hear about that.

Sir Michael Wheeler-Booth: I have a view, which is perhaps a little less strong than that of the majority of my Richard commission colleagues. It goes back to the point made by the previous witness about standing committees and Subject committees. Standing committees, in Westminster parlance, means, as the Presiding Officer has said, specially selected committees, but they cannot hear evidence. It seems to me that you want to have a process that allows a committee to do two things—to hear evidence from experts and test it. That is very important, because otherwise you will have this sort of—it is like that Platonic cave, looking at things darkly and looking at reflections on the wall afar, foggily, mistily; you do not get the true picture. If you have someone who really knows about whatever the issue is talking to you parliamentarians, or Assembly Members, that provides the opportunity for the direct meeting of minds, rather than it being through a brief that has been done for a Minister who barely understands it and reads it out, sometimes wrongly, and so on.

[28] **The Presiding Officer:** That never happens here.

Sir Michael Wheeler-Booth: Well, it happens at Westminster. You merely have to look at Alan Clark's diaries to get some good examples of this.

So that is very important. The other thing that is very important is that the committee that hears this evidence should be able to amend the Bill, because you do not want to have processes that are without a bite. So many processes have been engineered in the House of Commons that do not have a bite—you have a debate on a European instrument, but no vote

at the end. Procedurally, that is wasteful and ineffective. If the Assembly then has to overrule its committee, that is well and good, as you have seen in Scotland.

10.10 a.m.

However, there must be a capacity to amend, and therefore I come back to what, in Westminster terms, is called a special standing committee. These hear evidence, amend a Bill and then send it back to the House. In redrawing your Standing Orders—whoever is going to do it—it will be very important to get these procedures right. If I were you, I would not be proud about looking elsewhere—look anywhere. Look at Scotland, Westminster, Europe, Australia, New Zealand and Canada to try to produce procedures and a method of working that are the best in the world. That is what I would aim for.

[29] **The Presiding Officer:** Before I invite Kirsty Williams to ask a question, Professor Laura McAllister, would you like to respond to any of that or make a general statement?

Professor McAllister: Yes, if I may. I apologise for not submitting a written paper, but as you are aware, it was a rather short timescale and Michael and I are here today as a double act, so to speak—not for the first time—and it is fair to say that we are of one mind on the thrust of what we want to say to the committee. To reiterate Michael's opening remarks, we are convinced that the more measured and sustainable blueprint for the way ahead lies in the Richard report. We say that not for emotional reasons of attachment to it, but because we think that it is a more coherent and robust settlement than is offered in this White Paper. However, we come with a positive attitude in that we wish to comment on some aspects of the White Paper, with a view to suggesting possible improvements in a Bill.

I wish to concentrate on some areas that perhaps Michael's paper does not cover. The first concerns the dismantling of the corporate body, which, I suspect, will have few dissenters. It recognises the substantial shifts that have already taken place in the National Assembly's operation. The word 'innovation' is used in the White Paper to refer to the devolution settlement, but, as an outside observer, I would say that most of the innovation has come from within the body itself with regard to moving towards a parliamentary body in the knowledge that 'clarity' and 'accountability' are always the watchwords of good governance and democratic operation. To follow on from Mike German's contribution, I would say that the formal separation of the Assembly from the Executive offers enormous opportunity for greater clarity. I struggle to see why we would need to retain the term 'Welsh Assembly Government' in that context. The terms 'Government of Wales' or 'Welsh Government' make much better sense in terms of bringing a new level of clarity to a future settlement.

I have a slight word of caution on the issue of the end to the corporate body, and I feel quite strongly about this as an observer. That is that it will raise challenges to the new style of politics that was meant to be heralded in this institution. I say 'meant to be', because I know that some of you will feel that that has not happened. However, the baby should not be thrown out with the bath water. It is a very important point of principle that we move away from some of the old styles of political operation that have existed in other legislatures. It is very important in the new redrafted Standing Orders, that we consider how we might maintain at least some important dimensions of a more inclusive and participatory politics.

I have a few points on the meat of the White Paper. I am sure that you will want to take this up in questions anyway. Mike touched upon a couple of issues. The ones that concern me most are the two surrounding the initiation of the Orders in Council. As it stands, the White Paper is certainly not clear on the issues of the mechanisms for initiating Orders, how many will be accepted, and the very real dangers of Executive dominance of that process, which

would be enormously regrettable. My other point relating to that is the extent of the discretion that is given to the Secretary of State, which seems to me to be an anomaly. The right of veto could pose some very real issues with regard to the democratic legitimacy of this body, particularly given that basic safeguards are already built in to the Orders in Council procedures and the resolutions that operate there.

My other major area of concern is the scope of the possible coverage of the Orders in Council. The terms 'wide' or 'narrow' are referred to in paragraph 1.25, but, of course, they cannot refer to

'the whole of any of the fields listed in Schedule 2 of the Government of Wales Act'.

It seems to me that the way in which these are framed, and their essential limitations, is the critical issue, and one that requires a lot of thought. Could it be that the bulk of one devolved area listed in Schedule 2 features in an Order in Council with a tactical omission of one minor area so that it meets a requirement? In addition, would that be acceptable to the two Houses in their hour-and-a-half long debates in Westminster and so on? I think that this raises a lot of important issues.

The only other point that I would make is on scrutiny. I have been undertaking some research on the Assembly Subject committees, and this gives an opportunity to look beyond the parameters of the United Kingdom in this respect. We have been looking, for example, at Scandinavian systems of standing and subject committee operation, particularly to enhance the scrutiny functions. I would make the point that the unique duality of role of the subject committees here—the policy development and the scrutiny functions—are very important ones, and rather than, again, throwing the baby out with the bathwater, I would advocate seeing policy development and scrutiny as part of the same linear equation, with the same objective in mind. While the legislative burden will increase within the framework offered in the White Paper—and some of Michael's suggestions are very relevant in this respect—I would be a little bit careful about shedding some of the important policy work that goes on in the committees, as long as that can be effectively tied in with scrutiny in all respects.

I have a small point on the Standing Orders commission, Presiding Officer, which has been referred to. As Michael mentions in his paper, I have serious reservations about the tone and the motive for creating a new Standing Orders advisory committee set up by the Secretary of State; it strikes me as unnecessary and patronising. A democratic body that has been in operation for six years is surely capable of revisiting its own Standing Orders and managing that process in-house rather than there being the need to create a quasi-autonomous body.

[30] **The Presiding Officer:** Those are paragraphs 23 and onwards from Michael's paper.

[31] **Kirsty Williams:** Sir Michael, in paragraph 14 of your paper, you touch on some of the issues that Mike German raised about the capacity within the civil service to respond adequately to these new changes, and especially with regard to supporting backbench Members, you place great weight on the ability of committees to amend Bills and take that forward. Obviously, they will need help and support in making that an effective process, which is something that we heard about last week in Scotland, where the Executive in the early days tried to dismiss the committees' attempts as amateurish until they beefed up their parliamentary service to support them in that. From your experience, could you let us know a little bit more about what you perceive would be the necessary support that Assembly Members would need to carry out that particular function? Could you also expand a little bit more, as Professor McAllister has done, on how we could best approach writing our Standing Orders, and how you think that could be best handled?

Professor McAllister, you quoted paragraph 3.18 of the White Paper. Can you see any rationale for that recommendation, and could you perhaps advise this committee on how we could best shoot that one down should other evidence that we will hear express the same concerns?

Sir Michael Wheeler-Booth: Presiding Officer, on the question of staffing, it is a fact that other parliamentary bodies that have very limited numbers have compensated for this through superb staffing. The two obvious examples are the US Senate, which has 100 or 102 members—I forget—but a huge staff. It is amazing if you go to see it, and the papers produced are pretty good—I have read some of them. The other example is the Australian Senate, which has something like 75 members. Admittedly, it is 75 for 25 million, rather than 100 for 230 million or whatever. That is the way they get around it, but it is at a cost.

10.20 a.m.

The staff are well paid and well motivated. They are not all lifetime servants of their institutions; they come and go. Of course, in employment terms, American life is much more 'come and go'. I used to be the Clerk of the Parliaments in London, and we had a small staff. It was small compared with the House of Commons staff, which was three times our size, and minute compared with the home civil service. One way to get around this was secondments, with people coming in and people going out, which was difficult to organise. However, it can be a great source of strength to an institution, if you can get this going.

The other point is that the truth of the matter is that the parliamentary staff are well treated in terms of conditions and so on. That is reflected in their quality. I am told, for example, that there were only two vacancies, or something like that, for the House of Lords this year, and on the shortlist for interview there were some 17 highly qualified people. That is what you would have to do in my estimation, if these considerable accretions of responsibility were taken on.

This is also true in the matter of law. In the House of Lords, we had counsel, whom we called the Counsel to the Lord Chairman of Committees, but, in fact, he was the house lawyer. He had been the head of the legal services in the Department for Trade and Industry, and came to us for personal reasons. He was a very distinguished lawyer, who was with us for 20 years or more, and I do not think that his advice was ever faulted. He beat the Government lawyers, and he sometimes beat lawyers from the other end. He was a clever man, and he was appreciated, well paid and well served.

Professor McAllister: I will answer Kirsty's specific question, which is a tricky one to answer in the sense that one would not want to start from this position. That is a major reason

why the cleaner-cut settlement set out in the Richard report is infinitely preferable in my view. However, this is where we are at, and it is appropriate to consider what the opportunities are. It would make sense for an innovative Assembly to look at making Orders in Council as broad as possible to ensure serious policy making in a particular area. Of course, any kind of innovative policy making usually has a knock-on effect on related policy areas, which poses some serious difficulties in terms of Schedule 2. Skilful drafting is a critical factor in this respect. The kind of examples that spring to mind are policy over the Welsh language, or maybe even reviews of local government finance, but then if there were a recommendation for substantial change in local government finance, that would have an implication for a non-devolved area in relation to the Inland Revenue.

That leads to the future development, as set out in the White Paper, of a possible referendum on primary powers. There is an important point that links into yours there, Kirsty, which is that it would be enormously regrettable if we did not draw on the Scottish model in a proposal for primary powers. Having the devolution of all except the specific reserved matters offers a much cleaner-cut settlement than suggesting that we could have a referendum on Schedule 2 areas. I think that that would pose serious difficulties. My final point on that would be that if the Orders in Council are used in a maximalist way over this period of time, it would be enormously difficult to gauge when to hold a referendum, because, effectively, you as an Assembly would have already acquired primary legislative powers. So, how do you decide when the referendum might be held, and on what basis?

[32] **Jocelyn Davies:** On that point, you will know from your time on the commission that the current settlement had no logic—it was a recipe for confusion and it was complicated. Looking at the idea of transfer of functions, framework legislation, Orders in Council, repealing and amending and new procedures for SIs, it does not look all that simple from here on in. Is there a danger that, over time, but probably very quickly, the already complicated situation in which we find ourselves could be further complicated? Will it be a legal minefield, and will the lawyers be putting bits of Latin in their advice so that they can add another nought to their bill?

Sir Michael Wheeler-Booth: You go even further than me. [*Laughter.*] There are real problems. By definition, Orders in Council are an Executive action by the Crown on the advice of Ministers. An important point to note is that they are not amendable in Parliament. It has a ‘take it or leave it’ dimension, and they almost always take it. Very occasionally, Governments are forced to withdraw Orders because of opposition, and not quite so occasionally when mistakes in the drafting are discovered—that is quite usual.

There is a serious point about the philosophy of primary and subordinate legislation. I am certain that it would be wise to hear the advice of people learned in these matters. The philosophy of primary and secondary legislation lies down very badly with what is being proposed in the White Paper, and there will be trouble. I am sure that there will be goodwill, but it will be very difficult to work out the procedures that can apply at Westminster and in the Assembly, to dovetail them and make them sensible and non-repetitive so that people can learn from each other.

From the point of view of someone who has worked in Westminster for a long time, the chief work on the Orders in Council was done by the counsel to the Speaker and the counsel to the Lord Chairman. They had committees, which would occasionally kick up a fuss, especially the Commons committee. However, they did not go into the merits, because the merits were dependent on the primary piece of legislation, and it was at that stage that Parliament had a proper opportunity to sift, to question and to amend. I could see no evidence in the White Paper that this had been properly thought out. For example, when I was on the royal

commission on the Lords, Sir Christopher Jenkins, who was then First Parliamentary Counsel—who is, incidentally, a Welshman—was very worried about some things that the royal commission had suggested, or was thinking of suggesting. He was very interesting on the philosophy and the way that the counsel—he had spent his life doing this—viewed these matters.

On the other hand, there is the Lords committee on delegation and so on, which, again, is strong on this issue, and it has a great past. It is about the only parliamentary committee whose every recommendation, until recently, I think, has been accepted by the Government because it sort of goes, ‘Bing, wham, poof’. It is irrefutable and there is no way of arguing back. It would be very wise to hear its views.

10.30 a.m.

Professor McAllister: If I could supplement Michael’s point from a layperson’s standpoint, one of the Richard commission report’s aims was to introduce a level of intelligibility to the devolution settlement, which I feel very strongly about. Some of my academic work involves advising students from developing countries about the construction of effective constitutions and good governance. One of the principles is simplicity and intelligibility. It seems that we are saying something quite different now in a very developed system here in Wales and the wider UK. If you look at the Electoral Commission report, which examined the 2003 Assembly elections, it was made very apparent there that low levels of public engagement were related to difficulties in understanding the nature of the devolution settlement. It may well be the case that we are adding a further level of complexity at a time when we should be reaching out to the people of Wales and getting them to engage with this institution more effectively.

[33] **Jocelyn Davies:** I wish to ask a question about the Sewel motion—you probably heard me asking Mike the same question earlier. It seems that there was an expectation that Sewel motions would be few and far between and that they would decrease over time. However, they certainly have not. As I said, there is confusion about whether this mechanism should exist between the two Parliaments or the two Executives. How would you see such a mechanism existing between the National Assembly for Wales and the UK Parliament?

Professor McAllister: Although Michael is probably better equipped to answer that, the one thing that I would say is that, from our experience of looking at the Scottish situation, it became clear that a problem arose when there was an amendment to a Sewel motion and there was no opportunity to refer that back to the Scottish Parliament, which might have had serious difficulties with an aspect of that particular motion. I think that proper procedures for scrutiny of those have to be built in, because if they are not, then it becomes an Executive-to-Executive arrangement rather than a more effective engagement of the whole of the Parliament or the Assembly.

Sir Michael Wheeler-Booth: You could have an effective mechanism. Sometimes, when amendments are made to legislation at Westminster, it is referred back to the Scottish Parliament. The Sewel procedure, as you are probably well aware, was dreamt up at the very last moment while the Scotland Bill was going through Parliament. I think that it was announced during one of the later stages by a junior Scottish Minister in the House of Lords, which shows how late it was. He made a statement, which had obviously been cobbled together pretty quickly. Considering that, it has been made to work reasonably well, but I think that the Scottish Nationalist Party is profoundly unhappy about the way in which it has worked. I think that one could refine and improve it. It would be the job, I suppose, in the first instance, of the Standing Orders commission to produce a better-thought-out system,

which could be done.

[34] **David Melding:** I am tempted to give a spirited defence of Montesquieu; I think that he was commenting more on absolutist France than Georgian England. However, I will pursue your Platonic metaphor. It seems to me that the process of Orders in Council is so wide, in terms of the scrutiny that might be attached to it, that it could just be the Executive getting its business through without very much debate at all, or it could, effectively, be primary powers with a full committee stage. Are we going to be at the back of the Platonic cave, or are we going to be out in the sunlight? I suppose that that is the real question.

This might be slightly beyond the scope of this committee, but if it is to be primary powers in effect, why on earth are we travelling from Cardiff to Newport via Wrexham? Why do we not just say, 'Well, this is primary powers, and that is the system that we have'. That brings me to the main point that I want to make, namely that if there is reasonable scrutiny with the Orders in Council procedure, do you see that process or mechanism surviving a change of Government in Westminster? I think that the essential test of what we are looking at is whether it is durable.

Professor McAllister: My simple answer would be that it would be very problematic. There is enormous opportunity for obfuscating some of the very good work that might come out of Cardiff should there be a different colour of Government in Westminster. That, of course, is one of the major reasons why a cleaner-cut primary model is preferable, in my view. I suspect that this arrangement will chug along—for want of a better term—while the same party is in power in both institutions. As we learned from the Richard commission evidence, an enormous amount of departmental and Welsh Assembly Government links facilitate that arrangement as it currently stands. Again, going back to the advice that we give our students, any system that is based on goodwill is inherently unstable by its very nature.

One point that has not come out of the discussion this morning is the issue of parity for the system of governance that we have in Wales with that elsewhere. That was one of the most prominent themes that came out of the Richard consultation. People told us that they felt that they had a second-class model of devolution, particularly in comparison with Scotland. People such as Michael, as he mentioned, came into the Richard commission feeling very ambivalent, let us say, about immediate change but the mood that was communicated to us from the Welsh people suggested that they wanted something more durable and robust, and more sustainable, in your terms, David, if there were to be a change of Government.

Sir Michael Wheeler-Booth: I agree.

[35] **The Presiding Officer:** That is a fine answer. [*Laughter.*]

[36] **Lorraine Barrett:** I have just one small point. If possible, it would be appropriate to have something in writing afterwards. I was just interested, Sir Michael, in your paragraph 27, regarding the enlargement of parliamentary committees by co-option of non-parliamentarians as expert members. Could you expand on that, or give us something in writing that we could consider later?

Sir Michael Wheeler-Booth: It is a very simple idea. I have never quite seen the argument, apart from the old-fashioned Westminster idea, that you are a Member or a stranger. In the House of Lords, with environmental, scientific or Europe committees and so forth, you put two or three real experts on the committee and you co-opt them, but they are Members of the House of Lords, like Lord Ashby on environmental pollution or Lord Carver on defence or something like that. Given the life peerage system, and that there is a huge reservoir of

people, some of whom are politicians but many of whom are experts, you could get these people in. I remember a colleague from the House of Commons coming to listen to a committee on a European company law directive. He was doing it for his committee in the House of Commons and he said afterwards, 'That was rather a thing', because there was an ex-Governor of the Bank of England, an ex-Chancellor of the Exchequer, an ex-chief economic adviser to the Treasury, along with big bankers and academic economists on the committee. The Assembly cannot have those people. With 60 people, it just will not work. It has just struck me that the common-sense way to do it would be to allow co-option. I would not make them second-class members. I think that you have to treat people fairly and squarely. For example, the House of Lords environmental committee had advisers from Wales who were immensely helpful. On water pollution, for example, there was a professor from Cardiff—everyone knew that he was a real expert. Working here, I would wish to bring such people in despite the fact that they have not been elected.

[37] **Jane Hutt:** I just want to explore the issue about this perceived restriction or limitation on the fields in terms of Orders in Council. I hope that this is something which emerges through the evidence taken this morning. I just ask whether you recognise that we need to demonstrate why we would need an Order in Council; what would be the purpose? It might sound good to have a single Order transferring a whole field but you know that, in reality, that will not be possible because some functions are reserved. We have to be very clear about the purpose of the Order in Council. I would be grateful to have your comments, Laura and Michael.

10.40 a.m.

Professor McAllister: This is a tricky area, which requires an enormous amount of thought, both from an Executive and from an Assembly position. It is a difficult one also because of the nature of the jagged edges, as you hinted at, of the devolution settlement, particularly because the fields that are devolved are not only the Schedule 2 fields, but additional areas that have come to you in the ensuing period. My inclination is to go back to the point that I made at the beginning, that effective and innovative policy-making needs to have quite a wide brief. If you are to do something different—not for the sake of it, but because you want to have a different policy from that of England as a whole—then you would need to have a fairly broad sweep at an Order in Council to be able to manage all aspects of that policy. This relates to my previous point about crossover into other policy areas. Effective policy in one realm usually has a spill-over effect on another, and that will have a major impact on how you frame the Orders in Council at that stage.

[38] **Jocelyn Davies:** On that point, the implication is that if we have to be clear about the purpose for which we are going to use these powers, we have to justify why we want that power. Is not the veto of the UK Government implicit in that, in that it could say, 'We do not want you to have that power because we do not like what you are going to do with it'? Is that not implicit there, rather than the principle that says, 'You are the National Assembly for Wales and you may have this power to do as you democratically decide'.

Sir Michael Wheeler-Booth: I think that we both feel that it would be much better if it were simpler and more inclusive, like the Scotland Act 1998, which is half the length of the Government of Wales Act 1998. It is infinitely better drafted and more comprehensive. That is not the fault of the draughtsman concerned, but of the history and the way in which the Welsh Executive devolution was got up to speed, so to speak, and that tiny majority in the referendum. I think that we want it to be simpler and inclusive in the areas that are devolved.

Professor McAllister: We are dealing here with the concept of national devolution, and we

have to get our heads around that and be relaxed about it. We are not talking about a local or regional government structure. National devolution has different dynamics from some that were included in the original Government of Wales Act 1998, and which were incorporated in Standing Orders for this place. We are moving in that direction; the White Paper directs us towards that trajectory. However, it does not do so in the way that we, as the Richard commission, recommended, for slightly different reasons, I suspect.

[39] **The Presiding Officer:** On behalf of the committee, I thank this morning's double act. I also take advantage of this opportunity to thank you both for your contributions to the wider debate in Wales and beyond since the publication of the Richard commission report, which has been well beyond the call of duty.

Croesawaf yn awr ein tyst olaf am y bore I now welcome our last witness for this
yma, sef Glyn Davies, sydd yma fel morning, namely Glyn Davies, who is here as
Cadeirydd y Pwyllgor Deddfau. Chair of the Legislation Committee.

[40] **Jocelyn Davies:** I see, Glyn, that you do not have a presentation as such—

Glyn Davies: I can easily give you a presentation, for a couple of minutes, perhaps.

[41] **The Presiding Officer:** I am sure that Jocelyn will help you with an incisive question.

[42] **Jocelyn Davies:** I have my question.

Glyn Davies: First, I would like to apologise for appearing before you to discuss such a significant issue in such informal dress. Unfortunately, I did not have the keys to my flat this morning, and I had to come direct to the Assembly. I will, however, return properly dressed this afternoon. I was glad to come in early—I particularly enjoyed the part where we were drifting onto the possibility of having a House of Lords in Wales. Things may lead in that way, but let us go on to the Legislation Committee.

The first question that we must ask is whether new legislative arrangements would need a Legislation Committee at all. I have thought about this for a while. I do not think that it makes an awful lot of difference, because it is perfectly possible, within the current arrangements, to so restrict the Legislation Committee's work that it does not do much except cross t's and dot i's. It is perfectly possible to do that as we stand. Therefore, the requirement to have a Legislation Committee in law, as opposed to having it in Standing Orders, does not make an awful lot of difference.

However, I think that there should be a Legislation Committee. If the Northern Ireland Assembly were sitting, it would be an interesting exercise to spend some time talking through the system in Northern Ireland, where I do not think there is a Legislation Committee—it is more of a system where legal advisers support select committees, or the appropriate committee, in dealing with each item of legislation. It would be interesting to see how that works. It is a pity that the Northern Ireland Assembly is not sitting, because that sounds to me like a very interesting alternative, which may be just as effective.

Without spending time looking at the Northern Ireland model, I think that a Legislation Committee, or something very similar, is important, not necessarily because of what it does but because of it simply being there. The big benefit of the committee at present is the fact that it is there. Someone attending a committee meeting would very often think that it was not doing much at all, but the fact is that a lot of preparation takes place beforehand, and without it I think that you would have much more sloppy drafting. We have had examples of pretty

sloppy drafting, and, on occasion, one or two items have been so sloppily drafted that they have gone back. That is an issue.

It is also an opportunity for somewhere in the Assembly to introduce things such as the requirement to have non-gender specific language, and to have a real commitment to bilingual statutory instruments. Without the Legislation Committee, I cannot see how that could be forced through. I think that the committee currently will be minded before very long to refuse to approve statutory instruments that do not meet those two requirements. However, the committee serves a real purpose—first, in being there, in that with the legislation coming to it, much work has gone on to try to make it as professionally drafted as possible, and, secondly, it has those additional benefits to what the Assembly Members as a whole may want.

[43] **Jocelyn Davies:** Therefore, post 2007, if you look at the White Paper, what role would you envisage for the Legislation Committee then, and how should the Assembly then scrutinise the secondary legislation, because those committees that deal with a lot of secondary legislation will be the same committees that will be dealing with the Orders in Council? I cannot see an awful lot of secondary legislation being scrutinised by subject committees, but we still need to scrutinise it, because, otherwise, I assume that the Executive will make the subordinate legislation, and it is important that it is scrutinised. Therefore, what do you believe will happen post 2007?

Glyn Davies: You take me back, Jocelyn, to the two questions that I have touched on in my introductory remarks, I think. Even now there is this question about what it might do, and I think that it could do more in its current state, but I do not think that the will is in the National Assembly for it to do more. There has been some debate about something as minor as considering regulatory appraisals. Even that minor addition to the Legislation Committee's powers, which I believe should always have been there, is controversial. I do not think that the will exists. I have a theory—and I do not know how supported it might be—that the fact that there must be a Legislation Committee in the Government of Wales Bill, and not anywhere else, creates a feeling that the job is done. The law requires a Legislation Committee, so it is set up, and so, really, we do not have to think much more about it. However, when there is a choice about whether you do it, people are more aware of the role that it might play.

10.50 a.m.

The new legislation may not have the requirement. Hopefully, there will be a different view of the Legislation Committee, we will decide to keep it, and it will have a role in scrutinising legislation. The alternative role is the Northern Ireland model, which I have not looked at in enough detail to express a view on. I have always believed that the role of the Legislation Committee should be strengthened. It should play a stronger role in being judgmental, to some extent, about the statutory instrument. At the moment, it does not do that.

[44] **David Melding:** Glyn, will you give us your judgment on how robust the current procedures are for the scrutiny of secondary legislation? Is the Assembly up to a level that demonstrates good practice? If the committee is valuable, how would it be retained? Or is it your view that, by and large, these are minor and technical matters that fall on a couple of committees, principally? If we move to a system whereby Orders in Council give the Assembly mock primary powers, if I can put it that way—primary powers in all but name—that will dominate the interest and work of Assembly Members, will it not?

[45] **Glyn Davies:** If we move to the system envisaged in the White Paper—and this is going

beyond the evidence that I give as the Chair of the Legislation Committee—the whole nature of the Assembly is likely to change. It will have more of a scrutiny role, and committees, particularly those dealing with health and education, are going to become much more involved in the scrutiny of legislation. There will be a big debate about whether we need the Legislation Committee in that. Its work will almost certainly be more retrospective than it is now. At the moment, we object to the Executive procedure, usually known as the negative procedure elsewhere. If there is a lot of use of the negative procedure, the committee objects to it. However, if the Assembly had primary legislative powers in all but name under the new system, I suspect that we would reach a stage where most of it would be done through the negative procedure. As such, the work of the committee would change.

The subject committees would have to have a system of ensuring that the drafting is accurate, so I suspect that there would be at least some legal advice specific to the committee's work to ensure that legislation does not come to committees with the necessity to have the translation corrected in detail and 't's crossed and 'i's dotted. Generally speaking, the committees are going to become much more involved in legislation. There is a danger of the Legislation Committee being superfluous. There is a bit of work to be done on deciding on the clarity of the line between the two.

[46] **Kirsty Williams:** In his evidence earlier this morning, Mike German seemed to suggest or hint that the Legislation Committee could become the focus of dealing with secondary legislation in a system where the subject or standing committees would be primarily focused on other areas. I think that he even went so far as to say that there could be a role in looking at the policy drivers behind secondary legislation. Is that a role that you think that the Legislation Committee would be comfortable with?

Glyn Davies: It could be, but it is dramatically different from anything that the committee does now. That is probably taking the arrangement as far, and perhaps further, than that which exists at Westminster. It is something that the committee could do, but the evidence so far is that the issue is not whether it is something that the committee might want to do, but that the Assembly has not even remotely wanted the committee to go down that road. I do not know where the suspicion lies, but, as Chairman, when dealing with the legal advice to the Assembly or in discussions with the Business Committee, there has been no advance in the Assembly's powers, and there is no enthusiasm for it. On the step change that Mike German has been talking about, or that you imply in your question, I would want to spend quite a lot of time thinking about that policy role because that fundamentally changes the committee. It would not be a legislative committee in the sense that I think of it at the moment—it would be an entirely different kind of animal, and I would be very suspicious about that. There is a lot of work to be done on thinking about how we get to there.

[47] **Jocelyn Davies:** I believe, Glyn, that it is the fact that the Government of Wales Act 1998 says that the Legislation Committee should only have the duties that are prescribed in the Act and no other duties prescribed to it that has been the stumbling block, and it is not the entire Assembly that has been unenthusiastic about expanding the role of the Legislation Committee. I think that we would all have to admit that secondary legislative powers, and the scrutiny of those powers, were hugely oversold during the debate on the last White Paper. Why would any committee get excited about the potatoes originating in Egypt Order? I know that currently you can say, 'Well, you could even be deciding about tuition fees under secondary legislation', but during discussions on the last White Paper, the things that the National Assembly would be able to do were hugely oversold. There might have been 5,000 powers, but some of them were pretty puny and insignificant and technical in nature. Are you concerned now that the Orders in Council powers that we are talking about might be similarly oversold?

Glyn Davies: Yes, I am, because it is one of these things that one does not know what it is going to be. It may well be hugely significant, and, from a personal perspective, I hope that it is. However, it could easily be that one has to deal with minor issues and there is an element of goodwill in the way that the system might work, and I am suspicious of how goodwill works. It could easily be oversold—I just hope that it is not. I want to see us move towards the clarity of the Scottish model. It is very difficult for any of us to judge at this stage how the new system is going to work out, but from the National Assembly side, I imagine that most of our Members would want to see it in the sunlight, as David Melding put it.

[48] **Jocelyn Davies:** Well, not in the dark.

Glyn Davies: Yes. Not in the darker recesses of wherever it was.

[49] **David Melding:** Plato's cave.

Glyn Davies: That is right. Clearly, the role of the Legislation Committee depends a little bit on how far we go. If we do not go very far, then I suppose the Legislation Committee could carry on doing the kind of work it is doing now and the system would not change an awful lot. However, if we start doing significant legislation, then things would change.

[50] **The Presiding Officer:** I would like to pursue a little further with you, Glyn, what the role of a legislation committee might be in the new context. Our understanding of the White Paper is that the only statutory committee that we would have under the proposed new Bill would be the Audit Committee. Therefore, I was quite struck by the debate you had with Jocelyn, that if the Legislation Committee became a voluntary one, it might take its work more seriously. That is a very interesting point. If we are to have a substantial amount of primary legislation by another name, that is through the Order in Council procedure, and, very broadly drafted, it means that we are going to be making a lot more legislation than the kind of detailed subordinate legislation we have been making so far, is there a case for the Legislation Committee to become the equivalent of the House of Lords committee on the merits of subordinate legislation, for example, whereby it would look at the constitutional and other legal issues involved? A lot of the work that you have described about ensuring that the translation is there—which it should be anyway, otherwise it is contrary to the present Government of Wales Act 1998, and any other future Government of Wales Act—and any legal issues of vires or compliance are surely matters for lawyers to agree with. It is for the Government lawyer and the parliamentary lawyer to sort that out before it comes in front of Members, and, therefore, Members could spend their time more fruitfully looking at the implications for the house, as it were, of these statutory instruments and, therefore, recommending whether they should be debated or not, which, strangely, is similar to what goes on now in the Business Committee. Do you have a view on that?

11.00 a.m.

Glyn Davies: Yes, but I should presage it by saying that we have not discussed this in the committee at all, so I am speaking entirely in a personal capacity. However, I would favour that. I would need to know the extent to which the committees themselves are going to become involved in doing that sort of work. That is what may happen with advice—there will obviously be some sort of advice to the committee, which is why the Northern Ireland experience is particularly interesting. The work that you describe should almost certainly be done. At Westminster, in the House of Lords, in the—the exact name of the committee escapes me, but you know which one I mean. We hope to meet that committee, although we have not yet done so.

That takes you, at least partially, into the policy role, and first into identifying whether it is right to do something or not. That, in itself, is a big step, and I think that that should be done. The decision would be whether it was done by the subject committees or the Legislation Committee. My preference would be the Legislation Committee—this is a chance to argue for it, and that would be my view, but I do not know what the view of the Legislation Committee will be and I will not know until next week. If it differs from mine, I will send you a note.

[51] **The Presiding Officer:** That is helpful. We are looking forward to the views of the House Committee and the Business Committee, and any additional information that you might have from the Legislation Committee following today's discussion would be helpful. Are there any other questions for Glyn? I see that there are none.

Diolch yn fawr.

Thank you very much.

Glyn Davies: Thank you.

[52] **The Presiding Officer:** That concludes the committee meeting.

Daeth y cyfarfod i ben am 11.02 a.m.
The meeting ended at 11.02 a.m.

**Cynulliad Cenedlaethol Cymru
Y Pwyllgor ar y Papur Gwyn—Trefn Lywodraethu Well i Gymru**

**The National Assembly for Wales
The Committee on the Better Governance for Wales White Paper**

**Dydd Mawrth, 5 Gorffennaf 2005
Tuesday, 5 July 2005
QQ53 - 108**

Aelodau o'r Cynulliad yn bresennol: Dafydd Elis-Thomas, y Llywydd (Cadeirydd), Lorraine Barrett, Jocelyn Davies, Jane Hutt, David Melding, Carl Sargeant, Kirsty Williams.

Tystion: Nick Bourne, Arweinydd Ceidwadwyr Cymru; Syr Christopher Jenkins, Cyn Brif Gwnsler Seneddol.

Swyddogion yn bresennol: Paul Silk, Clerc y Cynulliad.

Gwasanaeth Pwyllgor: Siân Wilkins, Clerc.

Assembly Members in attendance: Dafydd Elis-Thomas, the Presiding Officer (Chair), Lorraine Barrett, Jocelyn Davies, Jane Hutt, David Melding, Carl Sargeant, Kirsty Williams.

Witnesses: Nick Bourne, Leader of the Welsh Conservatives; Sir Christopher Jenkins, Former Parliamentary Counsel.

Officials in attendance: Paul Silk, Clerk to the Assembly.

Committee Service: Siân Wilkins, Clerk.

*Dechreuodd y cyfarfod am 6.04 p.m.
The meeting began at 6.04 p.m.*

**Cyflwyniad ac Ymddiheuriadau
Introduction and Apologies**

Y Llywydd: Croeso i ail gyfarfod y pwyllgor ar drefn lywodraethu well i Gymru.

The Presiding Officer: Welcome to the second meeting of the committee on better governance for Wales.

**Papur Gwyn—Trefn Lywodraethu Well i Gymru: Tystiolaeth
Better Governance for Wales White Paper: Evidence**

[53] **Y Llywydd:** Mae'n bleser gennyf groesawu arweinydd Ceidwadwyr Cymru i gyflwyno'i dystiolaeth. Croeso.

[53] **The Presiding Officer:** It is my pleasure to welcome the leader of the Welsh Conservatives to present his evidence. Welcome.

Would you like to make an opening statement?

The Leader of the Welsh Conservatives (Nick Bourne): I did not realise that I was

expected to, but I am happy to do so.

[54] **The Presiding Officer:** You are invited to do so.

Nick Bourne: I am happy to say a few words. I understand that it is on the operational side of things in relation to the legislative side, not the electoral side. As you know, when I gave my party's response in the Chamber, we broadly welcomed the first stage of the settlement as outlined in the White Paper, in terms of the Henry VIII clauses and leaving the power to the Welsh Assembly to have room for manoeuvre within those broad clauses. I clearly welcome that, although it will have implications for the way we work, which I am sure you will want to bring out in questions.

We have grave reservations—perhaps rather more than that—about the intermediate stage of the process, if I can call it that, as outlined in the White Paper. It was not something that was presaged at all in the Richard commission, and we see it as an unnecessary stage, as it were—I certainly do—between stage one and, ultimately, a referendum and legislative powers, if that is what a referendum gives rise to. I believe that it leaves us far too open to the individual whim or caprice of a Secretary of State for Wales because it is his or her say so, in addition to the will of the House of Commons and the House of Lords. I have grave concerns about that, particularly whereas at the moment we have one-party domination here. It seems to me that it does not leave sufficient power for the National Assembly and it raises questions about what happens with private Members' legislation here under Standing Order No. 31 and so on. So, maybe that can be something that we look at in questions as well, but, as a party, we would have moved to a referendum on legislative powers or on the future status of the Assembly much more quickly. My own view is accurately reported, that I believe that we should move to legislative powers; that is not the view of everybody in my party, but it is certainly the view of the majority of my Assembly Members that, within a proper timescale, and subject to reasonable safeguards that could be reflected in legislation, that is the most desirable outcome for Wales and for the National Assembly.

[55] **David Melding:** I am now in the happy position of cross-examining my leader.

The Presiding Officer: I thought you might enjoy it.

[56] **David Melding:** I must do it with some skill, otherwise—

Nick Bourne: I have a long memory.

[57] **David Melding:** Nick, I have a couple of points. On greater room for manoeuvre and developing secondary legislation, that is quite a useful development, even if things do not go much further than that. I know that our party has called for this in the past, but I would like to look at this whole issue of Orders in Council allowing the Assembly perhaps quite major decision-making on areas such as housing, education and health. We do not know exactly how this would operate because it would be a rather dramatic departure in British constitutional practice, but, if it means anything, it gives powers that most outsiders and most of the electorate would take to be primary powers, does it not? Is there not a danger for democratic accountability if this institution acquires primary powers in a rather backhanded way?

Nick Bourne: Yes. I will deal with the points in the order in which you raised them. Certainly on the Henry VIII powers, I hope that I did welcome that, because I think that it is a useful development. It will have consequences for the way we work, but it was certainly something that we flagged up in our last manifesto for the Assembly elections. I am not in the

business of rubbishing that—I think it is a sensible development and we should have moved straight from that to the third stage. In terms of Orders in Council, you are right, certainly as I understand it. It is far from clear how it will operate. In fairness, I do not believe that the First Minister is entirely clear either because questions were asked, such as could we ask for devolution of a discrete area such as housing, or would that be too broad an area. I do not think that we could ask for health, as I understand it—it has to be something much more specific like power in relation to banning smoking in public places and so on.

It is not clear, but, step by step, if it is more bite size chunks, we could reach a stage—you are right—where we have effectively devolved a lot of power and attained a lot of primary power without ever having that referendum. It might then be—I think that Mike German used the analogy of the jigsaw—that there would not be many bits of the jigsaw still to put in place when we got to what should be the third stage, the referendum, if we found it had happened by stealth. That would encourage cynicism, and I do not think that that is desirable. I question why we need that intermediate stage; it does not seem totally apparent to me. I do not wish to be partisan, but I cannot see any really good reason for that in legal terms, or in terms of our operation here; it seems to be much more about the politics of it, rather than about what would work best for Wales, if I can put it that way.

6.10 p.m.

[58] **David Melding:** To ask my second question, assuming that this system, where a procedure of Orders in Council is developed, comes in sometime after 2007, do you think that that system would be durable if there were a change in Government in Westminster?

Nick Bourne: Unlike the First Minister—and this point was brought up by Ieuan in questions—I think that having a change of Government at Westminster will give rise to difficulties. A Government of different complexion at Westminster from the one here will lead to problems. The First Minister pointed out that, in some ways, it would make life easier if the Government at Westminster could hold its nose and say that it would devolve a power and it would then be for the Assembly or Parliament, or whatever we will be by then, to get on with it. It would not have to take it through the different stages at Westminster. I can see that, but I am not sure that it will get to that first stage of holding its nose. The procedure will probably be blocked, or, at least, there is the danger that it will be. I think that that leaves us vulnerable to that particular concern.

I return to the point that I do not think that the system is durable. It seems to be there for political rather than sensible reasons that are to do with the good governance of Wales, because I do not think that it assists the good governance of Wales. You have pointed out one real difficulty. However, I think that the difficulty would be there even when there were parties of the same complexion in power at Westminster and in the Assembly. We have seen Labour here, in fairness to it, taking a different stance on some issues. The bank holiday is one of those; it is not a perfect example in this context, because that is not something that could come to us. However, there are instances where there have been different views here to those of the Labour Government in Westminster. You are right; this highlights the problem where there would be a different complexion, but it could still happen where we have Governments that are allegedly of the same complexion.

[59] **David Melding:** My final question does not necessarily only apply in the case of Governments of different parties. The White Paper is very confusing as to what the parliamentary role is in the confirmation stage, whether it is for the Secretary of State or whether there is a parliamentary procedure. If the parliamentary/Secretary of State procedure is anything other than perfunctory, that is, receiving the decisions of the Assembly and

ratifying them formally and becoming part of the dignified constitution like the monarch, would it not introduce a system of double scrutiny to legislative development? That would surely be chaotic constitutionally.

Nick Bourne: It is more than the role of the monarch, even if the Secretary of State has a vice-regal aspect in some ways, especially now that he has a castle. Again, in fairness to the Secretary of State, when he was here, I think that he indicated that he may not accede to a particular request. It certainly says in the White Paper that he would have to give reasons for not acceding to a request, but that is a bit like Churchill's statement about the requirement to consult, is it not? You can consult with somebody in the morning, and chop their head off in the afternoon. It does not really give us very sound security.

As I understand it, it is the case that the Secretary of State could simply say 'no' and send a letter to us to say why he said 'no', which is what happens now. I have a copy of the letter saying why we could not have a St David's Day bank holiday. There is an obligation to reply to letters, and he could scarcely do less than that, but I do not think that it gives us much security. It seems to me that there are three hurdles. It has to be agreed in the first instance—and I do not want to personalise it to Peter Hain, because, obviously, there will be successive Secretaries of State—by the Secretary of State. He or she will then say 'yea' or 'nay'. It then has to go through the House of Commons and the House of Lords. Those are the three hurdles to be got over, quite apart from the request from here, which seems to be quite a long-winded process with no assurance that we will get much out of it at the end.

[60] **Kirsty Williams:** If we take an optimistic view, and the requests for Orders in Councils are looked upon positively, they will, potentially, have huge consequences for the workloads and the nature of committees and the internal structuring needed to get through that work. Have you given any thought to how we could best use the 60 Members that we have here, given the experience in Scotland, where, with many more Members, they have found it difficult in some instances, to cope with the workload?

Nick Bourne: That was a very well made point, Kirsty. It is certainly true that they struggle in Scotland with 129 Members, or whatever the number is. We only have 60 Members. We are a very small legislature, and if we are to get additional powers, our size becomes even more miniscule compared with the workload. I think that it will mean a difference in the way that committees work. I suspect that the policy-formulation role will go and much more committee time will be spent on passing legislation, if we take the optimistic view and some of these Orders in Council are acceded to.

It would take a very courageous politician to say that we should have more Members. That is the problem with the approach. I do not want to get on to talk about the electoral arrangements, but if we were able to say that we were reducing the number of MPs because some of the workload was moving from Parliament to the Assembly, I think that the idea of having more Members would become a lot easier to sell. My party's stance, and I suspect that it is probably the stance of most parties, is to say that we should not be adding to the sum total of politicians. However, if we are able to say that this shift of power also means a shift of personnel—there would be fewer MPs at Westminster and more MPs or MWPs, or whatever, in Cardiff—I think that that becomes easier to sell. We have to recognise, at some stage, unpopular though it is, that we will have to look at having more Members. I do not see how the system could operate otherwise. The quid pro quo as far as I am concerned, and my party is concerned, has to be to say, 'That has to have consequences for the way that we do things at Westminster and the number of MPs there, just as it did with Scotland'.

[61] **Kirsty Williams:** In his evidence, Sir Michael Wheeler-Booth said that small

legislatures in other parts of the world cope with the situation by having a small amount of Members, but a large number of staff to support them in their role. Do you foresee that there will be consequences for the Assembly Parliamentary Service, if opposition Members are to be competent and robust in their work of scrutinising the legislation that might come through?

Nick Bourne: That was a very unkind question. You are absolutely right. I think that both would have to grow. We would need additional Assembly Members to cope with the extra workload, if this is to happen, with a reduction in the number of MPs at Westminster. However, the size of the secretariat, the parliamentary side of the service, would have to grow, even if we kept the same number of Assembly Members. I think that that would have to follow. In fact, if we kept the same number of Assembly Members, I suspect that the parliamentary service would probably have to grow more than if we had a larger number of Members. Where the cost of that lies depends on looking at the relative balance and trying to balance one out against the other. However, it must follow, and I do not think that one could really argue against that.

[62] **Kirsty Williams:** Finally, do you have a view on the approach taken in the White Paper to the development of Standing Orders? If you do not agree with what the White Paper says about us developing our Standing Orders, how would you wish to see them approached?

Nick Bourne: I think that the expertise and experience here mean that the work should be rooted here. I am not sure whether there is resistance to this on the part of the Secretary of State, and I am not sure that there was. To be fair, he seemed reasonably open-minded about an approach, but it is hard because, if we are a mature institution, which I believe that we now are, this should be something that should be rooted here. We may want to call on expertise from Westminster, which I am sure exists there, but the driving force should come from here, not Westminster, otherwise it would just look as if we were picking up the crumbs from the table and jumping through hoops at the behest of Westminster. Everything in me believes that it should be done here.

[63] **Jane Hutt:** I am going to follow on the constructive and optimistic route. I know that you gave broad general support to the White Paper in your response to Rhodri Morgan's statement. Building on this issue of the opportunities that are offered through the Orders in Council route, this is surely about matching our policy needs to how we then enhance the legislative opportunities. Do you have any comments or thoughts on how we could take that forward, not just from the Executive's perspective, but also from the backbench perspective? I am thinking of our Standing Order No. 31 route and how we would have to build up robust processes in order to ensure that we could use the Orders in Council route for that. We have amended and reviewed our Standing Order No. 31 route to enable us to do this and have scrutiny and Government response.

6.20 p.m.

For example, most recently, most of the parties supported a motion under Standing Order No. 31 on child trust funds and the role of local authorities. We could not actually deal with this because of the primary legislative powers that would be required for local government, but it is, possibly, something that we could put through an Order in Council, I suppose.

Nick Bourne: To take you back, Jane, I would certainly be optimistic like you, but I must correct you on one thing—I gave broad and general support to some aspects of the White Paper, but I certainly did not give broad and general support to the Orders in Council part. I have grave misgivings about that part at the very least as I just do not see it working properly.

I am all for trying to take an optimistic view of the general direction, by all means, but with the important caveat that I do not agree with that stage, as I think I have made clear. Anything that I say about that is certainly not to be taken as a laying-on of hands by me or my party to suggest that we go along with it, because we do not. It would be far better to have moved from the Henry VIII-type provisions to the final stage of having a referendum without this intermediate stage, which I see, even looking at it optimistically, as haphazard and capricious.

It is hard to see how this will operate, because it seems that its key difficulty is that, whichever Government is in power—Labour, Conservative, or even an alliance; it could take many different complexions—it has the ability to say ‘yea’ or ‘nay’ to specific pieces of legislation that we have requested and that we think would be in the interests of Wales. This seems like putting the cart before the horse—it is the wrong way round. If we feel, as an Assembly, that something is worth doing, I cannot see why we are therefore saying that Westminster should have the ability, either by the Secretary of State device, the House of Commons or the House of Lords, to block it. It just does not seem to make sense. Repeated trips to Westminster with different requests are a little bit like our current arrangement; we make the requests now and there is no guarantee that we will have them granted. I am not sure that it is massively different.

On Standing Order No. 31, I agree with the sentiment behind what you say. It is important that, given that this will happen, we have some sort of device to ensure that it is not just Government-generated ideas that get into the pipeline, or indeed, ones that are resolutions of the full Assembly other than under Standing Order No. 31. That is a valuable device that has, as you say, on occasion, attracted cross-party support on important issues that may otherwise have been neglected. How we guarantee that that gets through, unless we eliminate some of those stages, I do not know, because it may not, unless we say that a certain stage gets left out and the demand goes straight through, or that the Secretary of State stage gets left out, because, presumably, there is not the same political imperative for something proposed by a backbencher of any party, particularly of a non-Government party, as it were, to be placed in the queue. I just cannot see how we can do it, other than to say, ‘Right, it goes straight to the House of Commons and the House of Lords for a vote’, and even then it is dependent on what they say. It seems to me that this is the difficulty with this proposal, in that, every time we want something specific to be looked at, it has to go through the House of Commons and the House of Lords, where it might be blocked. I am all for saying, ‘Right, let us take an optimistic view’, but we have to look at the worst-case scenario as well. The optimistic view is that the request will go through, and the pessimistic view is that it will not. If the latter keeps happening, what do we do then? Sorry, I should not be asking you the question.

[64] **Jane Hutt:** It goes back to the point that this is not powers for the sake of powers, does it not? These are powers for us to deliver on our policy developments and interests, be they those of the Government or the wider Assembly. We have to talk about quality and not quantity in this matter, have we not, and be very discriminating in how we take this forward.

Nick Bourne: Granted, but we have made requests and demands for six or seven pieces of legislation—I say ‘we’, that is, the Assembly Government has—and we have had two or three sometimes. The quantity has not been massive. If we are talking about six or seven a year, that does not seem unreasonable, but it would not be necessary if we had the third stage in place.

[65] **Jane Hutt:** But we are going to move forward. I will finish there, thank you.

[66] **Jocelyn Davies:** On that point, Nick, we will have the split of the corporate body, so, when we make these bids for Orders in Council, I am assuming that there will not be such a

logjam at Westminster then. Who should make the bid, then? Is it our Executive to the Secretary of State or directly to Parliament, or should the Assembly as a whole make the bid to the Secretary of State or to Parliament?

The other point that I wanted you to think about was the second stage, which you say is unnecessary. We will still have transfer of functions Orders, and the powers that we currently have. We will have Orders in Council, if we take the optimistic view that we will get some, and we will have powers under new Acts. It sounds to me as if it will be very complicated, on top of an already complex system. Does the lawyer in you see a minefield of the powers that we will have? As you quite rightly said, it relies on goodwill.

The other point is: what is wrong in asking for powers for the sake of it? Otherwise, the option that is open to us is to say, 'We need your approval for this policy idea that we have, therefore give us this power'. What is wrong with saying, 'We want this power and we will then exercise it as we see fit.'?

Nick Bourne: I will take the questions in the order in which you asked them. The question about who makes the bid is an appropriate one to ask at the moment, given that we have an Executive in a minority. Presumably, the Executive has to be in a position to make bids, whether it is in a minority or a majority, but that should not exclude the full Assembly from putting in bids, particularly where we are able to do so by a vote of the majority, which may include members of the governing party. So, if we are going down that route, it should not be confined to the Government—there would be inherent difficulties if that were the case. The Standing Order No. 31 issue also has to be dealt with, so there must be at least three routes for legislation—through the Executive, the full Assembly, and the Standing Order No. 31 procedure for private Member's legislation.

Then there were your comments on what I call the pig's breakfast syndrome, that is, that we have existing transfer of functions Orders going through. By the way, in relation to the energy one, it has been three years and an Order is still not there yet on the large energy projects of 50 MW and above. There are new ones, as you say. There is a new one tomorrow, for example. That, plus Orders in Council and this kind of procedure, seems to me to be an unholy mishmash. It would be far simpler and far better to move to the third stage. It was not a staging post that was considered, as far I can see, by the Richard commission, and it would not help the process.

On your last point, I have just written 'approval', and I cannot remember what it was regarding.

[67] **Jocelyn Davies:** It was on whether we should be in a position to say, 'Can we have the powers for X please, and then we will do as we wish with it?', or should we have to justify that by saying, 'We're going to do this, do you mind?'?

Nick Bourne: That is the inherent difficulty, you are quite right. The *reductio ad absurdum* is that you could have a position where 60 Members—and we have had it in a sense, although it is slightly off-beam, because it is the bank holiday issue; we had 60 Members in the Assembly wanting something, and Westminster blocked it. It is not a perfect example, because it is not a devolved matter, but it could still happen. It could be on a devolved matter—we could say that we wanted a power, and the Secretary of State says 'no' or 'Yes, okay, let's pass it to the House of Commons or the House of Lords', and the House of Commons or the House of Lords says 'no'. So, we still end up at the behest of Westminster, which is not desirable either in terms of the national self-confidence or the efficient working of the Assembly. It is not desirable full stop, and I have not heard anything that has

convinced me that it is necessary.

[68] **Jocelyn Davies:** There was one last thing. In terms of the scrutiny of statutory instruments, how will that happen in the future?

Nick Bourne: Goodness knows.

[69] **Jocelyn Davies:** The powers to make the statutory instruments will probably pass to Ministers, rather than rest with the Assembly as a whole. So, how will we scrutinise them?

Nick Bourne: We come back to structures, costs, the number of Assembly Members and the important back-up staff. It is bound to have financial consequences and an effect on the structures, some of which could be foreseen, and some of which perhaps cannot. We will have to significantly alter how we do things if we go down the Orders in Council route.

6.30 p.m.

[70] **Jocelyn Davies:** You mentioned St David's Day, but perhaps hunting with dogs would be a better example, because we have had resolutions here in the past that the powers in the legislation should pass to the Assembly. There might be very well be a different decision in the Assembly than there is in Westminster. So, is there a danger that you might want to leave some things, if you are the Secretary of State, at Westminster, because you know that the decision will be made there, and then not pass things? It is one of the examples that I gave of power being transferred according to a judgment on what the Assembly will do with the power, rather than according to the logic that the National Assembly, as the Government of the country, should have the power.

Nick Bourne: You are right, it is a much better example, for which I thank you. I suppose that the fact that the request is made, in some ways, will indicate very clearly what the decision is likely to be, so the Secretary of State will be able to second guess how the Assembly jumps on a particular issue. The Secretary of State is human—it is bound to affect the priority that it is given, because it may not fit in with the ideology at Westminster, whether that be Labour, Conservative, or whatever.

[71] **Kirsty Williams:** Returning to structures, and the concerns about how we organise ourselves, I take it from that that you are content with the proposal in the White Paper that there should be no prescriptiveness about the committees that we have here. We are currently required to have certain committees under the Government of Wales Act 1998. I take it that you are happy that it should be a matter for us to decide.

Nick Bourne: Yes, you assume rightly, Kirsty. Under the Act, we are obliged to have a committee shadowing each Minister other than the Finance Minister, subject to a maximum, and the standing committees. I think that it is something that should be left to the Assembly.

[72] **Kirsty Williams:** Under the Government of Wales Act 1998, there is a strict requirement that each committee should be party balanced. It seems that it is somewhat diluted by proposals in the White Paper that look at the overall balance, which could lead to a situation where perhaps, given the pressure on numbers, you might be looking at quite small committees, which would perhaps mean in some cases that a political party had no representation on a committee. Do you have any views on that?

Nick Bourne: It would be difficult. You and I well remember that the issue came up early in the first Assembly—there was an issue about party balance, and whether every committee

had to have the same party balance, or whether you could look at the position overall. In the end, common sense prevailed. It would be undesirable for a political party that has a certain minimum representation not to be represented—I think it is four Members at the moment, Llywydd, but you may correct me, in order to claim leaders' allowances and so on. All parties should be represented on every committee. It would be difficult and undesirable otherwise.

[73] **Jocelyn Davies:** The Scottish Parliament has more parties. You are judging that on the position that the Assembly has four parties and one or two independent Members. However, there are a number of small parties in the Scottish Parliament, so they cannot possibly expect to have Members on every committee.

Nick Bourne: No, which is why I used the four Member cut-off point—I think it is four Members to claim the leader's allowance. Admittedly, you must have a cut-off, and you are right that there are more parties in Scotland, because of the more proportionate element—there are the Greens, the Scottish socialists and so on, but I do not think that they have the minimum number of Members to qualify for leaders' allowances. However, given the nature of the four parties in the Assembly, it would be undesirable for any subject committee to be without representation from each of the four parties. It would not be in the interests of the working of democracy or of the Assembly.

[74] **The Presiding Officer:** I believe that three Members constitute a group in the Assembly. However, there is a distinct difference between what constitutes a group in the Standing Orders and what constitutes a party in the Act, which is another of the delicacies of operating within the framework of the Government of Wales Act 1998.

I have a few final questions to ask, unless colleagues have any other points. The thrust of the White Paper's argument bears up the argument that you have put very strongly over the years, and also as part of our work together on the Assembly review of procedure, namely that the terms 'Assembly' and 'Government' do not sit easily together, and that there is still a confusion in the perception of the electorate. Although the models that are referred to are those of Westminster and Edinburgh, the White Paper still proposes to call the Government in Cathays park the Welsh Assembly Government. Do you not think—this is now a leading question; I have spent too much time in Plenary listening to Members asking, 'Do you agree with me, Minister?'. I will not ask such a question. Sorry, I apologise for that, I will phrase it in another way. What is your view of paragraph 2.6 of the White Paper, which proposes that we continue to call the Executive the Welsh Assembly Government? Is that not contrary to the argument in the White Paper itself about the confusion that has been caused by combining the Assembly and the Government? Is that a better question, colleagues?

Nick Bourne: In answer to your non-leading question, I do not have paragraph 2.6 in front of me, but thanks for précising what it says. I think that we should follow the Scottish model; it is the Scottish Executive, and I think that it should be the Welsh Executive here. I think that the title 'Welsh Assembly Government' is confusing, and it would certainly be confusing by the time we get to the third stage, if we ever do, because we would no longer then be an Assembly—we will presumably be something else. So, I think that it would be better to call that arm of Government the Welsh Executive.

[75] **The Presiding Officer:** Presumably, we could still be the National Assembly for Wales, as the title 'national assembly' is a fine international title for many parliamentary bodies worldwide, is it not? Would it not be more confusing if we were to abandon this grand title for something less clear?

Nick Bourne: I hesitate to disagree, but I do. Within the United Kingdom context, I think that a parliament is a body that makes primary legislation. If we have primary legislative powers, I think that we should be a parliament, just as Scotland is. I know that in France—this is perhaps an invidious example at the moment—there is a national assembly that is very different. However, that has not been the British tradition.

[76] **The Presiding Officer:** I am not so sure. One needs to look to the Commonwealth, I would have thought. I received an interesting letter earlier this week from the speaker of the National Assembly of Kenya. You mentioned France, but there is also Québec. If you search on the worldwide web, I can certainly say that the term ‘national assembly’ occurs as a synonym for parliament very widely, both in the Commonwealth tradition and in the European tradition.

Nick Bourne: I would not disagree with that, but perhaps referring to British in the truly British context rather than British as passed on to the members of the Commonwealth. Québec would be a little bit different because it has a Napoleonic code and it would be more likely to follow the French system. I agree that in Kenya and elsewhere they have their assemblies, but then in countries such as India, Malaysia and Singapore they have their parliaments.

[77] **The Presiding Officer:** Indeed. I have just been reminded again—not to perpetuate this too long—that the president of the National Assembly of the Socialist Republic of Vietnam visited me recently. So, it is everywhere.

Nick Bourne: Indeed. It will be an interesting debate, but I would favour ‘parliament’.

[78] **The Presiding Officer:** As colleagues do not have any other questions, I wish to say that we are very grateful to you for your presentation and for the discussion. There may be issues that you pick up as we continue our work, which we hope to conclude as soon as may be—to use an old parliamentary system. We are grateful.

Nick Bourne: Thank you.

[79] **Y Llywydd:** Mae'n bleser gennyf goesawu Syr Christopher Jenkins i gyflwyno tystiolaeth. Mae wedi paratoi papur ar ein cyfer, ac felly symudwn yn syth at y cwestiynau.

[79] **The Presiding Officer:** I am pleased to welcome Sir Christopher Jenkins to present evidence to us. He has prepared a paper for us, and therefore we will move immediately to questions.

[80] **Jocelyn Davies:** You are probably aware that the UK Government has not since 1999 drafted Bills in a way that has given the Assembly wide and permissive powers. Although there have been several resolutions within the Assembly to that effect, and we adopted the Rawlings principles some years ago, that has not happened. Can you give us any idea why that might not be the case?

Sir Christopher Jenkins: Not really. I have been out of the loop since soon after the Act was passed, so I have not been watching the developments closely since then. However, I was under the impression that there had been cases whereby certain Acts had been passed giving to the Assembly powers that Ministers did not have in London. In other words, they have been given, in some limited cases, wider powers than those within which British Ministers could make delegated legislation, but certainly not on a grand scale.

6.40 p.m.

[81] **Jocelyn Davies:** The White Paper makes the point that the Assembly is a democratically elected body and we have robust legislative procedures. There is an argument that we should not be treated in the same way as Westminster Ministers and that powers could have been wider and more permissive because we have these procedures. The White Paper mentions that and states that that should now be the basis for Parliament conferring powers on the Assembly. Do you think that Parliament will embrace that idea?

Sir Christopher Jenkins: I would hope so. It seemed to me that, in 1998-99, the powers then passed to the Assembly would be difficult for the Assembly to use as a basis for changing things in Wales because they were not devised with that in mind; they were devised for Ministers to use, often for particular purposes that had previously been identified and for Ministers to use in combination with other Cabinet Ministers who had other powers. Neither of those points applied to the Assembly. When the powers were created, they were not created with the Assembly in mind. The Assembly could not co-operate with other Ministers who exercised powers outside the areas for which the Assembly had powers.

So, all in all, as has been recognised, the powers that the Assembly had were an odd mixture—some trivial, some quite significant, but not having any rationale at all that was relevant to the Assembly. So, it seemed to me desirable and, in fact, inevitable that there would have to be change from the beginning in that gaps would have to be filled in, at least, in the Assembly's powers, as time went on. By degrees, it seemed to me also inevitable that the Assembly should be given powers of a wider scope so that it could develop policies of a wider scope and implement them. I have not followed exactly how far that has gone, but I recognise that it has not gone nearly as far as the Assembly would like. That is one thing to be welcomed in this White Paper—that the power now proposed is not limited to the passing of existing ministerial powers, but to the passing of whole areas to the Assembly, where it will be free to develop its own policies. That can be done without an Act of Parliament, but by Order in Council instead.

[82] **Jocelyn Davies:** Evidence to the Richard commission would lead us to conclude that that has varied a great deal from department to department, and in terms of drafting style between individual drafting lawyers. When you say that there was no logic to the bundle that we started with, there has not been much logic since 1999.

You probably heard my question to Nick Bourne earlier about stage two, which he feels is unnecessary. I fear that that will be even more complicated than the situation that we now find ourselves in because we will have Orders in Council, but we already have the transfer of functions and we will have powers and new Acts. Could this end up as a legal minefield?

Sir Christopher Jenkins: When I read the White Paper, I had not seen it like that. It seemed to me that that would be a very useful addition to the ability of Whitehall and Westminster to pass powers to the Assembly. The main advantage of it, apart from the fact that the transfers could now be chunks of policy areas, was that it could be done without going through the long stages of a Bill in Parliament where competition for Bills, as you know, is very severe. Often, Bills that are wanted by a majority of Ministers do not find a place. The same is not true of Orders in Council, although there is still a blockage in Parliament of parliamentary time for anything that is bound to take time in both Houses and that is true of these Orders because I think that they are all subject to the affirmative procedure. Therefore, there will have to be a debate in each House, but that is nothing like as big an obstacle as the stages of a Bill.

[83] **Jocelyn Davies:** I have just one last question about Orders in Council. Most of us will

never have heard of Orders in Council. In your experience, for what does Parliament normally use Orders in Council?

Sir Christopher Jenkins: To begin the answer gradually, Parliament would not use it for anything on which Ministers or members were certain that they wanted to debate amendments in each House. It would not use it for anything of that kind. On the other hand, it would not be used for all other cases. Some Orders are subject to an affirmative procedure. Generally speaking, they are instruments of some constitutional or other great importance.

[84] **Jocelyn Davies:** Can you give us some examples?

Sir Christopher Jenkins: I should be able to do so, but I cannot at present. It will come to me, but not at present.

[85] **The Presiding Officer:** You are very welcome to supply us with an edited choice of Orders in Council over your parliamentary career.

Sir Christopher Jenkins: One relevant example is an Order transferring functions between Ministers.

[86] **Carl Sargeant:** Thank you for attending this wonderful evening session. May I assume that the Orders in Council route can actually work and that, perhaps, the distinctions in your paper between primary and secondary legislation are more nebulous than sometimes argued? Could there be a liberal use of Orders in Council, and that there would be no need for rushing into primary powers or a referendum? Do you believe that too much is made of the supposed distinction between primary and secondary legislation?

Sir Christopher Jenkins: I think that that is often the case, partly because I do not always understand what people mean when they use the expression 'primary' or 'secondary'. The only meaning that I know to be clear is the one between a Parliament which can do virtually anything, as Westminster is traditionally thought to be capable of doing, and a body which derives its power through a delegation of those powers exercised by the primary body. Therefore, if one takes that line, everything is secondary except what an unrestricted Parliament does; all legislation made under an Act of Parliament is secondary. It cannot be otherwise because that is what it means, 'secondary' or 'delegated' being interchangeable terms.

Most people would be reluctant to be that strict about the use of words, because for so long, people have used the word 'primary' to describe, for instance, Acts of Parliament in Northern Ireland, and now in Scotland. In my mind, those are strictly secondary. I do not make too much of that because it is not a popular notion but it is the only way that I can keep my head clear about the differences. If people here say, 'when we move from secondary to primary powers, something will follow', I do not understand it, because the Assembly already has the power to legislate. Its powers are likely to increase but I think that it will be impossible to identify exactly the point at which they might be called 'primary' powers unless there is a big, sudden change. At present, I foresee that what is proposed is a series of changes, some of which will be big, but all of which will use the existing machinery. This is the first new change in the White Paper, where there is a new power of Orders in Council which will be capable of giving chunks of spheres to the Assembly. By degrees, this could lead to the Assembly having very close to full power in all of the areas where it has any competence at all, in theory. The difference between that and absolutely full power is difficult to see but, presumably, we will continue to call it 'secondary'.

6.50 p.m.

[87] **Carl Sargeant:** So, it is a language-base scenario really—it is just the way that people term it ‘secondary’ or ‘primary’, because perhaps not many people out there really understand its significance. However, the Orders in Council within Standing Orders that would be developed could be the key to a new coherent policy for the Assembly—or whatever the name of this institution would be.

Sir Christopher Jenkins: Yes. To my mind, whatever the Assembly eventually has by way of powers, will be secondary powers, strictly speaking. However, when they are big enough, one will not grumble if people call them primary powers—indeed, already one might not grumble, simply because one does not know what they want to mean by primary powers.

[88] **The Presiding Officer:** I am tempted to ask you whether you regard European Union legislation as even more primary, but I will not.

[89] **David Melding:** Sir Christopher, we are in very tricky territory now. I remember Vernon Bogdanor talking about the fact that there is not really anything that can be strictly defined as secondary legislation. I suppose that we are in a dependent relationship with Parliament, if I can put it that way, and our legislative powers are quite properly—given the referendum, or what was put before the people of Wales—constrained, and quite tightly constrained really. The Orders in Council route would allow that constraint to be very considerably loosened, and, in shorthand, I think that that is when people start to talk about primary powers; it perhaps aids discussion. As we move that way, we are more likely to be able to have the full policy competence over the devolved areas that they have in Scotland. Presumably, you would agree that Scotland has primary powers, because, so far as the Scotland Act 1998 is not amended, there are designated areas where the Scottish Parliament legislates, and that is done upfront, and that is the case. There is surely a danger that, if the Orders in Council take off, we end up with, in effect, legislative powers, with a parliamentary system that has to be perfunctory, or invokes a constitutional crisis. That is open to serious friction as soon as you get a non-Labour Government, or different Governments in Cardiff and Westminster. Am I being horribly pessimistic, or are these real challenges that we may have to face?

Sir Christopher Jenkins: First, I do not think that I would say that the powers of the Scottish Parliament are strictly primary—if one uses that term in its strictest sense.

[90] **David Melding:** I would agree with that, but if you mess about with the Scotland Act 1998, you would create a constitutional crisis, and so the cost to any Government to do that is enough to put it off attempting it. However, legally, you are quite right that Westminster can legislate on any Scottish issue and change the Parliament’s procedures, but I do not think that we are in the realm of practical politics there. That is the point that I was making.

Sir Christopher Jenkins: On your substantive point about whether the Assembly could end up with pretty general powers within the devolved fields by way of these new Orders in Council, I think that the answer, on paper, is ‘yes’. The ability to pass such powers to the Assembly is there in the White Paper. There are only two restrictions, I think, on that ability. One is that, according to the White Paper, there should not be a transfer of the whole of any field.

[91] **David Melding:** You do not have to retain much, do you?

Sir Christopher Jenkins: No, nothing much. The second is that there should not be a

transfer of a new field. Otherwise, there are not any restrictions. So, within the existing devolved fields, there are no serious restrictions, on paper, to Westminster's power to pass the whole shooting match to Cardiff.

[92] **David Melding:** And on the durability of the system in terms of when there is a different Government in Cardiff and Westminster?

Sir Christopher Jenkins: I am much less competent to answer that. In principle, it seems to me that that is going to happen one day, and, therefore, whatever system exists will be made to work.

[93] **The Presiding Officer:** You mentioned the question of new fields and not transferring new fields. Does this not more or less freeze the devolved project in the aspic—to confuse my metaphors? I am not doing too well tonight. Does it not freeze the status quo in terms of devolved fields, and is it not the situation then that, unless it were made clearer, any agreed matter, as one would with the transfer of Ministers, between the Whitehall Government and the Cardiff Government—between Westminster and the Assembly—could be transferred by an Order in Council? Would that not be a more appropriate way of doing it, rather than saying 'no new fields'? Otherwise, what happens, for example, to the administration of justice, which, conceivably, could have been transferred in the old system from the Secretary of State for the Home Department, or the Secretary of State for Constitutional Affairs, or whomever may be currently doing it, to the old Welsh Office, but would be debarred by the wording of the White Paper at the moment?

Sir Christopher Jenkins: It is true, if I understood you right, that the proposal for the first change will mean that the Assembly cannot operate in completely new fields. Taking education, for example, as a field, it will be possible to pass almost complete powers to the Assembly. So, to that extent, you are preserving existing limits. However, that also seemed to me to be true of the second stage, but perhaps that is a separate point.

[94] **Kirsty Williams:** In your paper, Sir Christopher, apart from drawing our attention to this situation regarding new fields, you also state that paragraph 3.18, with regard to whole fields, is an arbitrary one, and the White Paper does not set out a rationale for it. Would you care to speculate on perhaps why that is there?

Sir Christopher Jenkins: I can only do that, because I am so ignorant about what is going on and what has gone on. That is to say that I have no idea what the actual reasons were at all. However, I wondered whether it was to do with the fact that a two-stage process is wanted and anticipated and aimed at, and that the second stage will be the one that requires a referendum. If there is to be a referendum, and if there are to be two stages, then some differences have to be found between the first stage and the second stage. Otherwise, why do you have a referendum at that stage rather than now? Therefore, it seems possible to me that these are the signs that differences must be found, or indeed that progress is expected to be such that there will be a difference between the powers actually passed in the first stage and the powers passed in the second stage after the referendum. That seems to me quite likely, but it is sheer speculation on my part.

[95] **Kirsty Williams:** I think that we could all speculate on why there is a need to have a referendum later rather than sooner. However, turning to Standing Orders, do you foresee any circumstances why an institution such as this would not, or could not, be responsible for drawing up its own Standing Orders?

Sir Christopher Jenkins: It depends rather on what goes into the legislation and what is left

of Standing Orders. There are some things of great importance, but even those may be left to the Assembly in due course. For example, in Westminster, the financial initiative is wholly with the Government, but that is because of Standing Orders, rather than because of anything else. I simply do not know whether that sort of subject—control over finance—is so important that it would be thought desirable to put something about it into the proposed Act, or whether it is intended that it should be left to Standing Orders. I have no idea. However, if Westminster thinks that it is so important that it should be specified and controlled by it, then it might be that it might want to put it into the Bill, in which case it would leave other Standing Orders to be decided upon by the Assembly.

7.00 p.m.

What I meant to point to in my note was that it seems to me that, so far, flexibility has been very important. The Act has allowed for a good deal of flexibility in the way that the Assembly organises itself, and that is good; it has meant that you could grow organically. It seemed to me that in the new regime, under the proposed Bill, it is also going to be desirable that there should be a lot of flexibility, that is to say that perhaps there should be some fuzzy edges in the definition of the powers coming to the Assembly, and even some awkwardnesses, so that there are reasons for making progress, for changing things in the future, rather than rigid boundaries that cannot be passed and that will make life much more difficult for the Assembly if they are too rigid and clear.

So, there is a case in some context for flexibility, and that is true of Standing Orders too. You do not now know exactly how you want to operate in five years' time. If it is in an Act, or in Standing Orders, even, which are fixed by the Secretary of State, there is nothing you can do about it. That is all that I was getting at there.

[96] **The Presiding Officer:** Our colleague, Lorraine Barrett, is unwell and has lost her voice. Thank you for turning up, Lorraine. Jane Hutt?

[97] **Jane Hutt:** Sir Christopher, you said that this White Paper will bring clarity to the miscellany of powers inherited by the Assembly. I shall use that quote frequently.

Sir Christopher Jenkins: It is capable of that.

[98] **Jane Hutt:** I am grateful for your positive contribution in your evidence to us. It is important for us to try to look further at this issue of the fields. It has already been raised in the evidence that we have taken so far, and there are concerns that there may be limitations. I just wanted to explore with you this issue about the fields. Clearly there are ragged edges in terms of the fields because of non-devolved matters, for example, in education and in other fields of policy that cover local government or the Inland Revenue. There are fields that are not devolved, and that will be a limiting and restricting factor in relation to the fields. We will be abutting our non-devolved responsibilities.

So, it would be helpful to have your further views on this, by clarifying how you think we can take this forward in terms of being clear about what we want to achieve as a result of an Order in Council. It will be policy derived from Government, and, indeed, backed by the whole Assembly, hopefully, that we will want to take forward through an Order in Council. We know from our brief history that, for example, we could have had an Order in Council to enable us to have a children's commissioner, without having a Wales-only Bill for that, or could have added it to the Care Standards Bill, which was the first step that we had to take. This was, therefore, prolonged, and there were lots of committee sessions at Westminster. I believe that we could have done that through an Order in Council.

Sir Christopher Jenkins: Yes. That is a good example of the kind of thing that could be done much more quickly. On the basic question of the precise definition of the fields, or areas of policy within which the Assembly can legislate, there are difficulties either way. If the limits are defined extremely precisely, then the Assembly will knock up against them and will be able to do nothing about it. If they are very vague, then the Assembly might be uncertain about whether or not it can do something, even though it is convinced that it should be able to do something. So, it is a matter of guessing in advance whether you would want to argue with London that you have perfectly clear powers that include something that you want to do, or that you would want to argue with London that your powers are not terribly clear, and that, on balance, they give you the ability to do what you want to do. In other words, it depends which way round you are trying to argue it.

There are precedents for this kind of difficulty, particularly over the long term, with Northern Ireland, where there has always been a division between what Northern Ireland could do and what had to be done at Westminster. There were always some arguments about what was devolved and what was reserved. However, I think that it is inevitable that it is going to happen, and, in general, I would guess that the devolved administration might be better with not rigidly defined fields than with rigidly defined fields because, very often, what the devolved legislature will want to do is to introduce new policies and new law, which everybody accepts is desirable. It will not always be so, but that will happen sometimes. If that is the case, and the Assembly proposed to bring forward some legislation that was generally accepted to be desirable, both here and in London, then a slight or even a medium-sized uncertainty about whether it was within the Assembly's powers would be likely to be resolved in favour of the Assembly. The opposite is true, of course, if what the Assembly was proposing was something that was, in London at least, considered undesirable. However, in general, if the Assembly is fixed on something that concerns Wales and not London, and has a strong argument that, despite uncertainties at the edges, it has the power to do these things, then, on the whole, I would have guessed, in real life, that would be accepted and nobody would argue that it did not have those powers.

[99] **Jane Hutt:** Perhaps I could just come back to existing examples. Recently, we have been looking at the banning of smoking in public places, and we are moving in a different direction to the policy being developed in England at the same time. Another example is our decision to keep our community health councils, and England wanted to abolish them. We managed to get that through—quite laboriously, I must say—all the legislative procedures, but that was a very different policy direction. So, if there is a different government in power, and if it is the same government in power, these are things that we can test in history, as well as to look forward to the issues that might arise.

Sir Christopher Jenkins: Yes, it is very difficult to predict exactly how you will want to play things in the future, but in so far as one has to decide in advance what the structures are going to be, the more flexibility you have, the better.

[100] **The Presiding Officer:** Could I ask you, Sir Christopher, to comment on something that Lord Evans, the Minister answering for the Government in the House of Lords, said when the statement was repeated and the White Paper was announced? He implied that an Order in Council would be, more or less, similar to the long title of a Bill and that it could be as simple as that. Do you think that this is likely to happen and that there would be that flexibility and liberality in the content of the Orders in Council?

Sir Christopher Jenkins: I suppose that it depends what the Assembly wants, or, in other words, what the Order in Council is responding to. However, if, for example, it was about

creating a children's commissioner, it is possible that the Order in Council would have simply authorised that and left everything else to the detailed working out by the Assembly. If it is to reorganise local government altogether, then it would probably put a bit more into the Order in Council—I do not know—but it depends what Ministers wanted to do and whether they wanted to restrict or not. I think that it depends entirely on each case, but it certainly could be as short as a long title, as it were.

[101] **The Presiding Officer:** I was very interested in the examples given to us by the Minister responsible for some of this legislation at this end. This points to a possible way of operating, where, depending on the will and the responsiveness of the Government and Parliament at Westminster, that, to go back to your earlier views, it is the equivalent of primary powers, whatever we mean by that. The Orders in Council can be very flexible and a rapid tool for the delivery of enhanced legislative powers, as described in the White Paper. Do you agree with that?

7.10 p.m.

Sir Christopher Jenkins: I would agree with that. As described in the White Paper, the limit to what can be done by an Order in Council is almost coterminous with the fields described in the Schedule to the Act, in single or very few words. So it is very general.

[102] **The Presiding Officer:** It was put to us in discussion, and we have also received a letter in evidence from Elin Jones AM, who intends to appear before us, and I know of your interest and sterling contribution to the making of the Welsh Language Act 1993, that the Welsh language is a field that would surely be mainly of interest to the Assembly. Do you think that it would be possible legally, and likely procedurally, that such a field would be left almost wholly to the Assembly?

Sir Christopher Jenkins: That would be very difficult to predict. I do not think that it is plain at first sight that it would be left entirely to the Assembly, though, on the face of it, it is a very good candidate for that. It partly depends on the expected reaction of the Members of the two Houses in London. Both Houses of Parliament have to approve the Order in Council, and, if it seems to Ministers that there would be strong opposition to a general transfer of that kind, then they might take account of that in drawing up the Order in Council. For example, if it were thought that the new powers would give the Assembly the ability to dictate much more to the private sector than the present Act does, or, for example, to require all companies employing fewer than X people to employ only people who spoke Welsh—it depends what people foresaw as the likely use of what is proposed to be transferred.

[103] **Jocelyn Davies:** As we are on the issue of the long titles of primary legislation, putting aside the Orders in Council, is there any reason why, in new Acts of Westminster, the Assembly should not be given powers as wide as the title of the Bill?

Sir Christopher Jenkins: No, I do not think that there is. The title of the Bill has some influence, especially in the House of Lords, over the extent to which the Bill can be debated, so the draftsman drafting a long title will often be aiming not only to describe what the Bill does, but to control, through the rules of procedure, what debates can take place in the two Houses. The more detail that he puts into the long title, then the more restricted the debate will be, in general. That is not an exact science, but it is very alive in the mind of the draftsman drafting a long title. A long title could say, 'a Bill to amend the Local Government Acts', but that would be undesirable if the Government only wanted to make a minor change to do with the running of a council. So it is more likely that it would specify in the title, if it were only a small change, what the small change was. On the other hand, if it was something

non-contentious, then a general long title would do no harm, because no difficult debates are foreseen in any case. In other words, the purpose for which a long title is devised would not be the same as the one that you are speaking of, that is, to describe an area that might be transferred to the Assembly. However, in principle, there is no reason why a transfer could not be of something as wide as a fairly wide long title.

[104] **David Melding:** I do not know if I can ask a hideously simplistic question, but the difference between Acts of Parliament and Orders in Council is in what they describe, is it not? I presume that Orders in Council do not state that there shall be a Bill to determine the regulation of the Welsh language or something. Also, would an Order in Council grant perpetual powers, such as the power to amend and return or even completely repeal something in the Assembly, with regard to the something like the Welsh language, for example? The Welsh language would fall into the category of something that would be entire if you were not careful, would it not, if the Order in Council states that the Assembly should have legislative competence over Welsh-language issues, whereas the children's commissioner is obviously not a whole field, but a small part of the regulation of children's services or giving children a voice, is it not? I am not a lawyer, however, and I am not sure that I understand what the actual difference is at that level. Is it just a procedural difference, or is there a different legal result that you get via an Order in Council compared with via an Act of Parliament?

Sir Christopher Jenkins: Not in this case. Orders in Council are, generally speaking, a form of delegated legislation. That is to say, they are made under a power that is granted to make Orders in Council by an Act of Parliament. So, the Act describes what can be done by the Order. From the point of the view of the White Paper, the big difference is procedural. That is to say that the Order in Council will need a debate in each House, whereas the Bill leading to an Act would need to go through the usual stages for a Bill. From the point of view of the result, there will not be any difference as far as the Assembly is concerned, except that an Order in Council, like any other delegated legislation, can be amended or revoked by a later Order in Council. That means, in theory, as I think would be true with the existing transfer of functions Orders, that they can be revoked. However, that is, of course, politically, likely to be extremely difficult, and, in any event, Acts can be repealed. There is therefore not much difference. The form of an Order in Council will be very much the same as that of an Act, insofar as it is transferring powers to the Assembly so that the Assembly may make laws within the areas of the children's commissioner, local government, or the whole field of education.

[105] **David Melding:** Is it fair to say that what an Order in Council spawns in terms of what it allows a delegated authority to do can end up being a fairly distant cousin to the primary legislation from which it originally emanated? In a way, the Act of Parliament generates the power to create Orders in Council and other subordinate devices. It is a fairly distant thing, really, is it not, compared with what you end up with in using the delegated procedures?

Sir Christopher Jenkins: Yes, absolutely. It will be at least a grandson, and, if Ministers get the powers that are conferred on the Assembly, it will be a great-grandson. So, there is a fairly long line of descent, but it should not make any difference to the powers. The power that matters is the last in line.

[106] **Jocelyn Davies:** On the issue of repeal, what is the mechanism to repeal an Order in Council? As you say, an Act of Parliament can be repealed, but what is the mechanism to repeal an Order in Council?

Sir Christopher Jenkins: It depends on the Act that authorises the making of the Order in

Council in the first place, but it will most likely be another Order in Council made by the same procedure as the first one.

[107] **Jocelyn Davies:** So, two debates.

Sir Christopher Jenkins: Yes.

[108] **The Presiding Officer:** And keeping Her Majesty busy once a week. We are very grateful to you, Sir Christopher, for your evidence. If you have any further thoughts as you follow your proceedings or if anything occurs to you, we would be grateful to receive a further written note. Thank you. That brings the formal meeting to an end.

Daeth y cyfarfod i ben am 7.20 p.m.

The meeting ended at 7.20 p.m.

**Cynulliad Cenedlaethol Cymru
Y Pwyllgor ar y Papur Gwyn—Trefn Lywodraethu Well i Gymru**

**The National Assembly for Wales
The Committee on the Better Governance for Wales White Paper**

**Dydd Mercher, 6 Gorffennaf 2005
Wednesday, 6 July 2005
QQ109 - 169**

Aelodau o'r Cynulliad yn bresennol: Dafydd Elis-Thomas, y Llywydd (Cadeirydd), Lorraine Barrett, Jocelyn Davies, Jane Hutt, David Melding, Carl Sargeant, Kirsty Williams.

Tystion: Dr John Marek, y Dirprwy Lywydd a Chadeirydd Pwyllgor y Ty; David Lambert, Ysgol y Gyfraith Caerdydd; yr Athro David Miers, Ysgol y Gyfraith Caerdydd; Marie Navarro, Ysgol y Gyfraith Caerdydd.

Swyddogion yn bresennol: Paul Silk, Clerc y Cynulliad.

Gwasanaeth Pwyllgor: Siân Wilkins, Clerc.

Assembly Members in attendance: Dafydd Elis-Thomas, the Presiding Officer (Chair), Lorraine Barrett, Jocelyn Davies, Jane Hutt, David Melding, Carl Sargeant, Kirsty Williams.

Witnesses: Dr John Marek, the Deputy Presiding Officer and Chair of the House Committee; David Lambert, Cardiff Law School; Professor David Miers, Cardiff Law School; Marie Navarro, Cardiff Law School.

Officials in attendance: Paul Silk, Clerk to the Assembly.

Committee Service: Siân Wilkins, Clerk.

*Dechreuodd y cyfarfod am 9.13 a.m.
The meeting began at 9.13 a.m.*

**Cyflwyniad, Ymddiheuriadau a Chofnodion
Introduction, Apologies and Minutes**

Y Llywydd: Bore da a chroeso i drydydd cyfarfod y pwyllgor hwn. Arnaf i mae'r bai ni wnaethom gadarnhau cofnodion cyfarfod Dydd Llun, 4 Gorffennaf yng nghyfarfod ddoe. A gaf i dderbyn bod y cofnodion yn gywir? Gwelaf fod pawb yn cytuno.

*Cadarnhawyd y cofnodion.
The minutes were ratified.*

The Presiding Officer: Good morning and welcome to the third meeting of this committee. It is my fault that we did not agree the minutes of the meeting on Monday, 4 July in yesterday's meeting. May I take it that the minutes are correct? I see that everyone agrees.

**Y Papur Gwyn—Trefn Lywodraethu Well i Gymru: Tystiolaeth
The Better Governance for Wales White Paper: Evidence**

[109] **Y Llywydd:** Croeso i'n gwestai arbennig

[109] **The Presiding Officer:** Welcome to our

heddiw, Dr John Marek, Cadeirydd Pwyllgor y Ty.

special guest today, Dr John Marek, Chair of the House Committee.

Lorraine, I understand that you are now recovering.

[110] **Lorraine Barrett:** I think that I can manage. Welcome, John. Looking to a few years hence when we have new powers, and thinking about the Assembly Parliamentary Service staff and the extra services that they will need to provide to Members after the new powers are introduced, what are the current areas of deficiency? How will we deal with attracting and retaining staff of sufficient calibre, and what are the resource implications? We should also perhaps be taking into account extra training for staff and Members.

The Deputy Presiding Officer: I take it that you have all read the evidence. It was only produced late yesterday afternoon, so we will assume that. I refer you to the section of the evidence relating to Assembly staff under paragraphs 9, 10, 11 and 12. You will see there that I believe, along with the House Committee—and the White Paper states—that Assembly staff should have comparable terms and conditions with the civil service, but that they should not be civil servants. We would like secondments to be possible and we would like to see staff transferring to the new Assembly Parliamentary Service and then being able to transfer back into the home civil service, so that there is flexibility.

We would probably need to pay a premium for our staff in some ways because, of course, career prospects could be constrained given the small nature of the institution that we will be running. We will obviously have to address that matter. Staff will have to work very hard for 32 weeks of the year and then the other 18 weeks, they will not have to work so hard. So we may have to look at annualised hours. However, the important point is that we can sort this out for ourselves once the Bill is enacted—or perhaps before then, once we know the shape of the Bill. Importantly, the message that we should send back to Westminster to the Secretary of State for Wales is that we are fairly content with what he proposes in the White Paper—namely that we would have our own staff of the parliament and that we would be able to vary their terms and conditions, though keeping them broadly comparable to those of the civil service.

On the other part of your question on where we have shortages, we will obviously need to develop an expertise on primary legislation. We will have to address that and we will need extra staff. We do things very much on a shoestring here. Remember that two years ago, we spent money on 10 members of staff for the Members' Research Service, and I think that everyone has said that that money was very well spent.

We will need another step change when we operate the Bill, but the good thing about it is that we will not start producing primary legislation from day 1; we will probably try one or two Bills and that process will develop, which will make it easier for us to fit in staff as time goes on.

[111] **Lorraine Barrett:** We heard evidence from Mike German earlier this week, and he argued, and I do not think that there was much disagreement with him, that the present sitting hours would not be adequate in the future. What do you consider to be the implication of that on our resources in terms of staff time and having enough staff to serve the Assembly for longer hours? We have just gone through the Senior Salaries Review Body review, so do you see any implications there with regard to a complete step change in the way Members work here and in their remunerations?

The Deputy Presiding Officer: First, if we have longer hours, it does not mean that there will be more work to do. Members might speak for longer and whether that results in more work is another matter. To be serious, Members may speak for longer in order, for example, to illustrate and make points. I know that Members would prefer, in some important debates,

not to be limited to five minutes, so they could speak for eight or 10 minutes with interventions—not to introduce new material, but to argue and to persuade. However, if we are sitting longer, we will need more security people and attendants, so there will be consequential increases. However, as far as expert staff are concerned, they will be to deal with primary legislation. Remember that, when we draft primary legislation, we have to get it right; we cannot afford to put a comma in the wrong place. It has to be absolutely right. Most of you on the Business Committee will know that drafts can be far too sloppy, lackadaisical, and cut and pasted from one document to another without checking. That will not be permissible once we start doing primary legislation. That is where we will need to have expert staff.

[112] **Kirsty Williams:** I note that, where the White Paper refers to Standing Orders, you disagree strongly with its position that Standing Orders should be created by a commission to advise the Secretary of State. I think that it is implicit, but will you clarify that that is not just your personal view but a view supported by the entire House Committee?

9.20 a.m.

The Deputy Presiding Officer: I am happy to say that that is the case. I believe that we could actually fashion the new Standing Orders better ourselves, because we now have six years of experience, we have competent people who take an interest in procedure and in matters such as Standing Orders. We know our own foibles and those of the institution. I am sure that we can fashion these Orders ourselves. Rather than drafting a completely new set of Standing Orders, I would like to see us starting from our existing Standing Orders, taking them in sections and changing each section as and when we reach agreement. For example, if you wanted to update planning legislation, you could have a look at that as it is a section of Standing Orders that stands on its own.

The treatment of subordinate legislation obviously would have to be changed quite radically. We are not yet in a position to decide how we will deal with statutory instruments in future. I have had a preview of David Lambert's paper, which I think you will consider later. It is very interesting and is a good paper for us to consider once we have a committee, or whatever, considering changes to Standing Orders.

However, I would first like to see a debate among Assembly Members so that we can have a consensual approach as to how we deal with the different types of statutory instruments. I do not want to go through it all, but we may be able to import a negative procedure and an affirmative procedure here. You then have the questions of whether statutory instruments will be amendable. Perhaps this will not be done at the final stage but in committee. It will have to be looked at slightly more seriously where committees decide to look at a particular statutory instrument; they would have much more responsibility in doing so knowing that perhaps it will go through on the nod in Plenary later on. I do not know. We need to sort our ideas on that. Let us think about it and have feedback.

I would eventually like to see a committee that will look at these Standing Orders, and I would recommend to you that your message to the Westminster Government should say that we have the expertise here, we have the knowledge and the experience, and we will not do anything stupid. I am not averse to the idea of the Secretary of State for Wales perhaps agreeing to have some reserve power, for example, in case we fail to do our duty. However, I have no doubt that we will do our duty on Standing Orders. I have high hopes that we will be allowed to do this, so, although it cannot be guaranteed, I think that we are probably looking at an open door if we send that type of message.

[113] **Kirsty Williams:** Coming to the role that the House Committee currently has in this institution, that will obviously be changed by the new proposals. You talk about setting up a statutory commission to look at some of these issues. Could you expand on that further? Also, how can we ensure that any structure that perhaps then deals with the budgets that the House Committee currently deals with will be looked at in an open and transparent way?

The Deputy Presiding Officer: On the Standing Orders, I want to avoid a statutory commission. I think that we want a committee of the National Assembly looking at these Standing Orders. With respect, I do not think that it should be the Business Committee. I think that the Business Committee could do it, but this would be quite a lot of work. It will be a very hard-working committee, so you need to have people on the committee who want to do it. The committee has to produce consensual Standing Orders.

In terms of finance, paragraphs 6 and 7 here are on financial matters. There will be a corporate body, when it is set up. I recommend that you look at section 21 of the Scotland Act 1998, which sets out ‘the Scottish Parliamentary Corporate Body’. I find that type of legislation appealing, especially with Schedule 2. If you look at it—and I can provide you with a copy if you do not already have one—you will see that it gives the Scottish corporate body all the powers that it needs to serve the Scottish Parliament well. If we can have something roughly similar, I would be very content.

In terms of scrutiny of the corporate body, in Scotland it is done by a finance committee. We need some form of scrutiny—I do not disagree with that. Again, we need to think about exactly how we do it. It is not important for the White Paper and the draft Bill, but it will be important for us to put into Standing Orders in due course. So, my answer is ‘Yes, we need it’. I think that a finance committee sitting just for that budgetary period might be an answer, but there are other possibilities as well. We could do it in the Chamber.

[114] **The Presiding Officer:** I will intervene briefly before I call Kirsty, who has another question, I believe. I think that we may be in some danger, John, of getting into problems of nomenclature here. I think that what we were referring to is the fact that, in your letter to the First Minister, you say that a statutory National Assembly commission should be created. He responds by saying that they are making provision for this in the Bill, although there was no specific reference to the White Paper. I assume that that is what you were talking about, Kirsty?

[115] **Kirsty Williams:** Yes, that is it.

The Deputy Presiding Officer: We have just moved on. At that time, I thought that the door was shut, but it is not. I think that it is open, in which case, my ideal position would be that we should do it.

[116] **The Presiding Officer:** Can I pursue the issue of the commission further, unless other Members have that question? I take the First Minister’s letter as the latest thinking of the Government of Wales—if I can use that expression—on this matter. Therefore, it reflects what is likely to be in the Bill, because he says that they are making provision for this in the Bill. You foresee no problems in transferring the House Committee’s activity into a commission, but would you see the commission structured differently to the House Committee, which is, after all, a creature of our Standing Orders, and on which the poor Presiding Officer does not even have a vote?

The Deputy Presiding Officer: Yes, I was mixed up. I was originally talking about our Standing Orders, and that we can do fine ourselves. We ought to have a statutory corporate

body.

[117] **The Presiding Officer:** Could I ask you not to use the words ‘corporate body’, as that is the Scottish experience? That would confuse us again with a ‘body corporate’, which is a late, lamented structure that we are now moving out of.

The Deputy Presiding Officer: I stand corrected; it is just that it says ‘the Scottish Parliamentary Corporate Body’ in section 21 of the Scotland Act 1998. So, shall we call it a ‘statutory commission’?

[118] **The Presiding Officer:** What you asked for in your letter to the First Minister was ‘a National Assembly commission’. I think that we are very happy with that, are we not?

[119] **Kirsty Williams:** I was happy—well, potentially.

The Deputy Presiding Officer: ‘Statutory commission’ is fine by me. However, importantly, I would like to see it governed by powers similar to those contained in the Scotland Act 1998, namely section 21 and Schedule 2, as a guide.

[120] **The Presiding Officer:** Jane Hutt will ask the next question and then David Melding. I promise that I will not interrupt again.

The Deputy Presiding Officer: No, do—put me right.

[121] **Jane Hutt:** John, your paper clearly demonstrates that, as we said at the last House Committee meeting, the First Minister’s response was very much welcome on the points that you made in your earlier letter. I want to tease out this issue about the financial arrangements a bit more.

You will know that we have had a small budget and a light touch, as it were, in terms of that kind of scrutiny and budget making, and that has to be much more robust and rigorous, as you have expected; I think that we would find that to be the case. However, we will need to extend the powers and the role and the scope of the Assembly Parliamentary Service, and Lorraine has already led on this in terms of those discussions. Therefore, do you have any more thoughts about the financial arrangements? I believe that, in Scotland, there are special procedures for determining how much the Parliament should spend on its own administration and on public audit. I think that that will be a key issue for us in terms of how much we receive for the administration of the Assembly.

The Deputy Presiding Officer: The Scottish model—and we were both there last Monday—demands that the budget be approved by a special finance committee. That is one way of doing it. However, on the other hand, the process that we use for scrutinising the Government budget now is to debate the Government’s draft budget in the Chamber, and then, six or eight weeks later, we have a final budget after Members have been able to discuss it and after it has gone before committees. That is an alternative way of doing it. If you like, the House statutory commission budget could be laid as a draft budget before Plenary in exactly the same way as your Government’s budget is at present, and it could go through the same procedures. So, those are two ways. I do not want to distinguish between them, because I would like Members to think about it. If we can come up with a consensual view, then let us do it, but if we cannot, we will have to make a decision one way or the other. It has to be robust and open.

9.30 a.m.

[122] **Jane Hutt:** I will follow on from some points made earlier on about staff, capacity and competency. Do you have any thoughts on what Members will need in terms of support, backing and expertise from the Assembly Parliamentary Service, in terms of its new roles and responsibilities? If so, how can we deliver that?

The Deputy Presiding Officer: The latest review of the Senior Salaries Review Body provided each Member with two and a half members of staff. I would have thought that that would be adequate at this stage. Currently at Westminster they can have three staff, and there could easily be discussion about that. However, we do have an extra half member of staff, and my view is that we ought to wait to see how it goes for a year or two. When we get into drafting primary legislation, and it is in full swing, we may need to revisit that and ask the SSRB to review the salary allowance. Personally, I am open to that, but I cannot give you a sensible answer at this stage, since I do not know how it will develop. This extra half a member of staff from this year is welcome, however.

As far as expertise is concerned, we now have a good team at Members' Research Committee Services. You will get feedback from ordinary Assembly Members as to how they feel they are being served when they ask questions of MRCS. Do they get the necessary answers so that they can scrutinise Ministers or whatever else they might wish to do? My feeling is that it is working well, and we may need to augment staff numbers in years to come, but I think that with this process starting slowly and speeding up as we go on, it is an excellent reason for us not to do anything too drastic, while remaining open to the possibility that we may need to augment expertise in any particular area.

[123] **Jocelyn Davies:** This is more of a comment than a question. You remarked on the current competence of drafting within the Assembly and I know that you keep a careful watch on that. It has improved a great deal, but you made the point that it would not be robust enough for primary legislation. You cannot have what there is not; it is like saying, 'I need a dentist therefore I can have a dentist'. It does not happen like that, does it? Where will we find these people? It is all very well to say that we need this expertise, but is it there?

The Deputy Presiding Officer: Yes, I think it must be. Government will have to get its own parliamentary draughtsmen and draughtswomen in for primary legislation. It already has lawyers to make sure that statutory instruments are right; Jane could tell you about that. Statutory Instruments are not always right, and they are withdrawn due to flaws, and they have to be re-tabled and brought before the Business Committee a second time. I do not think that we can afford to do that with primary legislation, because this will be very public and will affect the country very much more. Although the Government will have to get it right, we will have to have the experts here in Paul Silk's department, making sure that legislation is in order, rather than right. It is for the Government to argue whether or not the legislation is desirable, but we would have to get it right to make sure that every amendment is in order, that there are no inconsistencies between amendments, and that the work of setting timetables for tabling amendments, and going through a line-by-line examination of primary legislation, is done properly and without any room at all for error. So, there will be that responsibility on the new APS, but equally, at the end of the day, Government carries the can for the legislation it proposes and asks Plenary to pass. It will clearly have a much greater expenditure in ensuring that legislation is drafted by parliamentary draughtspeople.

[124] **The Presiding Officer:** Before I ask David Melding to come in, have you considered the position of what is currently our Standing Order No. 31, namely legislation or proposals for legislation which emanate from Members, as opposed to from the Executive? How do you propose that that might be dealt with?

The Deputy Presiding Officer: It is early days, but I refer to it in paragraphs 13, 14, 15 and 16. You will notice that the issue is not only Standing Order No. 31 legislation, but private Bill legislation. Although you did not ask this, Dafydd, I think that there is a good case for us asking for private Bill legislation to be taken over by the Assembly. It is usually about matters that are of concern to us in Wales, such as extensions to the Aberystwyth jetty, marinas or whatever. It is that type of local legislation, which properly should, I think, for better quality of decision, at the end of the day, be done here. As you know, in Westminster, there is never time for it, and if a Member shouts 'object' at a particular time, then that is the end of that legislation for at least six months before the chairman of Ways and Means manages to put it down as private business for a Second Reading debate. It can take two or three years before these things go through. I am not saying that we should rush legislation like this, but I am sure that private legislation would get a much fairer, better and more accurate treatment if it were the prerogative of the Assembly to do it.

To return quickly to your point about Standing Order No. 31, obviously it needs to be done. It depends how we do it; are we still going to allow every Member, once in a four-year term, to have a backbench piece of legislation? I hope we could do that, although we might not be able to do it initially. In Westminster, those Members of Parliament who secure seven places, I think, in the private Member's ballot, have access to parliamentary draughtsmen in order to fashion their legislation. However, I suspect that we would probably get lobby groups presenting Members with ready-made, off-the-shelf Bills a lot more because it would be primary legislation and there would be that incentive; that is, actually, I am sorry to say, absent at present.

[125] **Jocelyn Davies:** On those two points, and I am sure that Kirsty was going to make the same point, when we visited the Scottish Parliament last week, we found that the private Bills were taking up a great deal of MSPs' time. We were there on a Monday and the committee was meeting that day to consider a private Bill, and it had been meeting for many months on Mondays and Fridays to consider that Bill. Even though you make the point that it would be better that it were done by the Assembly, do you think that Assembly Members would have to meet as a committee to consider that legislation? We could find ourselves bogged down with a great deal of private Bills.

The Deputy Presiding Officer: My understanding of Scotland is that it goes through the whole of legislation, as Westminster used to do. However, I think that the modernisation of our procedures would mean that there would be some preliminary scrutiny here in the National Assembly, and a vote in principle, and that it would then go to a public inquiry under an inspector. It would be taken away completely from the Assembly and perhaps come back for a final vote. All these things need to be thought through and put right, but I hold by my original contention. I think it would be better and we would have better legislation as a result.

[126] **Jocelyn Davies:** On private Member's Bills, I would imagine that an Assembly Member who was successful in a ballot could choose to do something that would require an Order in Council.

The Deputy Presiding Officer: Yes, that is right. It would go through the procedure.

[127] **Jocelyn Davies:** It would go through the procedure, so there would probably be a great deal of work involved in that. How would the bid for that Order in Council be made? Would it be made by the Assembly to the Parliament, or by the Executive here to the Executive there? Who is the bid made by and to whom?

[128] **The Presiding Officer:** Bearing in mind that an Order in Council is unamendable in both Houses of Parliament, which makes it even more complicated.

The Deputy Presiding Officer: Yes, but remember that the Order in Council would not give the details of the Bill. I believe that David Lambert has it in his paper that an Order in Council would be an affirmative resolution that this particular piece of legislation is passed and it may or may not be amendable. It would not be amendable in Westminster—it would be a ‘yes’ or a ‘no’. I am reasonably attracted to the Scottish solution, that when somebody—Government, usually— produces a piece of primary legislation, it goes to a committee and it is there for scrutiny for about two months; so, it is properly scrutinised. If a private Member had a piece of legislation, then some help with drafting would obviously be required, but it would then go to committee and through the procedure.

9.40 a.m.

However, I hope that this committee recommends to Westminster that there ought to be no bids for Orders in Council and one-and-a-half-hour debates on affirmative resolutions. We ought to be able to have as many as we wish of those. It is certainly conceivable that if there were two or three Orders in Council at the same time, they could go through both Houses and be debated at the same time, for a one-and-a-half-hour debate with three different votes at the end of it. That often happens in Westminster, when they debate amendments to primary legislation. There might be 300 amendments, grouped into about 10 groups with 30 amendments in each group. We will have to have something that is not as bad as that, but we will have to have procedures that can take many amendments in a reasonable amount of time. Obviously, the trick is to do that, but not to lose out on important debates that Members wish to have in their scrutiny of legislation.

[129] **The Presiding Officer:** Taking this a bit further, speaking completely impartially, Standing Order No. 31 is one of the worst things that we have in terms of non output. In many cases, and pardoning the Minister’s blushes, what has always happened here is that a Member comes forward with an idea, which is technically an instruction to Ministers under our present system, the Government was able to vote down that instruction, so nothing happens except for complete frustration on the part of the Member and whoever was supporting that Member.

Let us take that into the new scenario. Do you envisage that we would go through all the processes of the Bill here, and then the request would be taken down to Parliament presumably by the learned clerk, on the 125 high-speed train, with a little ribbon around it, because it would be a request from the Assembly not the Government—

The Deputy Presiding Officer: Wrapped up in a red ribbon?

[130] **The Presiding Officer:** There would also be a green ribbon; it would be wrapped up in red and green. It gets there and it appears in Westminster. Do we then go through the Order in Council process at that stage? What if the Secretary of State says ‘No, no, we cannot have this one’, or someone else, which we will come to later, such as the House of Lords Select Committee on Delegated Powers and Regulatory Reform says, ‘You are not going to have that one’?

The Deputy Presiding Officer: I cannot prejudge that, but I would like to see the procedure for a private Member’s Bill, if it is passed in Plenary, following the same route as Bills proposed by the Executive. It would be primary legislation and, in my view, there should not

be a different procedure simply because it emanates from a backbench Member as opposed to a member of the Executive.

[131] **The Presiding Officer:** I have not discussed this with the Minister but, presumably, the Welsh Government's proposals for legislation would go through the Orders in Council procedure before they were legislated upon here. What about the labours of an ordinary Member if that were the reverse process, and it was after the Bill had been passed here that it had to go through that procedure? Do you see what I am getting at? I am trying to point out that it might be even worse that Standing Order No. 31 has proved to be.

The Deputy Presiding Officer: Speaking personally, Standing Order No. 31 is unsatisfactory at present, because it is not a backbench Member's motion, because it has been taken over by the Minister. I would like to see a system where backbench Members, ideally, have one chance in every four years to produce legislation. The Executive ought to lend the Member its expertise, but the Executive would then obviously take its own view of whether that piece of legislation was right, whether it was amendable or whether it should be rejected in the other place, in Parliament. There, of course, are silly ways of doing things, by putting people up to speak for about 50 minutes so that time runs short.

[132] **The Presiding Officer:** You never did that, of course.

The Deputy Presiding Officer: Perish the thought.

Of course I used to do it, but as you get older you realise that it is stupid to do so. It is far better to have a proper procedure and then to decide whether you want the Bill or not, and to have a vote on it. There are other considerations; you do not want backbench Members hanging about here on Thursday evening when they could be somewhere else, simply because there might be a vote on a private Member's measure. However, we can arrange to have votes at convenient times for Members, but the principle ought to exist that Members ought to have that possibility. I would like to see the legislation fashioned here.

Obviously, there would have to be a relationship with the Secretary of State for Wales. Requests for legislation would then go to the Secretary of State for Wales, and he, in this particular case, would have to say 'yea' or 'nay', and, if he were to say 'nay', well, let us see what happens when he does. However, in practice, I find it difficult to believe that a Secretary of State for Wales would say 'no' to something that has been passed by the Assembly and which does not impinge on any of the non-devolved matters that are properly the concern of Westminster.

[133] **The Presiding Officer:** David Melding has been very patient.

[134] **David Melding:** I hope that I am always patient, Presiding Officer.

I want to ask you specifically how likely it is that the enhanced or even mock primary legislative process, or whatever we call this creature, will operate through the medium of Welsh, because this will be the most extensive line-by-line discussion of legislation in Wales in Welsh. I would be very concerned that we improve the current arrangements, which often mean that the Welsh-language version of any piece of legislation is often delayed. Also, there are people who can help the committees to look at legislation effectively through the medium of Welsh line by line. It seems to me that there is a real possibility of impairing the process via the medium of Welsh, which will infringe very much on our bilingual principle in the Assembly.

The Deputy Presiding Officer: You raise a very important point, and I have no answer to it. I think that we, obviously, will need more expertise in translation. We should not look at that as a penalty, as it is something that we simply have to do because ours is a bilingual nation. The second problem, of course, is that if we try to get more people here, the Executive will get worried because it will not be able to have people for its translation and drafting. We need to go hand in hand with the Government on this matter, so that we do not try to beggar each other. However, there is a difficulty, for example, in that if somebody accepts an amendment in English, can the translators assure us that they can do a translation that faithfully reflects the amendment made in English, or vice versa if somebody tables an amendment in Welsh. I would like to think 'yes', but, inevitably, you would probably be able to give a better answer to that than I can, Dafydd.

[135] **The Presiding Officer:** I promise you, I am not answering anything today. However, since David has raised the matter, it is a field that we have not yet looked at or received evidence on. If there are people listening to the broadcast of these proceedings who regard themselves as experts in this field, they might like to think about it.

The Deputy Presiding Officer: We obviously should seek advice or at least see what they do in places such as Quebec or those countries where they do draft in more than one language.

[136] **The Presiding Officer:** I think that, in Quebec, they mostly speak French.

[137] **David Melding:** I accept your answer, Deputy Presiding Officer, and it is an area that the committee perhaps needs to look at. It is not just a matter of cold translation as it is about the whole vitality of debate in committee and having lawyers who are presumably native Welsh speakers, or lawyers who, having learnt the language, are able to discuss legal concepts through the medium of Welsh. That is quite a challenge, and I suppose that I am saying that that is something that we should be planning for. We should anticipate that this will be quite a challenge for us. It is a challenge that we should welcome, as you said, but it will not be addressed satisfactorily unless we accept that it is a major piece of work that we need to plan for.

The Deputy Presiding Officer: Thinking about it, something that could perhaps provide a little solace is that Members in committee, even when undertaking line-by-line scrutiny, will not be worried too much about the grammar or the technicalities, although they will on occasion, which is why I think that what you ask is important. However, I think that Members will, by and large, still try to get political principle, and the arguments will very much be ones about political principle and the types of debates that we have here now, albeit much more focused. The debates on particular arcane points that require close and careful scrutiny will, I think, be very few and far between.

[138] **Carl Sargeant:** Briefly, John, just to take you back to a statement that you made earlier, there have certainly been discussions with other witnesses as to whether primary legislation is primary legislation and so on, particularly with regard to your comment on the Secretary of State and the Orders in Council going back to Westminster for approval or not. As has been asked before, if a future Government at Westminster is of a different political colour to that of the Assembly, do you see that as a major obstacle in the proposed procedures?

9.50 a.m.

The Deputy Presiding Officer: That is a political question, and I, of course, have my views.

I do not think that it should necessarily change one way or the other what you should recommend to the Westminster Government about how it drafts the Bill, but, to put it into a couple of sentences, I think that, for it to properly mature, this Assembly needs a change of Government. I am not being party political here; it simply needs a different administration so that we mature and do different things. It also needs a situation where there is an administration of one type in Westminster and an administration of another here. In the fullness of time, that is bound to come about. We just have to wait. Meanwhile, our job is to try to fashion the changes that are now being offered to us, and to get them right and anticipate what might happen and what inevitably will happen and ensure that the rules that we fashion are robust enough to be able to manage that type of situation. On whether they will be robust enough, you can talk to different Assembly Members in the National Assembly about that and you would probably get different answers. Things would change anyway over the years.

As far as Standing Orders are concerned, if we do it on a gradualist basis, which I think we can do and which I recommend, we will continue to be able to change them if there are different administrations or if things change. As far as the new system with Westminster is concerned, if it needs change, different administrations in Westminster will have that prerogative and will be able to do it.

[139] **The Presiding Officer:** Unless colleagues have any more questions, I will thank John for stimulating our discussion on this as usual.

The Deputy Presiding Officer: Thank you.

[140] **Y Llywydd:** Mae'n bleser mawr gan y pwyllgor groesawu'r Athro David Miers, David Lambert a Marie Navarro.

[140] **The Presiding Officer:** It is the committee's pleasure to welcome Professor David Miers, David Lambert and Marie Navarro.

[141] **David Melding:** I will start with a question on definition. I think that we are reaching a conclusion in this committee that the prospect of having enhanced powers and powers via the Order in Council process takes the Assembly very close to having some form of primary law-making power—if you accept that there is a difference between primary law making and secondary law making. At least the Assembly will be less derivative and will have greater scope for wider-ranging legislation, if I can put it that way. I notice that in your paper, David Lambert, you say that you think that that is quite durable and that it would effectively survive any change of Government because Westminster would interfere with it at great cost. One of you points out that the Acts of the Scottish Parliament are technically subordinate legislation, but they are not really, in the world of practical politics, because the costs of annulling them from Westminster would be so enormous as to probably spark a constitutional crisis. So, is it your view that the system would be as robust as that and that, in effect, the Government at Westminster would interfere at its peril?

If we are in a process that, as far as legislation is concerned, is much more demanding of the Assembly and much more robust and is likely to take an awful lot more time, what sort of capacity will we need here in the Assembly, given that it is very unlikely, in the first instance, that we will have any more Members and that we would be operating as a legislature of 60 people, which is one of the smallest legislatures in the world?

Mr Lambert: I think that it would be robust once you have an Order in Council. David will be dealing with the possible problems of getting an Order in Council, but, once you have that, Parliament and central Government will probably leave us alone, provided that they are

satisfied that we are working within the provisions of the Order in Council.

In relation to the second part, Marie and I have given an illustration, based on the example in the White Paper, relating to an Order in Council that provides powers for the Assembly to make laws for the welfare and care of children in Wales. We have calculated that it would be possible, if you had an Order in Council of that width, to disapply something like 30 Acts of Parliament relating to children, in relation to Wales. That really would need expert staff to be able to do that. We never had that staff in the Welsh Office; in fact, no Government department has that kind of staff because that rests solely with the Parliamentary Counsel. I foresee that you would have to second a number of Parliamentary Counsel staff, possibly two or three, for at least the first four or five years, because nobody could draft on that magnitude, disapply Acts and put an Assembly measure, or whatever it will be called, in its place. I would not have the capacity and, with all respect to my colleagues, I think that they would accept that they did not have it either in the Assembly.

[142] **David Melding:** In terms of how the Welsh statute book would look, do you think that the system of using Orders in Council would be fairly understandable for the public, for those who have specific interests, such as voluntary organisations, pressure groups, business interests and the like? Will it be clearer than what we have now? Will people realise what scope there is for change in the Assembly to influence public policy, or will the system merely be more confused? You could argue that we should take Occam's razor to all this and say, 'In effect, this is a Scottish Parliament by other means, or at least a Northern Ireland Assembly by other means'. Why do we not just recognise that fact and have a more direct expression of where the Assembly has primary powers and create that in statute at Westminster, rather than having this constant rolling programme where we supplicate to Westminster?

Mr Lambert: I think that Marie, who is the editor of our *Wales Legislation Digest*, would probably agree that we could not have a more confusing system than the present one. It is dreadful, because every time an Act is passed by Parliament, poor old Marie has to read every line of every section of that Act, just in case there is a mention of the Assembly. Just because something is outside the 18 subject areas of Schedule 2 to the Government of Wales Act 1998, it does not necessarily mean that there will not suddenly be a reference. You cannot have anything worse than that.

We hope that, gradually—it really will be gradual—these Orders in Council will enable the Assembly to replace its diverse powers in relation to a particular policy area by one measure. On that basis, the people of Wales would not be interested in the Order in Council, but they would be interested in the measure. We would hope that everything relating to the protection and welfare of children in Wales, for example, would be in just one measure, instead of scattered among something like 400 sections of 29 Acts. I think that that would be marvellous. It is the reason why we set up the *Wales Legislation Digest*, because neither of us, nor David, could see any other way of trying to explain the powers of the Assembly.

Professor Miers: Could I just make an observation in response to Mr Melding's question on public confusion? I think that it is important to note that the public would need to recognise that there are two distinct steps in the case of the enhanced settlement, the Order in Council procedure. The first step is obtaining the Order in Council. That, I think, will take some time in any case. David Lambert has already remarked on getting things right in terms of the application of laws related to the protection of children, for example. John Marek spoke about not getting commas out of place in primary legislation, in Bills, but that will apply with equal force to the draft Orders in Council that will go from the Assembly to the Secretary of State and then to Parliament, presumably to some joint or separate committees on the floor of

each house. That procedure alone will occupy a great deal of time and must occupy time on the floor of the Assembly, in Plenary and in Committee, just to get it right. That is quite distinct from the later application by the Assembly of its powers, thus granted, in any particular case. That may be one, two or three years later than the procedure for getting the Order in Council, and then the getting of the Order in Council. Sorry, this is quite circumlocutory, but to come to your point, after two or three years, the public might well say, ‘Well, you have the Order in Council, so why you are not doing anything about it?’

10.00 a.m.

[143] **David Melding:** The process as I understand it—and please interrupt me if I am wrong, because I probably started off thinking that it was the reverse of what I am going to describe—is that the Assembly, often prompted by the Government, will wish to seek an Order in Council governing, say, the welfare of children; it will then go through a parliamentary process, in effect, here, and deliver a finished Order in Council detailing all the areas in which it wants to amend or alter law. That is a substantial piece of work, which could take up to 12 months in the Assembly system, if you had a lot of time for it. Is that correct? We would not simply be asking for an Order in Council that says—I think that we were told that, in the House of Lords, it would just be like the long title of a Bill, and we would then get the powers after it has been passed as an Order in Council. The process that you are describing is a full parliamentary procedure, which would then be subject to approval by affirmative vote via the Order in Council process. The clerk would dress up in some court uniform that we would devise, get on the 125 train to deliver the Order in Council, bedecked in ribbons, and Parliament would say ‘yes’ or ‘no’. Have I got that right, or am I fundamentally misunderstanding the process?

Professor Miers: My understanding of what is proposed here is that, in the first instance, there would be a request from the Assembly. The question immediately arises as to how that request would come to be formulated. A necessary condition of that formulation is that it would need to be done with attention to every comma and detail by the Welsh Assembly Government. It would then have to be debated here. The paper that I have submitted suggests that that debate would be analogous to a Bill debate in Parliament—in Plenary and committee and so on—so that when that request eventually comes to be considered in Parliament by, let us say, the Delegated Powers and Regulatory Reform Committee in the House of Lords, the committee can be satisfied that proper consultation has taken place, because that is one of the requirements that it imposes.

If the kind of criteria that that committee and the Commons equivalent impose on Henry VIII clauses, in regulatory reform Orders and otherwise in relation to delegated powers, are to apply—and I do not see why they should not; the Lords committee said that it would approach matters in Wales that are devolved to the Assembly in the same way—the same kind of rigour is going to be applied in Parliament. Therefore, before it sends the request, the Assembly will have to have gone through quite an elaborate procedure. In effect, it is like a Bill, but I take it that it goes to the Secretary of State first, because that is where the request goes. I will pause there, if that is okay.

[144] **David Melding:** Most of us are laymen and laywomen, as far as the law is concerned. It is important to understand what is being suggested. I will stick with the example of welfare for children. I had assumed that, if we were to have an Order in Council that granted us powers in relation to the welfare of children, we would not be asking for that power in principle, as it were, without any detail. We would be saying that it was because we wanted to establish a children’s commissioner, a unified regulatory system of inspection, or because we wanted greater control over foster carers and so on. Therefore, the detail would have to be

in the Order, rather than it just being a matter of the principle of whether the Assembly should have competence to pass enhanced legislation on the welfare of children.

Professor Miers: I agree with that, but the point that I am making is that that is not the end of the road.

[145] **David Melding:** Of course, once that has been done—although you have to present the detail in the first place—you more or less have the power to change whatever was the detail, have you not? Frankly, it is a very odd combination. You have the full parliamentary process in the first instance, to justify what you want to do, but, once that has been done, Parliament is out of the loop.

Professor Miers: Parliament is out of the loop, yes.

[146] **David Melding:** That is unless it comes in with its heavy boots and says that we will take all this back. We have already agreed that that is rather unlikely.

[147] **Jocelyn Davies:** Paragraph 1 of David Miers's paper states, in relation, I imagine, to new legislation that is going through Westminster, that Whitehall should, as a matter of principle, move to giving the Assembly wider powers, but that, in the case of Orders in Council, we would have to justify wanting those powers. I would argue that you should, as a matter of principle, be able to say, 'We would like powers over X area', without having to justify that or to gain approval for how you would implement those powers.

Professor Miers: That is right. There are two separate issues here. Clearly, where you are dealing with Bills being enacted by Parliament, and not dealing with a request that Parliament devolve delegated powers to the Assembly to make subordinate legislation to amend its primary legislation—and not just existing primary legislation, but future primary legislation—that is qualitatively a very different exercise for Parliament. However, going back to developing the current settlement, the principle to which I refer is one of them, and you probably recognise it as one of Richard Rawlings's principles. My only comment on this is that it falls to Ministers, the Secretary of State and the UK Government to determine whether, as a matter of policy, it wishes to see devolution develop in a way that starts from the presumption that, where departments are devolving or delegating powers to Ministers or statutory agencies or bodies in England, those delegations should apply equally to Wales. You start from that presumption, rather than the other way around, as has been argued by many other writers.

Mr Lambert: I will just add to what David has said, if I may. There is that matter that you have both raised referred to in the end of paragraph 3.21 of the White Paper, which states that this consideration of the draft Order in Council

'could be informed by understanding the use the Assembly might propose to make of these powers in the immediate future'.

I think that 'could' is probably 'should', really. However, and I think that this was Jocelyn's point, as the power would be a general and continuing one for that particular policy area, the understanding of how the powers would be used would serve only as an example of what could be done. The issue for the committees and for each House would be the appropriateness, in general, of delegating legislative authority to the Assembly on a particular policy area. So, I think—and David has certainly more experience than I do—that they would want to see initial reasons why you would want the Order in Council, but after that, to take David's point, you are on your own. You are amending new Acts of Parliament and

substituting them. It is a tremendous thing.

[148] **Jocelyn Davies:** Yes, you could, for example, say that you wanted to do A, B and C and then later do D, E, F, all the way to Z, if you wanted to.

In your paper, David and Marie, I feel that you are being quite optimistic about what we will be able to do with Orders in Council. On the bottom of page 4, under the heading of the benefits of the White Paper, in the last paragraph on that page, you say that should the Assembly vote overwhelmingly for a new Order in Council, it would be very difficult for the Secretary of State to refuse to put the draft to Parliament. Do you not remember, when we voted on free personal care for the elderly, an official at the Wales Office describing the Assembly as 'pathetic'? I think that we have a bit of history there, in that an official felt that he could describe the Assembly's vote as pathetic. So, I feel that you are being over-optimistic on that. You mentioned the Rawlings principles earlier, but they have never been taken up even though the Assembly unanimously supported them and there have been a number of resolutions asking for broad powers in new primary legislation. Those have been completely ignored. So, I do not know why you are so optimistic about that.

Looking at stage 2, we will have the transfer of functions—this bundle of illogical powers that we already hold—and we will have the powers conferred on us since 1999, which are also illogical in how they have been conferred, and we will also have the Orders in Council powers. I think that it will be a very complex situation. With those powers we will be able to disapply Acts, amend and repeal things, and we will be creating these Assembly measures. It just sounds like a nightmare. From the lawyers' point of view, is there a possibility that we will need a lot more lawyers just to be able to—

10.10 a.m.

Mr Lambert: You have before you—in Marie and me—the most positive people that you could possibly have on this White Paper. We really are positive—

[149] **Jocelyn Davies:** I think that you are saying that the situation could not be worse than it is at present. Therefore, this is—

Mr Lambert: Absolutely. Yes. Taking your first point, the deregulation and contracting out committee in the House of Lords, in commenting on the Wales Bill on prevention of smoking, did hint that we have a democratic body in Wales that should be responsible for carrying out its own powers. It actually said that, 'If this Bill were giving powers to the Secretary of State in relation to England, we would throw it out, but this is Wales and therefore we would like to leave it to the House of Lords to discuss whether these very wide powers should be given to Wales, because this is a democratic body'. I just have a feeling that, if you had a 100 per cent vote from the Assembly, the Secretary of State for Wales, having set up this body in the first place, would find it extraordinarily difficult to say 'no'.

I also feel that, if he says 'yes', the House of Lords and House of Commons committees looking at the Order in Council in draft, and then the debates in the Commons and the Lords, would also bear in mind the fact that this request comes from a democratic body, not from the Wales Office, where we were treated with disdain many times. This body is quite different.

Secondly, in respect of what I said to David Melding, it cannot be worse than it is at present, and our example at the end of the paper shows what we think that you can do in relation to children. It must be better. Forget about England; it has to put up with 29 Acts in relation to children. We have the possibility of saying that this is our one law on the protection of

children. Marie and I think that that is tremendous.

Ms Navarro: To talk a little more about simplification, now, before the Assembly can exercise something, we have to go through a huge list of single powers to know what can be done. Under the new system, you would first go to the Orders in Council. You would check whether the power or the area of law that you need is included, and forget about the transfer of functions Orders as they are now, and the hundreds of Acts of Parliament. You would only concentrate on that area, so that simplifies everything. In the end, if that system is put in place and remains, in 30 years' time you will need only a few wide Orders in Council. That simplifies my day-to-day to work in reading through everything.

Hopefully, the second step would be for the Assembly to make measures under these Orders in Council. These measures will consolidate the whole legislation that applies to Wales. That is where I see the beauty of the proposal, and that is where I am really impressed. I really like the system.

[150] **Jocelyn Davies:** That is assuming that we will have wide powers given to us in Orders in Council. I think that you are being over-optimistic. Coming to the example that you give in your paper, which comes from the White Paper, about powers in relation to the protection and welfare of children, a great many Assembly Members are very disappointed that Westminster drew back from its promise to ban smacking. If we had this, would we be able to ban the smacking of children in Wales? If we are talking about the protection and welfare of children and that Order in Council, would we then be able to say, 'Okay, you can still take your children across the border to England to smack them, as long as you do not leave a mark'? Would we be able to ban smacking in Wales?

Mr Lambert: First, of course, it depends on the width of the Order in Council.

[151] **Jocelyn Davies:** There you are.

Mr Lambert: Well, yes, but if it is on the protection and welfare of children, you would be able to do so. Again, and you will notice how enthusiastic we are about it, paragraph 3.16 states that Orders in Council will:

'give the Assembly powers, in specified areas of policy,'—

the protection of the welfare of children, for example—

'to modify—ie, amend, repeal or extend—the provisions of Acts of Parliament',

and

'to make new provision.'

So you are not constrained by the provisions of the existing Acts; if those Acts fall within your Order in Council power, you can amend, disapply or do whatever you like and make entirely new provisions in relation to something that is not in the Act. That is fantastic—well, we think that it is.

[152] **Jocelyn Davies:** Yes, but as you say, the devil is in the detail.

Mr Lambert: Yes, but you have an example in the White Paper. It is something rather wider; in fact, we think that this example is extraordinarily wide.

[153] **Jocelyn Davies:** Can I ask you about your conclusion? You say that the British constitution is flexible, but do you really think that Orders in Council are a suitable method for national governance?

Mr Lambert: That is a political question.

[154] **Jocelyn Davies:** You are a lawyer.

Mr Lambert: For me, I do not mind the machinery, provided that you can achieve something better than we currently have. I do not mind what it is, but all of us in Wales must have something better than we have at present.

Ms Navarro: You must have something workable, too.

[155] **Jocelyn Davies:** In the last paragraphs, you mention the Sewel convention, and we have asked other witnesses about this. In your paper, you assume that there will be communication directly between the Assembly and the UK Parliament on something that will work like the Sewel motion. However, in Scotland, in practice, communication is between the two Executives. There has been criticism of that mechanism there, because you may very well agree to allow the UK Government to legislate on something that is a devolved matter, to save yourself resources for a start, as well as a lot of time and effort. However, that legislation sometimes changes then in Westminster. It is subject to amendments or to changes, and you may not like the look of the legislation, but there is no way of revisiting it. Therefore, do you have any idea how a Sewel mechanism may work between the Assembly and Parliament?

Mr Lambert: I am sure that David can say more than I can on that. However, we said that, given that there is this recognition that the Assembly, because of the extent of an Order in Council, can amend or set aside a new Act of Parliament, I just feel that Parliament will want to speak to someone before it enacts new legislation just to see whether or not the Assembly would intend to set it aside. To me—and, I think, Marie—that is not just the Assembly Government; that is the National Assembly. Parliament will ask itself what on earth is the point of making a new Act if the Assembly can set it aside the moment it is enacted—unless there is a proviso that says that you cannot change it. Again, it is tremendously flexible.

[156] **Jocelyn Davies:** Do you have anything to add to that, Marie?

Ms Navarro: No, I agree totally.

Professor Miers: The only observation that I would make on the possible changes in Parliament on a Sewel-type Bill is that, like any other Bill, if there were proposed amendments, you would go back to Ministers, and UK Ministers to determine what they want to do about the amendment. I assume that that would be the case on a Sewel-type Bill. You would come back to the Welsh Assembly Government and ask, 'Are you content with the amendment that has been tabled in the House of Lords or the House of Commons?'. However, you are right that, ultimately, the decision will be for Her Majesty's Government, subject to whatever is built into that Sewel convention between here and London.

[157] **Jocelyn Davies:** Well, we would not call it Sewel.

Professor Miers: No, I am sure that you would not.

[158] **Jocelyn Davies:** We could come up with something else—perhaps we would call it the Lambert convention.

Professor Miers: I am just using shorthand.

[159] **David Melding:** I feel sorry for Lord Sewel—I am sure that he did not realise that his name would be blazoned in history in this way when this amendment went through at the last minute.

[160] **The Presiding Officer:** Lord Sewel is doing fine.

[161] **Jane Hutt:** I want to try to take forward this issue regarding the fact that we have opportunities that we have not had before, and we will have a much greater clarity in terms of the Welsh statute book, which will please Marie in her endeavours. We will not have to shut down debate and discussion because we say, ‘Oh well, that is for primary powers’, which, we must accept, has been the outcome of some of our debates in the Assembly, whether it is inspired by the Assembly as a whole or the Government.

10.20 a.m.

As David has explored in his questioning, we will need to do our job properly in order to get to the point where we have a measure that we want to take forward for an Order in Council. I see that you are all nodding your heads in agreement. The opportunities that you have very positively laid out are enormous, but would you agree that we need to walk before we run in terms of handling those opportunities, and how would you perceive that happening?

Mr Lambert: Perhaps David can answer on this too, but one of the things that we have emphasised in our paper is this statement that the Government intends to draft parliamentary Bills in the future in a way that gives the Assembly wider and more permissive powers as of now. The three of us think that at least you will have this power, which is in the Education Act 2002, to give effect to the Act. That power is, we think, quite wide, and it seems to us that you could experiment in the next 18 months in deciding how you give effect to an Act. It is quite different from making supplementary provisions—the sort of thing that I grew up with over the years in the Welsh Office, as well as transitional and consequential provisions. To me, giving effect to an Act is to say that if you think that a provision in an Act is unclear, or does not quite achieve what it ought to achieve, you can amend that Act. You are allowed to, anyway, under the provision of the Education Act 2002. It says that in making regulations to give effect to this Act, you can amend Acts. I think that you already have a starting point in the next 18 months.

[162] **Jane Hutt:** Any other responses?

Professor Miers: This would be in respect only of legislation that gives you that power. The question that always remains is whether Ministers will be prepared to say that they will give the Assembly powers to make such provision as it thinks fit with regard to certain aspects of transport, planning, health and so on as they were with the Education Act 2002. That is always a political question.

[163] **Jane Hutt:** I will just follow that up with you, David Miers. You mention in your paper the need for a change in political culture in London. Would you not say that we already have the indications of a maturing political culture, partly as a result of the joint scrutiny that emerged with the Transport Bill, and the fact that we virtually have framework legislation for the health improvement Bill in terms of smoking in enclosed public spaces, which will be

devolved to us to decide how to take that forward? Are you more optimistic, given the discussions that we have already had about the possibility of a different Government in Westminster, that there is a maturing political culture and a will, clearly expressed in this White Paper, to deliver those opportunities?

Professor Miers: Yes, I would go along with that. I confess that I have no direct access to how Ministers think on these matters, but considering what has already happened and assuming that what we read in the White Paper is a genuine, bona fide statement of intent by the Government, it must be read as contemplating that future Acts of Parliament are more likely to give the Assembly broader powers to do the kinds of things to which David has referred, and which the Education Act 2002 already allows.

Mr Lambert: The wording gives the Assembly wider and more permissive powers to determine the detail of how the provision should be implemented in Wales. That is pretty flexible, subject to the parameters of a particular Act.

[164] **Kirsty Williams:** I am still not quite buying your vision of a simpler world following all of this. For instance, you say that we would be able to ban the smacking of children had we had a previous Order in Council that deferred powers. The Secretary of State for Wales, however, has already said that if, for instance, we had an Order in Council on the organisation and management of local government, perhaps that could allow us to get rid of the 22 local authorities and create one, but it would not allow us to change the way in which local finance is managed, via scrapping council tax, because that would impact upon the Inland Revenue, or its equivalent. So I still think that we will potentially have huge areas where it is not quite as simple as you are suggesting it might be, and that Orders in Council will not be the free for all that we might expect.

Do you think that there is a danger, just as we did before the Assembly, of hyping up the opportunities and raising expectations about what we will be able to do, only to find that, in reality, we cannot deliver on that? We have already heard evidence from people who suggest that we will be doing the equivalent of seven or eight Bills a year. What do you regard as a realistic amount of work for the Assembly to get through? We are already hiring the lawyers and the extra parliamentary staff. Poor old Lorraine will be here until 9 p.m. and on Wednesday mornings. What do you think is a realistic workload, and what can we get through in this process?

Mr Lambert: Perhaps David would comment on the workload.

[165] **Lorraine Barrett:** Should we not go for quality rather than quantity?

[166] **Kirsty Williams:** They are very worried about quality versus quantity. I have always been a quantity kind of person myself.

David Lambert: All this is negotiable and I understand that you have paragraph 3.17 of the White Paper about not being able to interfere with policy areas, which are a matter for central Government, but there is a hint—so I understand from certain former colleagues of mine, with whom Marie and I keep in touch over tea and coffee when they come down from London—that you will have supplementary provisions in your Order in Council that will, with the agreement of central Government, allow you to amend certain provision that would, otherwise, be a matter for central Government.

It seems to me, therefore, that there is everything to play for because, if you negotiate with central Government, it may understand that you need a clearer package in order to fulfil the

requirements for local government. I cannot see community tax going, for example. This business about policy areas for which central Government is responsible is not immutable. It is not as of now. As I understand the thinking in places, which I had better not mention here, that is flexible and Whitehall could decide to give up a particular part of its retained policy areas and give it to the Assembly if it is supplemental to what the Assembly wants to do. Now, you will certainly not get community tax, I agree, but you may get little bits around the edge. So, again, there is a lot to play for. I am sorry to be so positive about this.

Ms Navarro: We have the three examples in the White Paper. Perhaps you will start with having very specific powers first on subjects and competence and then slowly, you will move towards the wider subject areas of policy. We do not know; it will depend on the policy areas in which the Assembly asks for powers and what the two provisos, namely never a full subject area and retained functions, will be.

[167] **Carl Sargeant:** The White Paper is very interesting and you were right to be very upbeat about it, which is encouraging. We all have our views on the devolution process and mine is about taking the people along with you through the process of change. I think that that is particularly important; that is where the White Paper comes into its own.

On your comments on the Orders in Council, we had an interesting discussion yesterday about those and primary and secondary legislations and about where they all sit, where people believe they sit and how important they are. I asked this same question yesterday, but it is also quite pertinent to today's discussion: do you believe that there is too much emphasis on the supposed distinction between secondary and primary legislative powers and do you think that Orders in Council, while recognising primary and secondary legislations, give us—Wales, the Assembly or whatever—the option to move forward very effectively in future?

Professor Miers: Clearly, that is so, and that has been argued for quite some time. If the Assembly had wide-ranging devolved powers, to go back to the example of the Education Act 2002, it would then have, by definition, the kind of legislative power that resembles a Bill but is not the same as a Bill. We really must understand that, it resembles a Bill, but it is not the same as that; it is not the same procedure, it is not the same in terms of constitutional significance, and it is not legally the same as a Bill.

10.30 a.m.

I will make an observation to answer Ms Williams's point about what might or might not be appropriate in an Order in Council. I used the adjective 'appropriate' partly because it is the adjective that is used by the House of Lords committee. Local government finance is clearly not an appropriate matter for an Order in Council. It is budgetary, it is finance, and I cannot conceive that, as things presently stand, Her Majesty's Government would permit the Assembly to go down the road of restructuring that. To go into this with a little more detail, appropriateness is defined, or conceived, by the House of Lords committee as things that are not large, controversial or politically contentious. With any matter of that sort, their lordships would simply look at it and say 'We are not having any of that.'

So, to return to your point, Mr Sargeant, therein lies the constraint, but it is an initial constraint and, again, to return to the point about workload and the subtext of some the questions that have been asked, the Orders in Council procedure puts an enormous premium on the ability of the Welsh Assembly Government to get it right from the outset. I think that that is absolutely crucial. It must not get it wrong in terms of either trespassing on paragraphs 3.17 and 3.18 or of the execution not being as clear as possible about how this power, granted under an Order in Council, will be used next week, next year or in a decade's time, assuming

that the primary legislation is not changed. If it is an open, and not time-limited, Order in Council it will mean that it is a continuing power. The burden that is going to fall on the Government here to get it right will be very substantial.

You talked about workload, but I have no particular insight into or grasp on what the implications will be for the Welsh Assembly Government. However, it is equally true to say that it imposes an enormous burden on the Assembly too. When the request goes from here to the Secretary of State, he will need to be absolutely persuaded that what he is then going to lay as an Order, ultimately, for the affirmative resolution procedure, is legally and constitutionally unimpeachable. That is why I have put so much emphasis on that in my paper; to me, that seems to be the crux of it. Of course, Bills present their own problems, but they are problems of a different kind.

[168] **The Presiding Officer:** I am grateful to colleagues and to the three of you for coming here today—for the papers and for giving evidence. I am cutting this short because we are, we hope, soon to be in audio-visual contact with the Scottish Parliament. I thank you, not just for what you have done for us today, but for being critical friends of this institution and the way that we have developed. It is important for all of us that we can turn to a department and a law school that provides academic rigour to the scrutiny of what we do. I hope that we will continue to work together creatively for many years to come, until the matters that we have discussed today are even further clarified.

Professor Miers: I am grateful to you for that, Presiding Officer.

[169] **Y Llywydd:** Dyna ddiwedd y sesiwn gyhoeddus. [169] **The Presiding Officer:** That concludes the public session.

*Daeth y cyfarfod i ben am 10.34 a.m.
The meeting ended at 10.34 a.m.*

Cynulliad Cenedlaethol Cymru
Y Pwyllgor ar y Papur Gwyn—Trefn Lywodraethu Well i Gymru
The National Assembly for Wales
The Committee on the Better Governance for Wales White Paper

Dydd Iau, 7 Gorffennaf 2005

Thursday, 7 July 2005

QQ170-266

Aelodau o'r Cynulliad yn bresennol: Dafydd Elis-Thomas, y Llywydd (Cadeirydd), Lorraine Barrett, Jocelyn Davies, Jane Hutt, David Melding, Carl Sargeant, Kirsty Williams.

Tystion: Ashok Ahir, BBC Cymru; Kevin Davies, Ochr yr Undebau Llafur; John Osmond, y Sefydliad Materion Cymreig; yr Athro Keith Patchett, y Sefydliad Materion Cymreig; Laurie Pavelin, Ochr yr Undebau Llafur; Graham Pogson, Ochr yr Undebau Llafur; Syr Jon Shortridge, Ysgrifennydd Parhaol Cynulliad Cenedlaethol Cymru; Gwenda Thomas, Cadeirydd, Pwyllgor Cyfle Cyfartal.

Swyddogion yn bresennol: Paul Silk, Clerc y Cynulliad.

Gwasanaeth Pwyllgor: Siân Wilkins, Clerc.

Assembly Members in attendance: Dafydd Elis-Thomas, the Presiding Officer (Chair), Lorraine Barrett, Jocelyn Davies, Jane Hutt, David Melding, Carl Sargeant, Kirsty Williams.

Witnesses: Ashok Ahir, BBC Wales; Kevin Davies, Trade Union Side; John Osmond, the Institute of Welsh Affairs; Professor Keith Patchett, the Institute of Welsh Affairs; Laurie Pavelin, Trade Union Side; Graham Pogson, Trade Union Side; Sir Jon Shortridge, Permanent Secretary of the National Assembly for Wales; Gwenda Thomas, Chair, Committee on Equality of Opportunity.

Officials in attendance: Paul Silk, Clerk to the Assembly.

Committee Service: Siân Wilkins, Clerk.

Dechreuodd y cyfarfod am 10.19 a.m.

The meeting began at 10.19 a.m.

Cyflwyniad, Ymddiheuriadau a Chofnodion y Cyfarfod Blaenorol
Introduction, Apologies and Minutes of the Previous Meeting

Y Llywydd: Bore da a chroeso.

The Presiding Officer: Good morning and welcome.

Mae cofnodion i'w cadarnhau. A gaf i gadarnhad eu bod yn gywir? Gwelaf fod pawb yn cytuno.

We have minutes to ratify. Can I have confirmation that they are correct? I see that everyone agrees.

Cadarnhawyd cofnodion y cyfarfod blaenorol.
The minutes of the previous meeting were ratified.

10.19 a.m.

Papur Gwyn—Trefn Lywodraethu Well i Gymru: Tystiolaeth The Better Governance for Wales White Paper: Evidence

[170] **Y Llywydd:** Estynnaf groeso arbennig i'n dirprwyaeth heddiw, John Osmond a'r Athro Keith Patchett. Diolch yn fawr am eich papurau.

[170] **The Presiding Officer:** I extend a special welcome today to our delegation, John Osmond and Professor Keith Patchett, and thank you for your papers.

[171] **David Melding:** I would like to ask a question based on your paper, John. You look, at the process that Orders in Council would take, and you say that Orders in Council would have to be approved by both Houses of Parliament in short debates. You then go on to say that the Assembly Government's parliamentary draughtsmen would then proceed to draw up the required legislation which would be considered by the Assembly, and so on.

10.20 a.m.

These are points (iii) and (iv) on page 3. We were told by Cardiff Law School yesterday that it envisages the process being the diametric of reverse. We would develop the legislation here, and the Order in Council would just be the end point, where a brief debate—an hour or an hour and a half—in both Houses would then approve the finished product, unamendable but by an affirmative procedure. I would like to flesh out whether you feel that the system starts with a decision in principle in Parliament to grant the power, and then the whole process trickles down from that. I wonder whether Professor Patchett shares that understanding of how the mechanism would work in opposition to the Cardiff Law School's interpretation. I accept that the White Paper does not spell this out, so we are in a slightly grey area.

Mr Osmond: I think that that sums up the generality of the position in terms of the White Paper. All that my points (i) to (iv) intimate is my reading of the White Paper, and what I took my understanding of it to be. It could be interpreted the other way. It may be that your committee will want to make a recommendation from your perspective of what way it should be. However, that is how I read the White Paper, and that is all I can say. I did not have any intelligence, so to speak, from the drafters of the White Paper as to what they meant. I do not know whether you want to add to that, Keith.

Professor Patchett: The first point is that I do not think that John's item (iv) refers to the preparation of the Order in Council, but to the preparation of the measures under the Order in Council. Therefore, the procedure about the preparation of the Order in Council is quite a separate matter. I, too, am puzzled and concerned about this particular aspect, not least the extent to which the Assembly itself can be engaged with this process. The first question that I ask is whose initiative will it be? Will there be a kind of legislative programme from the Government, which is then discussed and approved by the Assembly, and the Orders in Council will be based upon this, or will the Assembly have its own right of initiative in relation to an Order in Council? That is an important issue that the Assembly will have to address.

My second question is at what stage negotiations with London take place. I am not one of those who believe that getting these Orders in Council will be as straightforward as some people think. I have seen the comings and goings that have taken place in relation to getting powers in legislation. In the book that the Constitution Unit has recently published, it draws a nice distinction between those institutions that are power sharing, and those that are power hoarding. The experience that we have had here is of both types of response—there are two different cultures there. We may find that, particularly in the early stages, certain line

departments may be power hoarding in this respect. Therefore, the question arises, at what point do negotiations start to discover what is feasible. Does the Government do this before it produces its legislative programme, or does it wait until the Assembly has had a go at it and then enter into discussions about that? Will the Order in Council then be drafted here on the basis of the discussions that take place, or will the Welsh Office feel that it has to be involved in the preparation of an instrument, which is the central Government instrument, after all?

[172] **The Presiding Officer:** You are talking about the Wales Office, I believe.

Professor Patchett: Did I say the Welsh Office? I am terribly sorry.

[173] **The Presiding Officer:** The Welsh Office is, as I understand it, now extinct, but I am not certain.

Professor Patchett: You sometimes see remnants of it, do you not? I meant the Wales Office, I apologise.

However, the question as to whether there will be involvement is significant, and then the question arises about Assembly debate and the approval of the draft Order in Council. Will the proposal be amendable if it has come from the Assembly Government? Is that one of the reasons why the Secretary of State has retained the power to turn down the Order in Council? My concern at the heart of this is that this process must not be a formality as far as the Assembly is concerned. Gaining powers, and gaining them in a way that makes good sense in the interests of Wales, is absolutely crucial, and the Assembly has to be as fully engaged as possible at every stage of the process. I am not as convinced as the law school was that this will not require a lot of careful thought.

Mr Osmond: I would have thought that it would be a matter of how the precedent was set at the beginning, and that depends on the politics. There seems to be little point to go through the whole process of drafting the legislation as a draft Bill here and taking it to Westminster for approval, if Westminster will not approve it in the first place. That is just a waste of time for everyone.

[174] **David Melding:** Let us take a benign interpretation; if the flow was from the Assembly to Parliament and so the legislative instrument, or whatever we will call it, that would need an Order in Council to make it law went through what was, in effect, a Bill procedure here, it would be initiated here after the Welsh Assembly Government, or whatever it is then called, lists its priorities and identifies the areas where legislation will have to be modified. Let us take the welfare of children as an example, as we did yesterday; the Government identifies the legislation that needs to be amended in terms of its application to Wales. It is all fleshed out, and then you just have the Order of Council which permits the power, and, if that is passed, then becomes law. That goes up in a finished form to Parliament for the affirmative resolution of the Order in Council, a 'yea' or 'nay'. That places the power of initiation with the Assembly. It also makes it extremely unlikely that Parliament would say 'no', because it would then be dismissing the wishes of an elected body.

If the reverse is the case, that the whole principle of being able to amend, adapt and extend legislation kicks off with an Order in Council in Parliament, it seems to me a much less durable system, because it is possible to have a Government in Westminster that, for whatever reason, would not want this power to be exercisable in the Assembly. Is this a view that you share?

Mr Osmond: Just to reiterate the point: when I read the White Paper, it seemed to me that

that was what was being put forward. There was a clarity about it for me. You may wish that it were the other way, but that would give, as you say—

[175] **David Melding:** This is Westminster having the power of initiation?

Mr Osmond: Yes, that would be entirely the way that it was going to be, or so it strikes me. Going the other way, as the law school was saying yesterday, which sounds to me quite odd, involves giving extraordinary discretion to the Assembly and it is quite clearly upping the ante in a political way from the beginning. Having said all that, all these things are conditioned by politics, because if you have a Labour administration here and in Westminster, they are going to do the deal beforehand, are they not? On the other hand, circumstances could be quite different if there were different administrations in different places, but from a Westminster and Wales Office point of view, there would be a wish to set a precedent from the beginning that, so far as they could, they would call the shots.

[176] **David Melding:** I know that it is not absolutely clear in the White Paper, but is that your interpretation? Is that what you infer from it?

10.30 a.m.

Professor Patchett: I infer that Whitehall or Westminster will not readily concede all the ground. Let us put it this way, I was listening to something that Lord Dahrendorf, who chairs the Delegated Powers and Regulatory Reform Committee, said about concerns over the Henry VIII clauses and so on, and I think that there will be some obstacles that will have to be faced in that regard. The Orders in Council may well have to be drafted in a way that meets those concerns. For example, I have heard it said that the powers of amendment and repeal and so on would be tied in with a specific list of Acts that could be subject to that process, not an open-ended power, but one that is limited. Similar constraints might be built into the Order in Council to ensure that it can only be used in particular ways. For example, again, I have heard it said that the Assembly Government will have to explain why it wants particular powers on particular occasions, which will be the justification for the grant. That being so, the temptation at the other end must be to put restrictions in the Order in Council that will ensure that it can only be used for that purpose.

If we are talking about prospective legislation, there are significant problems in that area, particularly if there are changes of administration, where one Government might not be happy to see the Assembly pursuing policies that in some way conflict, or do not meld, with the policies in London. I feel that at least in the early stages, and probably for a longer period, the Orders in Council will not be simple documents at all. They will be the result of negotiations within which the interests in London will take steps, as best they can, to ensure that their interests are protected.

[177] **The Presiding Officer:** May I pursue one issue? Not all legislation emanates from Government. We have a very unsuccessful Standing Order—I think that it is No. 31—relating to proposals for legislation by Assembly Members. I would obviously want to protect that in my present position. That type of legislation could not possibly emanate from any inter-Governmental discussion. In that context, presumably, there would have to be a request at some stage in the process here for an Order in Council, unless it was within a policy area of a field that had already been agreed.

Professor Patchett: There are always problems with private Member's legislation, at the best of times. Government takes an interest in these when they come in Parliament and will sometimes make resources available to ensure that the instrument is improved, but sometimes

it will use its political forces to ensure that that instrument is not proceeded with. I suspect that initiatives of this kind would run into similar considerations here.

[178] **Lorraine Barrett:** Good morning, gentlemen. We have had varying evidence about future workload, with regard to enhanced legislative powers. That evidence has ranged from, 'We will do a little bit, one or two Bills a year', to, 'We are going to have loads to do and we will have to sit right through the night'—perhaps a slight exaggeration—'and take on lots more staff'. What are your views on what we want and what it is that we cannot do at the moment, cutting our cloth accordingly and looking for quality rather than quantity?

Mr Osmond: My first thought is that despite the lack of clarity around these proposals and a lot of grey areas that we have partially discussed already, it seems to me that a large advantage of the proposals is that they give the Assembly time to build up capacity and experience, which, in a sense, is what the Richard commission proposed as an interim measure before primary powers, in its putative timetable, would have kicked in around 2011, I think it was. A reading of the White Paper suggests to me that it very much implies itself to be an interim measure in that same sense. Otherwise, why have the notion of a referendum at some later stage, leading to full primary powers?

You alluded to problems of capacity and so on, and they are key issues. It seems to me that what we are building here is a parliament and that we have been doing that from the start. This is just another stage in that process.

Professor Patchett: I hope that, when it comes to Assembly measures that implement Orders in Council, there will be a new set of procedures established to produce a staged process that is analogous to dealing with a Bill, and that will put extra pressure on the Assembly. It is important that that is put in place, because that is the proof of the Assembly's capacity to handle legislation and it lays the foundation for a grant of primary powers in a securer way. The more the Assembly can do to show that it is able to fulfil the legislative role within the new confines, the stronger the argument for moving to the latter stage. So, staging this legislative process for measures is absolutely central in the Standing Orders.

In relation to the general workload, people have been talking about the theoretical advantage that will come from these in being able to produce coherence, as it were, in a particular policy area by perhaps producing an integrated piece of legislation that brings together the fragmented stuff—the kind of part amendment, part consolidation process. It would be a lovely idea for this, and although I wish it could be given a high priority, I cannot think that that is likely given the day-to-day demands on Members and on the support services. The latter point is important, and I am sure that attention is being paid to the question of strengthening the capacity in this area, and there is no doubt at all that that is essential. Capacity in analysing legislation and in helping Members to get to grips with the features that really should be their primary concern, which means extra work, of course, in getting proper briefings and so on. There is an extension of work, which is why some of us said that there should be more of you.

Mr Osmond: To add to that, what is obvious and what you must already have taken on board, is that it is stated in the White Paper that you will have to completely recast the committee structure in the Assembly. The whole notion that the Assembly will engage in an iterative process with Government on the development policy will have to go—you will have to abandon that completely. That is implied with the Minister leaving the committees in any event. The committees will have to have a primary legislative role, and you will have to think seriously about establishing new committees such as a finance committee. Also, you may have to have ad hoc committees established from time to time in relation to particular issues

on which you may wish to hold the Executive to account. So, the name of the game will be a legislative committee role in relation to Bills and so on, and scrutiny, and you will have to be fleet of foot. You do not want committees to be there just because they are there—you want committees and activities to be constructed, and a strategy adopted in relation to what is actually going on in the Executive from time to time. The place will have to change radically, in that sense.

10.40 a.m.

Professor Patchett: I would like to add a further point. Under the new arrangements, most secondary legislative powers are now going to go with the Assembly Ministers, which means that the scrutiny role becomes very important in another very interesting sense. The chairman of the Lords' delegated powers committee was expressing deep concerns the other day about Wales getting secondary legislative powers, which were not going to the Secretary of State in England, for England. The argument that has been used in the past to justify that is that the Assembly, as a democratic institution, is the legislative authority for secondary legislation, and, therefore, you have a sound input from elected representatives. Under the new arrangements, that will not be the case, because the power will rest with the Ministers. Therefore, if you are going to meet some of the concerns that are felt by people like those on the delegated powers committee, it is vital that the scrutiny procedures in relation to secondary legislation are robust and effective and are seen to be much more meaningful, perhaps, than those that exist in relation to secondary legislation in London. That will take away some of the concerns that are expressed at that level.

[179] **The Presiding Officer:** Do you think that we should have an enhanced legislation committee—we have discussed this matter—that would issue regulatory appraisals? You have previously, very helpfully, suggested a course, which we were then unable to take, but we may be able to take it now. Do you have a view on how we might be able to do that?

Professor Patchett: I have not given thought to that, but I would have thought that there would be a good argument for having a deliberate focus upon that area of activity and, obviously, having a committee is a way of doing that.

[180] **The Presiding Officer:** If you have any further thoughts, we would like to have them.

[181] **Jane Hutt:** I thank Professor Patchett and John for their written evidence. Inevitably, much of the evidence that we have taken and the questioning have been about the legislative process that is coming through the White Paper, and both of you referred to that as being an ingenious device in relation to Orders in Council. Keith, you honed in on the key point of all this. This is about having powers for a purpose and opportunities for policy development, and that would apply to a policy that may emanate from a Member, which, under Standing Order No. 31, has to be tested and debated and the Government would respond, as you said. However, that would also apply from the Executive, the Government, perspective. So, I was interested in the points that you made in your written evidence, Keith, in particular, on the opportunities for integrated policy development. I hope that the Institute of Welsh Affairs will be putting its resources, thinking and discussions to this purpose. This is turning it round to say that we want to have more opportunities in terms of policy development and integrated policy development, and this is a process and procedure with which we think we will be able to take that forward, and, as I say, having powers for a purpose is what we are seeking. So, I welcome both of your views on that in terms of the approach to the policy issue.

Professor Patchett: I would have thought that there would be strength in the case for asking for Order in Council powers in relation to particular policy areas if one were able to say that

a primary purpose of this is to enable the Assembly to produce an integrated legislative framework within which that policy area could be pursued, in substitution for what is, at the moment, fragmented or which has gaps and lacks the kind of integration that is necessary in legal terms to allow integration in policy terms. I would have thought that that would be one of the major justifications that could be put for using this procedure. However, at the same time, the Assembly must be in a position to be able to realise that, and that demands a great deal of commitment of resources, which in some respects do not necessarily move the policy on immediately, because you have the powers already, in many respects. What we are asking for is a much more coherent presentation of those. In the order of things, those factors do not come high compared with new policy initiatives that require new legislative powers. So, it may be that the Assembly has to look at this issue of, let us call it consolidation for the moment, and have a rolling programme in relation to this, so that every session it is agreed that this particular sector should have this kind of attention paid to it, so that at the end of it you have a much more solid legislative base on which to proceed.

[182] **Jane Hutt:** Yesterday, we talked about the possibility of a welfare for children Bill of that kind of scope. That came through in David Lambert's evidence.

Mr Osmond: The thought that occurs to me is that you can overestimate the need for legislation in relation to policy. An awful lot of policy is being done here without the need for legislation, and it is very significant policy indeed. You have done quite a lot of it yourself. If you would describe reorganising the health service, for example, as a major policy intervention, you managed to do that. I suppose that you had legislation to do that, but I was thinking more, say, of some education initiatives, particularly early years initiatives, which I regard as being among the most important things that have been done since the Assembly was established. That did not require legislation. Effective service delivery, which the Assembly Government is responsible for, mainly in terms of education and health, is the vital thing for the Assembly's success. So, I am all in favour of extending the powers, but, in a sense, I do not think that we should get caught on that hook and say that this will be the necessary litmus test for the success of the Assembly. That is certainly not the case.

[183] **Jocelyn Davies:** We did not mention the fact that subject committees might like to pursue a piece of legislation. That has happened in the Scottish Parliament, and I am sure that it would have happened here had we been able to do that. So, perhaps the Assembly should be allowed direct access to Parliament for a request. What I got from the Cardiff Law School yesterday was that a request is unlikely to succeed unless it has a robust pre-request stage of some sort. So, I would like your views on that. I thought, Professor Patchett, that you put it rather diplomatically, that powers for a purpose are all very well, but that powers as a matter of principle are also worth pursuing, even without justifying what you are going to use them for. That is certainly something that I would like to pursue.

Things up until now have not been all that encouraging. You say about these Orders in Council that the proof will be in the eating. I know that you have mentioned in writings that you have published already that the Department for Environment, Food and Rural Affairs opposed the passing of powers to the Assembly under the Pollution Prevention and Control Act 1999 for years, because it did not want to give us the discretion to use them. I thought that it was a shame that the Richard commission did not speak to UK Government departments, because all that is a bit of a mystery to us, is it not? Is there a danger then, with the Orders in Council idea, that the UK Government, as you mentioned earlier, might put in caveats and provisos that could make our already complicated situation rather more complicated?

In your paper, you mention the need for principles, and mention specifically the devolution

chapter in the Cabinet Office's *Guide to Legislative Procedures*, which you have already described as placing undemanding requirements on the UK Government. How can we make those measures robust? At the moment, this is rather secretive and has a cloak over it. It is certainly not open to democratic scrutiny.

10.50 a.m.

The other issue, Mr Osmond, is that you mentioned that Governments do much more than simply legislate, and I agree with that. The Richard commission concluded that scrutiny was sadly lacking. If we busy committees with legislation that the Executive wants, I wonder how we will have time for scrutiny of the things that Governments do that do not require legislation. If we are failing to scrutinise them now, when we do not have a legislative burden, how is that going to happen afterwards? When we visited the Scottish Parliament, it became apparent that the committees were not carrying out that scrutiny role at all. In some committees, all they did was deal with legislation that the Executive wanted. Any thoughts on that would be welcome.

In your paper, judicial review is mentioned several times, as if we are going to be pounced on by lawyers the minute that this starts. Everything that we have done up to now was capable of being subject to judicial review, but I doubt that you could quote us many examples of judicial reviews of the Assembly's work. I do not suppose that we would even be made aware of them; there have been very few examples. I think that the sea fisheries committees got a judicial review, because of a statutory instrument. I wonder whether it is pure speculation that we will be bogged down in going back and forth to court every five minutes for judicial reviews. The other thing that I wanted to ask—

Mr Osmond: I am losing track of the questions.

[184] **Jocelyn Davies:** I thought that you would be making a note of them as I was going along. I might not have another chance.

[185] **The Presiding Officer:** You will have another go.

[186] **Jocelyn Davies:** May I ask one last question?

[187] **The Presiding Officer:** Yes, but I hate to burden my distinguished witnesses beyond their intellectual capacity, although huge. [*Laughter.*]

[188] **Jocelyn Davies:** Just remember the last question that I am going to ask you. You called your paper 'Virtual Parliament'. As a matter of principle, do you find it objectionable that the National Assembly becomes a virtual parliament without a Bill in Westminster to say so?

Mr Osmond: Whether I find it objectionable is not relevant, really. This is just the way that the British system works. It is the way that it works in the relationship between England and Wales. This England and Wales notion, which Richard Rawlings has drawn attention to, has a cultural aspect to it. Keith could perhaps enlarge on this, but there is something in the mind of legislators in Westminster that makes them recoil from doing anything that has England attached to it. That is a deep cultural problem.

[189] **The Presiding Officer:** Is that not simply because it has always been done that way, except for obvious things such as the Welsh education and language?

Mr Osmond: Yes, but for whatever reason it is the case, it is the case, and it presents us with

a difficulty in trying to unpack these things. Therefore, it seems to me perfectly normal that we should be proceeding in this fashion, albeit it is not intellectually kind of—

[190] **David Melding:** Elegant.

Mr Osmond: ‘Elegant’—that is the word that I am looking for. It certainly is not elegant. In the short remarks that I have made, one of the points that I made was that it does not lead to clarity of understanding for the poor benighted public. It would be nice to make the step change that the Scots made in 1999, and have clarity about it all. We are all going through this learning process, I think. This is just a way of getting across the road, really.

To pick up on one of your earlier points about the importance of scrutiny and the lack of it here, that raises the serious point that backbenchers will have to come to terms with the fact that they are not going to be initiators of legislation in this phase—they should not, in my view, think of themselves as such. It is not going to happen, in practical terms, because the majority here will prevent it. What you should do is what you can do best, which is to concentrate on subjecting the legislation that comes forward—in whatever way that happens, whether initially or having gone first for an Order in Council in Westminster—to scrutiny. You should also devise your committee structures in such a way to enable you to hold the executive actions of the administration outside legislation to proper and effective account. The worst thing that you have done—in collaboration with Westminster, it has to be said—fobbing the presence of Jane, relates to the organisation of the health service, which I regard as catastrophic; there was no examination of that whatsoever. That was a huge failing.

[191] **The Presiding Officer:** We are now getting into policy areas that are ancient history. There is a helpful paragraph in the companion to the House of Lords, which states that if a Member asks many questions, the Minister answering for the Government need only answer two of them. You might like to try to answer one more of Jocelyn’s questions.

Mr Osmond: I will hand that over to Keith.

Professor Patchett: Let me pick up on one or two points. Regarding judicial review, it is not that we imagine that there will be any more litigation than there has been at the present time. There has not been any litigation, by and large, because the work has been done excellently at every level in relation to the drafting of powers and instruments. However, the people who do that work are well aware of the risks involved and, therefore, take the appropriate action to ensure that those risks are reduced to the minimum. We should give great credit to the people who have been involved in that process. Our argument is that the new procedures add yet another area in which those safeguards have to be built in. These areas are potentially more important for the development of the future activities of the Assembly. Therefore, it is important that they are got right. It is also important that the scrutiny applies the criteria to that process to assist and encourage those who prepare them to get it right. So, I do not consider a judicial review to be a threat; it is a factor that feeds into the way in which the processes are carried through.

I have certain concerns about what I called power hoarding. We must remember that under our system, line Ministries in London have a high degree of autonomy in the way they go about their tasks. Some kind of principled approach to devolution issues has been lacking in relation to when you can move and what kind of restrictions you should enforce and so on. That has all been very much driven by the particular project concerned and that is absolutely inevitable. However, under-riding that should be some kind of criteria by which these decisions are judged. I get a feeling—I was at a meeting on Monday, at which there were many Government law officers—that there is a degree of sympathy for that thinking.

However, there is no mechanism in central Government at the moment to ensure that devolution issues are looked at in the round. This aspect, about principles, is one of those issues. We have to live with that, but the consequence is that we should not expect that getting new permissive powers or Order in Council powers, will, in every case, necessarily be an easy task.

Mr Osmond: I will just briefly add that we drew attention to the judicial review issue for two reasons: first, because we felt that this new procedure opens up more opportunities, potentially, for that, but, more importantly, to underline the fact that this is still secondary legislation in the technical sense. It is not primary legislation. As I understand it, primary legislation in Westminster is less vulnerable to judicial review because it is primary and is the will of Parliament. So, the judges, shall we say, are less inclined to challenge it. However, this can potentially be subject to challenge and it is important to understand that.

11.00 a.m.

[192] **Kirsty Williams:** I think that Jocelyn has covered most of my points, so I would just like to ask the guests whether they believe the Assembly to be competent to draft its own Standing Orders.

[193] **The Presiding Officer:** The answer is 'yes'.

[194] **Kirsty Williams:** For the record, Presiding Officer, I would like to hear what the witnesses have to say.

[195] **The Presiding Officer:** I was making light of what is a serious matter for us and I apologise.

Professor Patchett: I would be very sad to think that it was otherwise. One has very considerable respect for the way in which the Assembly has tackled procedural reforms and issues. When it comes to devising what should go in the Standing Orders, I hope that Assembly representation will be as full as possible. When it comes to drafting them, I am sure that the people who are responsible for that in the Assembly are very competent to do it.

Mr Osmond: I would only add that there is a sense that you have established the precedent in any event, because you have had a year-long procedural review, which, in essence, was revisiting the Standing Orders that you had inherited. To the extent that you could, you changed them in a more rational way. I think that you have made your own point with regard to that.

[196] **Kirsty Williams:** Obviously not loudly enough.

[197] **The Presiding Officer:** I thank you both very much, not just for appearing today and for the paper, but also for the sterling help that you have given us on that review of Assembly procedure, which, as you implied, we see as a model of what we might be able to do again if we were allowed to do so. No doubt we will be calling upon your advice in future. Professor Patchett, if you have any further thoughts on what we have discussed, we would be very glad to hear them.

Professor Patchett: Thank you very much indeed.

[198] **The Presiding Officer:** There is some coffee available outside. I am afraid that we

soldier on, but Sir Jon, we are very pleased to see you.

Felly, mae'n bleser gennyf groesawu'r It is my pleasure, therefore, to welcome the
Ysgrifennydd Parhaol, Sir Jon Shortridge, i'r Permanent Secretary, Sir Jon Shortridge, to
pwyllgor. committee.

[199] **Jane Hutt:** I am just going to start with a question about staffing issues, because you will know that there has been some evidence-giving during questioning about the role of the Assembly Parliamentary Service and its staff not ceasing to become civil servants, as outlined in the White Paper. Obviously, we will be talking to staff about those issues to ensure that they have appropriate terms and conditions, but the issue about our trying to develop a Welsh public service is important. What do you feel about the permeability of working in the Assembly Government and in the Assembly Parliamentary Service? There is a question mark about that permeability in terms of developing the Welsh public service.

Sir Jon Shortridge: I would hope that there would be the fullest appropriate permeability between the two sets of staff, and that is entirely in keeping with the vision that underlies Public Service Management Wales. As an official, I feel very strongly that we need to be reducing the barriers to the movement of staff between various parts of the Welsh public sector, and it would be very disappointing if, as a result of these important changes, a new barrier was established. I personally do not think that there is a need for such a barrier to be created. I am sure that we can find practical ways, through protocols or whatever it may be, to ensure that staff who want to move in either direction can certainly do so in an appropriate manner. That might mean secondments, for example, as opposed to having to go through open competition. I would want to use all my influence to ensure that that happened satisfactorily. Ultimately, issues around terms and conditions of what are currently APS staff will be a matter for the commission, and I cannot speak for it.

[200] **Jane Hutt:** Just to follow that up, I think, in Scotland, there is a divergence emerging with regard to terms and conditions, and there is inevitably an issue about the size of APS. You have just said that it is not a matter for you to comment on terms and conditions, but do you think that there will be a difficulty in how we approach that in relation to the opportunities for the Welsh public service?

Sir Jon Shortridge: I would have thought that any variation that emerges will be for good business reasons and can therefore be introduced in a way that seeks to minimise any subsequent problems. It is most unlikely that there will be a wish to move away from the principal civil service pension scheme, for example, which is a fundamental condition of service. There will probably be a business need to have some flexibility around the time at which people work, but that is not a significant barrier. There may be issues around pay but, in the wider scope of things, that should be manageable in terms of people moving between the two services. So, I would have thought that as long as there is goodwill from the Members of the new Assembly, all the time that I am here, and equally, I would hope, my successor, there will be the necessary goodwill to make this work. It is a question that I am sure you will want to hear the trade union side's views on as well.

[201] **Kirsty Williams:** During our six years here, it has always struck me as slightly strange that, whereas the likes of Sir Nigel Crisp would regularly appear before House of Commons Select Committees to be directly scrutinised, in his case on his running of the health service, attempts to bring Ann Lloyd to the Health and Social Services Committee for such questioning, for instance, have always been quite robustly resisted. Could you foresee, in the new set up, given that the Assembly committees would perhaps want to truly enhance their scrutiny role of Government delivery, a situation in which officials would regularly, if called

by a committee, attend to answer questions?

Sir Jon Shortridge: My view is that officials do not have a separate and different responsibility from the Minister whom they serve. So, any invitations from Assembly Members and committees should be addressed, in the first instance, to Ministers who can then decide whether they want to accept that invitation or to have an official respond on their behalf. The exception to that is where you have an official, like me, who exercises separate and different responsibilities and then, obviously, I have to account for the way in which I exercise them.

[202] **Kirsty Williams:** I appreciate the difference, and, of course, officials have regularly appeared before the Audit Committee over the last six years in that kind of capacity. However, why is it different in England, where officials regularly attend committees without the Minister being present?

Sir Jon Shortridge: I do not think that there is a problem with officials attending without the Minister being present, but the Minister should have an opportunity to decide who is going to account for the way in which he or she has exercised his or her responsibility.

[203] **Jocelyn Davies:** Further to that point, when we were speaking to the Clerk to the Scottish Parliament yesterday, we were told that the Auditor General for Scotland produces reports for the subject committees. I am assuming that the officials who are the accounting officers probably have to appear before the subject committees. Could that be something that we could develop here?

Sir Jon Shortridge: If it is an auditor general who has reported to a committee, and under the new dispensation that might well be the case, then, clearly, as accounting officer, I have a responsibility to account to Members for any matters in that report. I would expect that either I or one of my sub-accounting officers would attend committees under those circumstances. However, I make a distinction, and it is an important one, between officials who are serving Ministers, where it is, essentially, the Minister's call, and where officials are exercising separate responsibilities.

11.10 a.m.

[204] **Kirsty Williams:** Maybe I am not getting it right in my own mind. However, using the health service as an example—which is perhaps an area that I know better than any other—surely there is a difference between the Minister's role and the role of the chief executive of NHS Wales in her day-to-day management of the national health service. It may be that committee would like to question her on that. The Minister constantly, in the field of health, would get up and say, 'It is not my job to run the day-to-day health service. I set the strategic direction in which the health service should be run, and it is then up to the director of NHS Wales and those officials below who are responsible for that aspect of it'. It could, quite legitimately, be an issue on which a committee may want to scrutinise that official. I do not see why it would be appropriate for that to happen in England, Scotland, and, I believe, Northern Ireland—God willing, when that place is sitting again—and why it would not be appropriate here for the director of the new Economic Development and Transport Department, which will employ vast arrays of people managing huge programmes, to be able to be called to the Economic Development and Transport Committee should its members desire that.

Sir Jon Shortridge: I do not think that I am necessarily disagreeing with you. However, I think that the Minister should have an opportunity to decide whether he or she wants to

account for the performance of a particular service or not, as opposed to officials finding themselves in the situation where they have to deal with matters that they may think are better handled politically. In a sense, I think that I am making a bit of a distinction without a difference, but I would just ask you to remember the situation surrounding David Kelly. You can have circumstances where officials are put in difficult situations, and you need to think about what procedures are needed to protect officials best.

[205] **The Presiding Officer:** I believe that we are perhaps discussing history and Scotland, neither of which really applies to our present case. However, I can see that this is relevant in pursuing whether we should have similar powers to section 23 of the Scotland Act 1998, which is the power for what I still call ‘calling for persons and papers’, and all the rest of it, in that rather wide way. As a committee, we may want to consider whether we think such powers important for us.

[206] **Carl Sargeant:** Can we look at capacity on the basis of power for a purpose—and my thoughts relate to what Jane mentioned earlier—as opposed to giving us all the powers and putting them in a cupboard and not using them. Let us have the power-for-a-purpose scenario. On the basis that the Scottish Parliament has passed around 250 pieces of legislation, for which the Assembly is responsible since the devolution process, can you quantify the amount of legislation that is currently within the capacity of Welsh Assembly Government officials, assuming that there is goodwill in London?

Sir Jon Shortridge: Sorry, what did you want me to quantify?

[207] **Carl Sargeant:** The amount of legislation that is within the capacity of the Welsh Assembly Government at present, assuming that there is goodwill in London.

Sir Jon Shortridge: You need to distinguish between the capacity to instruct draftsmen and the drafting capacity itself. In terms of Assembly measures, we do not have that capacity at present, because we do not have that responsibility. Therefore, that is an additional capacity that we will need to create at short notice, which will be quite challenging, because high-quality parliamentary draftsmen are in short supply, so that is an issue for me.

In terms of the capacity to instruct, it depends on the extent to which the new Assembly—if I can call it that—chooses to make use of these legislative powers. If the view of those Members is that they want the Assembly to turn into something like a manufacturing plant for legislation, we will need to have much more capacity both for policy officials to develop the instructions and for the lawyers to convert them. I cannot give you a straightforward answer.

We clearly have a problem in terms of the parliamentary drafting; I am dealing with that. For the rest, until I have better intelligence as to what the balance will be between administrative oversight and scrutiny and legislative development and scrutiny, I cannot make the necessary plans to enhance my staff. However, I hope that there will be an evolutionary process so that I will not hit a wall in year one.

[208] **Carl Sargeant:** Following up on that, on the assumption that when you know you will then have the capacity to deal with that, are you currently satisfied with the legislative arrangements outlined in the White Paper? Are they sustainable if there are different political parties in Westminster and the Assembly?

Sir Jon Shortridge: With respect, I do not think that that is a question for me. As officials, we will make the system work to the best of our ability in whatever political context and

environment we find ourselves. If there are problems, they will be problems of a political nature, frustrating—if I can put it that way—what the Assembly or the Assembly Government might want, as opposed to problems that are intrinsic to the way in which officials perform their duties.

[209] **David Melding:** On the issue of capacity, if the system of enhanced powers and Orders in Council works, there will be more mock primary legislation—if I can refer to this new area in that way—in Welsh, which would not have been in Welsh; it would previously have existed in English-language-only Bills. How will we cope as a bilingual institution; for all of the scrutiny that we do, everything would have to be available in English and Welsh, and there would have to be officials who could conduct legal conversations in Welsh if the committees required advice to aid their scrutiny of the legislation. This will be quite a challenge.

Sir Jon Shortridge: Yes, it will. In the short term, there may need to be certain appropriate—I would like to emphasise that—expedient solutions to that. We are up against the capacity constraints for written translation at the moment, so, in the short term, if you have a fixed capacity, you have to reprioritise within that capacity. Legislation would obviously be right at the top of those priorities. The impact would be downstream rather than intrinsic to this new function. The same principle applies to bilingual scrutiny orally; as you know, I am not a Welsh linguist, but I would think that the simultaneous translation challenge must be much higher when you are dealing with quite esoteric legal terminology.

[210] **David Melding:** I certainly share that view, it is important that we look at how we will conduct our business as a bilingual institution, which has been one of the great advances in Welsh public life. I respect that you cannot answer the question about whether you feel that the new system would be sustainable if there was a change of administration in Westminster. However, you have well-honed political antennae; do you distinguish, in terms of preparing for whatever the concrete outcome will be, that if the Order in Council process was initiated by the Assembly and then delivered to Parliament in a more or less completed stage, subject to a vote, that that is likely to lead to certain dynamics? If it is the Assembly Government applying in principle for a certain area to be subject to an Order in Council, and then that being affirmed or not, leading to the legislative process being devolved to the Assembly on a piece-by-piece basis, the political dynamics would be very different, would they not?

11.20 a.m.

Sir Jon Shortridge: This is mainly a question for the First Minister next week. My understanding is that the hope and intention is that the formula to be adopted will be the latter, the second of your approaches, and if that is the one that is sustained in practice, it will cause the fewest problems.

[211] **The Presiding Officer:** If there are no more questions from colleagues, may I refer you to paragraph 2.4 of the White Paper, which makes this general statement:

‘The civil service supporting the Assembly is expected to serve both the Ministers discharging executive functions and also the legislative branch of the Assembly’.

It also includes a sentence with which I think that we could both empathise:

‘it can place officers at the highest levels of the civil service in Wales in difficult positions of apparently conflicting loyalties’.

Are you relieved at that paragraph and the consequences of the White Paper?

Sir Jon Shortridge: On a personal basis, I am looking forward to the successful implementation of these proposals by May 2007.

[212] **The Presiding Officer:** Thank you very much, Sir Jon; there are no further questions.

We are about to call the trade union side, but Members seem to be signalling that they would like some coffee. I do not normally chair Assembly committees, and I am not used to breaks. However, it seems to be an appropriate time, before we call the trade union side, for Members to have a break. You must understand that, when the White Paper is implemented and the Bill is through, there will not be any breaks. However, in view of the old dispensation, if our witnesses do not mind, we will break for five minutes.

*Gohiriwyd y cyfarfod rhwng 11.22 a.m. a 11.30 a.m.
The meeting adjourned between 11.22 a.m. and 11.30 a.m.*

[213] **Y Llywydd:** Croeso i gyfarfod y pwyllgor i bob un ohonoch o ochr yr undebau, sef Kevin Davies, Graham Pogson a Laurie Pavelin. Diolch ichi am ddod.

[213] **The Presiding Officer:** I welcome to this committee everyone from the union side, namely Kevin Davies, Graham Pogson and Laurie Pavelin. Thank you for coming.

[214] **Lorraine Barrett:** How concerned are you for your members about the proposals that Assembly Parliamentary Service staff should no longer be civil servants? What implications are there for the future development of staff? Do you think that there are any lessons that we can all learn from the position of staff in Westminster and the Scottish Parliament in the future?

Mr Pogson: We know that the Assembly will employ its own staff, but we wonder whether existing civil servants would have the option to retain their civil service status, for example through some kind of loan or secondment arrangement. We also believe that any staff transferring to the new employer should have protection under the Transfer of Undertakings (Protection of Employment) Regulations 1981. Those thinking of moving to the Assembly Government before and at the time of the separation should be given support, and we would strongly advocate arrangements to facilitate two-way transfers between the Assembly and the Assembly Government in the future for the purposes of career and professional development and to allow staff to broaden their experience. A system of two-way secondments would be helpful, as would be the ability to apply for internally advertised posts. The Permanent Secretary's remarks earlier were reassuring in that regard.

On another related matter, there is currently a great deal of goodwill and co-operation between officials in the Assembly Government and APS, which has helped to make the Assembly a success. We would want this culture of co-operation to be maintained and fostered post separation.

[215] **Lorraine Barrett:** Do staff generally welcome these proposals, or are they worried about what the future might hold as something different is going to happen? Is there any apprehension or is this move welcomed?

Mr Pogson: I think that it would be fair to say that we broadly welcome the thrust of the White Paper. We have collected some comments so far, and we are also holding a meeting for members next Monday. If any new substantive points come out of that, we will write to you. We think that separation will remove the confusion in terms of roles, responsibilities and lines of accountability. We welcome the enhancement of legislative powers as this will increase the status of this Assembly and make the devolution settlement work more

effectively.

[216] **The Presiding Officer:** That is helpful, not only in terms of your positive comments, but your willingness to provide any further feedback that you have from staff discussions. Those of us who have participated in open meetings with staff during the course of this process have found them extremely helpful opportunities, and we will certainly participate in such meetings again. Is there any apprehension about being managed indirectly by a National Assembly for Wales commission, or the equivalent of the House of Commons Commission or the Scottish Parliament corporate body? Presumably, you are assured that politicians will not seek to interfere with staff management issues, which seems to me to be quite important.

Mr Pogson: Our members would need some reassurance that their political impartiality could be maintained and that appointments and promotions would be based on merit. There are some existing mechanisms to guarantee a lack of political interference. We think that this is an important issue, and the potential for political patronage must be avoided. You could consider having some sort of recruitment commissioner.

Alternatively, you could ask the civil service commissioners to vouchsafe our procedures, although their powers would need to be extended. Another possibility is to make it a legal requirement that staff not be asked to act in a way that might bring into question their political impartiality, and that appointments and promotions must be on merit. A code for staff, similar to the civil service code, should be introduced. There is a whole panoply of existing codes and protocols that would need to be updated, which contain important references to staff remaining politically impartial.

[217] **Jocelyn Davies:** Those practical examples are very helpful. These changes could come very quickly. Do you think that we will be able to cope with the changes in the timescale?

Mr Pogson: We are not totally certain at the moment. We would want an assessment of staffing needs and skills required to be made fairly urgently. Clearly, there will be additional work because of the legislative functions. That alone would seem to call for an increase in staff, particularly for legislative work.

[218] **David Melding:** I want to pursue the question of how the institution is going to continue to exist as a bilingual one. We have heard some evidence from the Permanent Secretary that the need to ensure that we remain bilingual in our legislative capacity is very important. That may create problems elsewhere, because resources will have to go to that as it is a top priority. It strikes me that that might lead to some difficulties and strain on the system. Will you comment on that and on what the challenges might be?

There will also be quite a demand on policy staff, because they will have to instruct the lawyers when they are drafting legislation. What are your views on the existing capacity there? We hear the occasional whisper on this side of the fence that it is not necessarily as strong as it needs to be—I must emphasise that that is in terms of the numbers, rather than the quality, of the people.

Mr Pogson: On the face of it, there is a strong case for additional staff. If there is a lot more legislation to be drafted and to go through this institution, on the face of it, more staff are needed. Increasing numbers of policy staff are used to giving instructions for secondary legislation, so they do possess the skills. However, giving instructions for the equivalent of primary legislation would be another step change again. There would certainly be some initial significant challenges and training needs.

The Welsh language aspect would be an issue, particularly with regard to the high-level technical translation of legislation and dealing with line-by-line amendments. That is potentially a big problem.

Mr Pavelin: There are quite a number of colleagues with experience of providing instructions for the Parliamentary Counsel in the form of the Bills that go through Parliament at the moment. The numbers would need to be enhanced, and the organisation of that work would probably need to be enhanced. At present, we try to find somebody with the knowledge and skills to deal with a particular task or support a particular area of work. That gets us by at the moment. There are people who, over the years, may have had a lot of experience of that, but they would probably need to be brought together in a different structure and organisation, so that that knowledge could be spread around and experience gained over time.

[219] **Kirsty Williams:** Do you think that it would be appropriate to be able to require that the most senior officers of the Government of Wales, or whatever it might be called, appear before a subject committee, or do you share the concern of the Permanent Secretary that officials at all levels need to be protected?

11.40 a.m.

Mr Pavelin: I listened to what the Permanent Secretary said, and he explained that it was merely an emphasis on a particular point. I think that the expectation for senior officials is that they will appear before committees, as they do now. The point that the Permanent Secretary made was that requests for people to appear should be funnelled through the Minister, in the first instance. If the Minister decided that he or she should come before the committee to discuss a particular issue accompanied by an official, then that decision would be made by the Minister. However, in most instances, senior officials would expect to continue to appear before committees, and I am certain that they would be very happy to continue to do so.

[220] **The Presiding Officer:** There do not seem to be more questions. Is there anything else that you would like to tell us?

Mr Pogson: There are a couple of things to add. Whatever the shape of the future Assembly, I am confident that our members will give their full commitment to making the new arrangements work.

On the staffing issues, we welcome the statement that Assembly staff will continue to be eligible for membership of the civil service pension scheme, but we wonder if the Assembly would have any say if there were to be any future changes proposed to the scheme. Who would fund and underwrite APS staff pensions? Would APS be an integral part of the civil service scheme or would it be a 'by analogy' scheme? If it were the latter, we would have concerns.

On staff working for the Assembly having broadly comparable terms and conditions with Assembly Government staff, it would help to have on the face of the Bill something similar to the wording in the House of Commons Administration Act 1978. We would welcome some kind of analogous arrangements on pay and grading to those of the Assembly Government staff, with periodic reviews. That would facilitate two-way secondments.

We would press for current opportunities for flexible working and a commitment to family-friendly policies backed by strong principles of equal opportunities to be, at least,

maintained. APS should continue to recognise the existing trade unions and honour agreements with staff until they are renegotiated.

[221] **The Presiding Officer:** Would it be helpful for you if we were to explore further the implications of paragraph 2.20 of the White Paper on Assembly staff?

Mr Pogson: Yes.

[222] **The Presiding Officer:** If you have any further views or thoughts on this in the next weeks, up until the end of the August at the latest, we would be glad to have them because we may then be able to put some more specific points in our report, which might assist you in getting those assurances.

Clearly, the assurances in terms of pensions are specifically outlined in the White Paper. However, there may be other assurances that you would like to seek, if they are not on the face of the Bill, through debates. Although, I accept your point about the House of Commons Commission legislation, which seems to be a model for us, along with that of the Scottish corporate body. I am not offering you my services as an advocate; I should not be doing that. However, if there are issues that you want raised in Parliament, I am sure that we could ensure that that happened.

Mr Pogson: Thank you very much.

[223] **Lorraine Barrett:** Graham mentioned something that we should all have asked at the beginning. None of us have an idea of how this will work, but there will be a gradual step change in the working hours in this building. Occasionally, we run over in Plenary, for example—more so than in committees—to 6.00 p.m. or 6.15 p.m. and that obviously has a knock-on effect on our staff and on your staff. So, have you given much thought to possibly a complete change of working hours and flexibility in shifts and all sorts of issues for working later, longer or earlier—we do not know—and I do not expect an answer now. It is something that you are probably addressing already, so I wondered what your thoughts were briefly, and, obviously, you could feed them back to us once you have given it more thought and as the whole thing progresses and we get a clearer picture of how it all might work.

Mr Pogson: Clearly, over time, there will be variations to terms and conditions of the staff working here, which is normal with non-departmental public bodies. However, there are opportunities here for staff, as well as the Assembly, to benefit, and I am sure that through a spirit of partnership, we can negotiate in a constructive way.

[224] **Lorraine Barrett:** That is reassuring from the staff side. That is great, thank you.

Mr Davies: One thing to add is that there is already a precedent in terms of flexibilities within the system, such as the recording of proceedings and security, and we have been involved in discussions in looking at reviews in the security services at present. So, I think that Graham was right in terms of the commitment that staff have shown already to want to embrace the changes that we are looking forward to. The lack of concern perhaps shown by staff about civil service status and the actual changes is probably a good thing, because I think you would hear more if people were a little bit more concerned. However, questions have certainly been asked about career development in terms of a smaller organisation, the link back into the Assembly, the centre and WAG itself, and about the initial timescales in which staff will be expected to make decisions for example, such as, 'When do I make a decision about whether I want to join the new organisation and will there be safeguards about going back if it is not quite the right move for me', and things like that. Those are the staffing

issues that we need to be addressing, but the actual change is being embraced and welcomed by the staff as an opportunity. A number of the staff who work in the area are quite new to the civil service and have only ever worked on the Assembly side rather than the Government side, and they see it as being their workplace and see this as something that they want to see through.

[225] **The Presiding Officer:** I will ask a general question that I had not prepared. Obviously, you represent the trade union side, so is there a lot of active interest in trade union membership, and do staff here participate widely in trade union activity in a way that would assure us, which I am sure, hopefully, is the case, that you are clearly representing the views of the staff here?

Mr Davies: The answer is 'yes', as we have representation as much as any other place. We have certainly looked at APS as being slightly different, and we are actually in the process of setting up a separate branch within APS to deal with separation and looking forward to the future, and that is in progress at the moment. I am in discussions with human resources about facilities and the way forward with the numbers of people we are talking about. I already have volunteers, and we have already agreed, following the members' meeting that we will hold on Monday, to set up an advisory group from areas within APS. We are seeking volunteers from among staff in those areas to advise me and my colleagues about what is really happening at the grass roots and at the coalface. We can only act upon the information that is provided to us, and the advisory group has worked well in other areas, such as with the Merthyr relocation, where we dealt with the package and transfer of staff there. So, we see that as being a positive. I have a number of interested parties, and I will address that following the members' meeting on Monday.

Mr Pavelin: I would add that union membership is growing at the present time, both in APS and across the Welsh Assembly Government as a whole. There is much greater interest, stimulated by the many changes that are going on relating to mergers, location and the present proposals in respect of the separation between the Welsh Assembly Government and the Assembly.

[226] **The Presiding Officer:** I never thought that the devolution project itself would be an encouragement to trade union membership, but, as an almost lifelong member of the Transport and General Workers Union until recently, I obviously welcome that. Are there any other questions? I do not think so. Thank you very much for the positive tone of your presentation.

11.50 a.m.

Mae hi'n bleser, fel arfer, i groesawu Gwenda Thomas, sydd ger ein bron heddiw fel Cadeirydd y Pwyllgor Cyfle Cyfartal. Galwaf David Melding.

It gives me pleasure, as usual, to welcome Gwenda Thomas, who is attending today as the Chair of the Committee on Equality of Opportunity. I call David Melding.

[227] **David Melding:** I did not realise that I was starting, but I am delighted to.

[228] **The Presiding Officer:** I thought that, as Chair of a committee, you might like to begin the proceedings.

[229] **David Melding:** Okay. Gwenda, the equality duty is likely to fall on Assembly Ministers under the White Paper, because of the separation of the executive—[*Interruption.*]

Gwenda Thomas: There was some background noise then, David. Would you mind starting again, please?

[230] **David Melding:** If there is a division between the executive and legislative functions, the responsibilities in terms of equality, and the duty on the Assembly, will now transfer to the Ministers. Do you see that as a welcome step? Do you think that perhaps there needs to be a mechanism for the Assembly to have an analogous duty, and should that be in any legislation, or should it be addressed via Standing Orders as an Assembly duty on equality?

Gwenda Thomas: If we refer to section 120 of the current Act, I certainly would not be content for the contents of the current Act to fall on Ministers only. The committee and I strongly believe that this should include the legislative part of the Assembly, the Members and the staff. In the committee's opinion, and in my own, issues arising in relation to equality issues would not be satisfactorily dealt with if section 120 referred to and fell on Ministers only.

[231] **David Melding:** Ministers will have some form of duty—I presume that they will, anyway; we are not moving away from that principle. Will that be more difficult to scrutinise than it is at the moment, with a committee structure that includes all of the Ministers? They will not be included in future on committees, so how will the ministerial duty be scrutinised in future? Will this create fresh challenges for us?

Gwenda Thomas: In my view, the answer to that is that the Committee on Equality of Opportunity should be retained after 2007, with the onset of the implementation of the White Paper. Without the Committee on Equality of Opportunity, I think that the monitoring and the co-ordination of mainstreaming equality issues across portfolios would definitely weaken. If we were to suggest that the committee should cease to be, I think that that would immediately raise questions. Standing invitees to the committee would want to look at their roles immediately. Not only would it weaken the monitoring and the co-ordinating role after 2007, but it would dilute the purpose of the committee from now until 2007.

[232] **The Presiding Officer:** I know that you and your committee will be aware, as are all other committees, that, as far as I read the White Paper, it is only the Audit Committee that would have a statutory basis under the current proposals. You are clearly concerned about this.

Gwenda Thomas: I am very concerned. I would like to see section 120 and section 48 retained. Section 48 is just as important. On the issue of section 48 of the Act, the Committee on Equality of Opportunity is adamant that there should be in no way a watering down of what is now the legislative requirement of the National Assembly. It is unique as a legislature in having this as a statutory duty, and my view is that we could follow the Westminster model too closely, and perhaps lose the important work and focus that this Assembly has on equality of opportunity issues.

[233] **Jocelyn Davies:** So you think that this should be in the Bill rather than in the Standing Orders of the new Assembly? Do you feel that this is an obligation that should be placed on us by the Westminster Parliament rather than one that we take on ourselves by way of our Standing Orders?

Gwenda Thomas: Yes, I think that it should be retained as it is in the current Act. Standing Orders should then support the requirement in the new legislation. I certainly do not think—and neither does the committee—that this should be left to Standing Orders alone.

[234] **The Presiding Officer:** What is wrong with Standing Orders, if they are not able to do this?

Gwenda Thomas: There is nothing wrong with Standing Orders. However, at the moment, it is not a requirement under the Act for us to have a Committee on Equality of Opportunity. It is a requirement that we have due regard to equality of opportunity issues in all of our work, in policy development and scrutiny. Standard Orders give us a way of implementing the legal requirement under the Act. In that way, I see Standing Orders at the moment as being very supportive of the requirement of the Act.

[235] **Lorraine Barrett:** As a member of the Committee on Equality of Opportunity, Gwenda, I was going to ask you about the continuation of the committee, but you have already answered that in saying that, as a committee, we feel strongly that it should continue. Have you given any thought to how different that committee might be? At the moment, we call in the Permanent Secretary and the Ministers regularly. Do you see the committee operating any differently in the future? For example, we do reviews looking into Gypsy traveller requirements, and so on. Do you see our role changing in future?

Gwenda Thomas: I do not think that it needs to change. We can always move with the times, but it depends on what times we will be dealing with in 2007. I certainly do not think that we should be prescriptive about the roles of committees, or even their existence. As far as the Committee on Equality of Opportunity is concerned, the arrangements that are in place at the moment for what the committee can do as regards auditing equality arrangements in the future, and scrutinising Ministers across portfolios, have represented a step forward. In contrast to the subject committees, the Committee on Equality of Opportunity has worked without having a Minister as a member, and I think that that is developing quite successfully. The present Minister has made it clear that she would like to attend the committee in order to assist her policy development activities, and the committee feels that it should have the right to call any Minister when it feels that that will promote equality of opportunity. We have seen that happen very successfully in the review of services for Gypsies and travellers, where there were obvious cross-portfolio issues. Each Minister with an equality responsibility has been called to committee. So, I really do not think that the committee needs to change very much. The fact that it does operate without a Minister as a member has probably taken it ahead of some other Assembly committees.

[236] **The Presiding Officer:** What do you say to that, Minister? [*Laughter.*]

12.00 p.m.

[237] **Jane Hutt:** I will start by acknowledging the unique contribution of the Committee on Equality of Opportunity over the past six years. It would not have had such force and influence had we not had the statutory duty under section 120, and section 48 is key to the business of the whole Assembly with regard to equality of opportunity. The separation is a challenge, is it not, in terms of how we take this forward, in ensuring that the Ministers are held to account and the views of the committee are clear, but also that the Assembly plays its part as well and is held to account? I know that this is an issue in terms of the Assembly Parliamentary Service, and I think that work on the mainstreaming of equality really does provide us with a vehicle to see how we can take that challenge forward with the White Paper recommendations, because it does apply to the Assembly Government across the board. As you said, all Ministers have a role to play in mainstreaming equality, as does the Assembly Parliamentary Service. There is an issue of capacity in terms of Members and the Assembly Parliamentary Service with regard to mainstreaming equality, and you may wish to comment on that.

Also, do you feel that the committee—I understand that, in Scotland, a committee has been set up very similarly to the Welsh committee—is a model or a vehicle for us to look at in terms of other committees as we move into the recommendations of the White Paper, whereby Ministers might not be involved as members? The Committee on the Equality of Opportunity might be an example that we can usefully look at in terms of a Minister not being involved as a member on a committee, but being called for scrutiny, and also in relation to other Ministers being called for scrutiny, as well as to learn from your policy development. Perhaps it could be a vehicle.

Gwenda Thomas: I think so. In Scotland—I believe I am right in saying this—the committee is there by way of Standing Orders, and not by way of the requirement of an Act. That makes us different from Scotland, and, as I have already said, we need to preserve the status of equality of opportunity as it stands in the current Act. I think that I have explained the issue of Ministers not being members of the committee in that the Committee on Equality of Opportunity has been operating in that way, and that took a change in Standing Orders for that to happen. Indeed, at one point, there was a requirement for the Minister to chair the Committee on Equality of Opportunity, so it can be said that we have moved in stages to what we have now: a committee without a Minister as a member of it. However, we have a Minister in yourself who has overall responsibility for equality of opportunity, and the committee has the ability to call for evidence from across the portfolios. I certainly think it worth repeating about section 120 that, where it will fall on Ministers, that section of the Act could mean that the equality of opportunity duty would fall on Ministers only, and I think that that would be a dreadful mistake. A requirement should remain on the APS as well to have a statutory obligation to look at equality of opportunity issues, and I would be really upset, as would others, and it would send out a very wrong message indeed to the standing invitees who attend the committee meetings and to the public if the APS did not have to have regard to gender issues, to recruitment issues, to the Welsh language—I certainly want to see that retained—and I think that there are other important equality issues for which it is just as important for the APS to have a statutory requirement to consider, as it will be for Ministers when we have the split of the Executive from the Assembly.

[238] **The Presiding Officer:** I do not want to get into an argument with one of my favourite Assembly Members, and we go back a long time, but, do you think it appropriate or necessary to put a statutory responsibility on a parliamentary body? Can I explain this by saying—and you referred to the Welsh language—that I was the one, I am afraid, who resisted all along the call for the Assembly Parliamentary Service, as it is now called, to have a language scheme. I took the view that we are the body responsible for the administration of the law and our statute, and, therefore, we do not need to have someone else telling us, by statute or by scheme, what we should be doing.

Gwenda Thomas: But we already have that in Wales, and it has worked well. It has worked well for the Welsh language and for other equality issues, such as gender and race, and will now embrace the other equality strands. It would be a retrograde step to step outside the statutory requirement as contained in the original Government of Wales Act 1998, and would give the wrong messages. I fear that it would appear as though we were diluting the requirement towards equality of opportunity.

[239] **Y Llywydd:** Clywaf beth yr ydych yn ei ddweud, Gwenda. Gadawn y mater yn y fan honno.

[239] **The Presiding Officer:** I hear what you are saying, Gwenda. We will leave the matter there.

[240] **Kirsty Williams:** May I just clarify, Gwenda, that you and your committee believe that

there should be specific mention in the Bill of a requirement to have a committee on equality of opportunity?

Gwenda Thomas: I am not saying that. We do not have that now, of course. What I am saying is that sections 120 and 48 should remain, and should require the Executive and the Assembly to have due regard to equality of opportunity matters in all of its work across the board. I am saying that Standing Orders—and one would hope that the Assembly would have a say in its Standing Orders—could then be written, or rewritten if needs be, and I am not convinced that they need to be insofar as the Committee on Equality of Opportunity is concerned. However, Standing Orders would then need to be the means by which we implement the statutory requirements to have due regard to equality issues.

[241] **Kirsty Williams:** Via a committee?

Gwenda Thomas: Yes.

[242] **Kirsty Williams:** That clarifies it. Thank you.

[243] **Jocelyn Davies:** You argue strongly that the Committee on Equality of Opportunity should remain. What about human rights, which is another of our statutory obligations? Do you think that that should also continue, and that the Committee on Equality of Opportunity could also be the committee on equality of opportunity and human rights in one?

Gwenda Thomas: There is an inevitable movement towards that. Human rights, for the time being, will remain within the existing legislature. However, with the setting up of the commission for equality and human rights in 2007, there will be an emphasis on human rights. Human rights issues have already touched the committee's work, particularly in its review of services to Gypsies and travellers. When the CEHR is in place in 2007, there will be a Welsh committee, and I can see an enhanced role for the Committee on Equality of Opportunity at that point to work with that Welsh committee to ensure that we embrace human rights. It is inevitable that we move towards that situation with the onset of the new arrangements. I think that we can have a supportive role in supporting the different strands and the different bodies, such as the Equal Opportunities Commission and others, who will have to look at their role and bring their roles together.

Therefore, to answer your question, human rights should become more of a part of the Committee on Equality of Opportunity's work post 2007. One good thing is that there will be a coincidence in time, and there will be the need to develop with the human rights aspect and to consider how we embrace the commission for racial equality, which will not join until 2009. Insofar as our race relations scheme is concerned, and the mainstreaming of equality commitments made by the Welsh Assembly Government at the moment, and the Assembly Parliamentary Service, then there will certainly be a need to support the movement into the new body.

12.10 p.m.

[244] **Y Llywydd:** Nid wyf yn credu bod neb arall eisiau gofyn cwestiwn. Diolch am y cyflwyniad ac am ddadlau mor gadarn o blaid y pwyllgor.

[244] **The Presiding Officer:** I do not think that there are any further questions. I am grateful to you for your presentation and your spirited argument on behalf of your committee.

We now welcome our friendly media.

Yr wyf yn rhoi croeso mawr i Ashok Ahir. A very warm welcome to Ashok Ahir. It is
Mae bob amser yn braf croesawu'r cyfryngau always a pleasure to welcome the media to
i'n pwyllgorau. our committees.

[245] **Jane Hutt:** Ashok, obviously, you are here from BBC Cymru, and I am interested in the role that the media can play, in terms of the whole issue of political engagement and awareness raising. You will know from the research that was undertaken for the Richard commission and follow-through from polls that you have done that there is a strong measure of awareness about devolution, and of the Welsh Assembly Government as a tier of government that people relate to. In the Richard commission, it came out that people saw that they ought to be relating more to the Assembly Government. That has come through your polling as well, and puts a big responsibility not just on the political world, but also on the media to respond and enable that level of political engagement. So, I want to tease out how you feel the media, and the BBC in particular, can play its full part in the maturing of democracy in Wales through that kind of political engagement?

Also, in the Ofcom report, as a Government, we said that there should be more recognition of the devolution of Welsh issues at a UK level. How are you seeking to address that? Those are my two questions.

Mr Ahir: On the first question, the BBC Cymru political reporting team that is based in this building shares journalistic responsibilities for the Assembly, Cardiff bay and the European Union. We are the biggest political reporting team, other than the one that is based at Westminster, for the BBC. In sheer numbers, we are probably the second biggest political reporting team anywhere in the UK. In itself, that shows the importance that BBC Wales puts on reporting Welsh politics in a post-devolution age.

If you look at what we do, we probably have more programming per se in both Welsh and English, on radio and television, than any other part of the BBC when it comes to politics. In Scotland, for example, some of my colleagues are quite jealous of the fact that we have a channel like S4C2 that gives wall-to-wall coverage of proceedings here, because they do not have that provision in Scotland. That is why they do most of their stuff online, with the www.holyrood.tv service.

In terms of what would happen to our reporting if this place changed, nothing much would change. We may well have more to report, and we may well have more important things to report. For example, the transition of a Bill is more important than a debate, which has no conclusion. However, I would not see us changing what we do. We would certainly give greater importance to particular things that had more relevance to the public out there, but I do not see us changing as a team in any form.

In terms of the question about the UK networks, and how the BBC reports Welsh politics on a UK level, one of my main roles is to liaise with colleagues in London and at Westminster on how they should report Welsh politics. One of my tasks is to pick them up when they are saying things that are wrong. As the media, not just the BBC, we report Welsh politics badly. A lot of that has to do with the fact that they report things as being done by the Welsh Assembly or the National Assembly for Wales as opposed to the Welsh Assembly Government. That creates confusion, because if the public sees things being done either well or badly by the Assembly, then it is the Assembly that gets either the benefit or the negative aspect of that perception. That does not really help. At BBC Wales, we have a quite strict style guide on how we should refer to distinctions between the Assembly and the Welsh Assembly Government, and how committees should be referred to. We are always trying to

improve the language that we use to refer to different parts of Welsh politics and devolved politics.

Post devolution, a lot of training went on at the BBC. There was 'The New Devolved Britain', a course that everyone had to attend. There were seminars across the BBC, but that was in 1999 to 2000, at the cross-over point. There has been a big slippage, which is what I think that you are referring to. Across all broadcasters, not just the BBC, and particularly in the written press, we often see references to Welsh politics that say, 'The Welsh Assembly has done this', whereas it was actually the Welsh Assembly Government. That is misleading, because that is not what should be getting across to the public. I pick people up and point out that they should be saying 'the Welsh health Minister has said this' rather than 'the Welsh Assembly has said this' or whatever else it could be.

We are currently undergoing a lot of journalistic training post Hutton. A series of courses were run five or six months ago, post Hutton, to reinforce editorial values across the BBC. That is being taken a step further in the autumn. There will also be a focus in that training on intermittent things that we think that all BBC journalists and editorial staff should be aware of. The first two things that will go into that training are Europe and the middle east. At the moment, in conjunction with a college in London, we are also working on a new devolved Britain module, which will be rolled out across the BBC next year. Hopefully, before the elections in Wales and in Scotland, we will reinforce to our staff in Wales and to BBC staff across the UK the differences that now exist in a new devolved Britain. In a sense, a lot of the stuff that we tried to teach people in 1999 has changed, because powers have changed and responsibilities have shifted to a certain extent. I think that we are working on it, but we do not get it right.

[246] **Jane Hutt:** That was helpful. Training on post devolution Britain, beyond Wales, is important in terms of your colleagues. I will always remember, not long ago—I think that it was 1 April 2004—someone coming down from London to ask about abolishing prescription charges and questioning me about whether we were allowed to do so.

[247] **The Presiding Officer:** That is the BBC for you.

[248] **Jane Hutt:** That was the point when we realised that they did not really understand that devolution had happened and that the terms of the settlement, within the transfers of power, enabled us to do that. There will be a big step change as we take the White Paper through to a Bill and through to 2007. It is welcome, but I am sure that you will recognise that it is still a big challenge for the confidence of the people of Wales. Understanding what we have done and what we can do is important for our confidence.

Mr Ahir: When major policy areas are devolved, such as health and education, and now there are distinct policies developing across the UK, it is also important to say that there is a tendency in the BBC for us to jump on the back of whatever the Department of Health or the Department for Education and Skills put out in terms of the big thing that the Ministers will be doing this week. To me, that works both ways. It is a problem for us in the BBC, but it is also a problem that exists with Whitehall departments.

Far too often, press officers in Whitehall departments sell a line to the papers, particularly at the weekend, which then gets picked up by the broadcasters, and no-one makes any reference to the fact that it is a major devolved area and that the policy that is being pushed forward does not have any relevance in Wales or Scotland. We kind of catch up by the middle of Sunday or Monday morning and note that it is an England-only policy. Given that it is sold straight to the newspapers as a new policy to do with health, it is splashed on the front of *The*

Mail on Sunday as ‘prescription charges frozen’, or whatever it might be. Given that newspapers are worse than broadcasters in terms of explaining devolution and including references to devolution, colleagues—not just in the BBC, but a lot of network colleagues who work for other broadcasters—fall into that trap quite easily. We pick up newspapers on a Sunday or on a weekend and think ‘Oh, there is a major decision being made this week’ or we see that there is a major policy rollout on a particular devolved field, without thinking about its having no relevance outside of England. The prime example that I keep picking people up on is foundation hospitals. You know better than I do that there are no foundation hospitals in Wales or Scotland; yet, in the media, and, I dare say, within a Westminster context, within political parties, there is a lot of talk about foundation hospitals, but it is not relevant to one sixth of the population of the UK.

12.20 p.m.

[249] **The Presiding Officer:** Your frankness is an inspiration to us all in these matters.

[250] **David Melding:** Ashok, I presume that your stylebook will be made a little simpler by the fact that we will have a split between the legislative and executive arms. I assume that you feel that that would be useful in terms of projecting to the people what goes on here and in the Government.

I want to draw you out a little on the current reporting arrangements. You mentioned that there is wall-to-wall coverage on S4C2. That coverage is of Plenary, as I understand it, and some committee work is also chosen to be shown, on a piecemeal basis. Let us assume that the Order in Council process creates something that is very similar to having a Bill stage, where a Bill goes through Parliament, and a committee stage. There will be some issues—we might be dealing with something on the environment or whatever—on which there is genuine concern among the public, especially among those involved in voluntary groups. If you are living in Bangor or somewhere, you would find the service very useful, but you would want it fairly immediately, I would have thought; you would not want to see it on the highlights for the month or something. So, what type of decision would you be making in terms of what to cover, and would it be important to cover some of the committee work that was really getting to grips with the line-by-line scrutiny? Would there be any knock-on effect on the UK parliamentary channel? That is an excellent channel, but I do not think that it covers any, or very little, of our committee work at the moment, which I quite understand. It covers quite a lot of Plenary, although that is not full coverage, and, again, one can understand that.

[251] **The Presiding Officer:** I was hoping that it would cover this committee, because it is so germane to the whole issue of devolution.

Mr Ahir: It may well cover it next week, I am told, and I can encourage that if you like.

On the matter of committees, we do not traditionally broadcast on a Monday on S4C2—you sat on Monday this week, is that correct?

[252] **The Presiding Officer:** We sit every day, except Saturdays and Sundays.

Mr Ahir: I meant in the committee form. If there is a development whereby we see committees being held on Mondays, for example, we would have to think again about whether or not it becomes, in effect, wall-to-wall coverage, every day, as in four days a week as opposed to the three days a week that it is at present. Most of what we transmit is Plenary, but when work has been done around Plenary elsewhere in the Assembly, we have covered that. There will always be a distinction and editorial judgment about what we broadcast. If

you think of Parliament, BBC Parliament has to choose between House of Lords committees, Westminster Hall debates, subject committees—it has much more than we have, and I am sure that there are things that the great British public are interested in that are never shown on BBC Parliament, and, unfortunately, that will happen in terms of what we do. However, I would hope that we would make the correct editorial judgments and that, whatever business is happening in committees, we show the right ones. We have a tendency to record some, when there are clashes, and we try to show them at periods when there is not as much interesting stuff going on, shall we say. Given that, I would hope that if there was an interesting hearing on the environment that people in Bangor wanted to see, they would get it two days later rather than at the end of the month.

I have forgotten your second point.

[253] **David Melding:** It was just on the legislative-executive split.

Mr Ahir: From a journalistic perspective, I do not think that what we say has changed. I am probably a bit fascistic as an editor about the distinction between the Welsh Assembly Government and this institution and the way in which we refer to them. Even in the White Paper, there is still reference to Assembly Ministers. If I can dare to speak as a citizen, and not on behalf of the BBC, Ministers do not serve the Assembly. I know that there is a delegation of functions, but they actually serve the people of Wales, or the Crown if that is what happens in term of development. So, I do not think that there should be a reference to Assembly Ministers anywhere, which is why we try to avoid using the title ‘Assembly Minister’ and refer to them instead as the health Minister, the environment Minister, the education Minister and so on. Given that, when there is a distinction between something that is happening in the Assembly on which Assembly Members are voting, it needs to be quite clear that it is the Members that are taking that vote and that a decision will or will not then be taken up by the Welsh Assembly Government. If there is an official split in the corporate structure, it needs to be a fairly clear one as it is important.

[254] **The Presiding Officer:** On that theme, I wish to draw attention to paragraph 2.6 of the White Paper, which I am sure Ashok is well aware of. The whole logic of this section, relating to where you are and where I have been for some time, is that you cannot have democracy without having a Government and a Parliament that are distinct. However, in 2.6, it says—and this takes up your point—that

‘Welsh Assembly Ministers collectively will be known as the Welsh Assembly Government’.

Is that a severe disappointment to you as a citizen and a journalist?

Mr Ahir: If I can go back to being a BBC journalist for a moment, I think that it is important, when we are trying to make the workings of the Assembly better known and understood by our audiences, which is our key aim as broadcasters, that they are aware of how they are governed. I think that an important part of what the BBC does is to explain the governance of Britain, and the governance of Wales in a Welsh context. We are all aware that there is confusion regarding the Assembly as an institution and the Government. Any distinction that is made would be helpful to us as broadcasters and ultimately to our audiences.

[255] **The Presiding Officer:** I wish to pursue this a little. I know how creative you can be in the BBC, and one of things that you do is to try to think of different ways of saying something using synonyms, because it makes the discourse of the news a bit more interesting. Have you thought of the various possible titles that could be used, such as Welsh Executive, Welsh Government, Government of Wales and so on?

Mr Ahir: As we know, there is a precedent in Scotland, and there is a distinction and a body called the Executive. Initially, the Welsh Assembly Government was known as the Welsh administration.

[256] **The Presiding Officer:** Sometimes. It was also occasionally known as the Government of Wales, and then on the morning of one St David's Day it became the WAG.

Mr Ahir: I think that any subsequent new Government of Wales Act has to make it clear that the Executive is one thing and the legislature is another. Whether or not that means that there needs to be a removal of the term 'Assembly' from the Government's name is for other people to decide.

[257] **The Presiding Officer:** We are grateful for your professional advice, as always. Jocelyn?

[258] **Jocelyn Davies:** The White Paper is obviously about more than just the split in the corporate body, and you are well ahead of the Bill in that regard because you have already decided that you will make that distinction. It is quite complex in some areas, and it will be difficult, and a challenge, for you to explain that to the public, and not just to the knowledge rich but to the knowledge poor. How do you intend to set about explaining this White Paper to the people of Wales?

Mr Ahir: At the outset, well ahead of publication, as a broadcaster, we did plenty to outline what may or may not come in this document. Now that it is here, a lot of what was discussed on our programmes is in this document. A lot of the stuff has been outlined. As a broadcaster and a team, we work both at Westminster and at the Assembly. We have reported at both ends of the M4 corridor in terms of the opinions and the stuff that was going on. Now that the document is here, I think that it is fairly clear that, however you read it, there will be greater powers for this place. There will be a clearer distinction between the institution and the Executive. We need to keep reinforcing that during the process of the White Paper becoming a Bill and the debates that follow.

12.30 p.m.

As a broadcaster, our primary function is to explain what is in the White Paper and what it could mean in the short term. However, obviously it is only a White Paper, and we will see what happens when the Bill comes into being, and if an Act is passed. With regard to what we are doing, we would not argue a case one way or the other. That is not our role. In the BBC, we will just explain what is being put forward.

[259] **Jocelyn Davies:** It will probably be quite a challenge to explain the Orders in Council. Most people will not even have heard of an Order in Council.

Mr Ahir: That is the point, but that is what the White Paper says. It is a bit difficult to explain what Orders in Council are, even to politicians. All the public need to know is that there will be a mechanism by which powers can be transferred easily, if that is the case. That is the shorthand that we are trying to use.

[260] **Jocelyn Davies:** As we have heard from some witnesses, it could amount to what most people would regard as primary legislative powers—although the lawyers would argue about the definition of that—without needing to legislate for a Welsh Parliament.

When we visited Scotland, we discovered that the timing of the First Minister's questions was changed to accommodate the media. They wanted it at midday, rather than in the afternoon, so that they could report it at lunchtime. Do you have any views on the practical organisation of committees and questions? You might not be asked again, so I am asking now. This is your opportunity. If we moved things around, would it be better for you?

Mr Ahir: We changed our schedules around to accommodate First Minister's questions live a couple of years ago. We changed the time of *AM.PM* on Tuesdays to start at 2 p.m. so that we could carry it live. I would have to talk to our schedulers to see what would happen at 12 p.m. on a Tuesday or Thursday. Obviously, we could not do Wednesdays, because that would clash with Prime Minister's question time. Tuesdays and Thursdays at midday may not be a bad time for us to transmit a programme. However, it depends on what else BBC 2 across the UK is showing at that time. We have worked out quite a nice slot between 2 p.m. and 3 p.m. on Tuesdays. However, if moving it meant that we could report it better on the lunchtime news on a Tuesday, I am sure that we could look into it.

[261] **Lorraine Barrett:** To be honest, most of what I wanted to ask has been asked. I want to make the point of how irritating it is to all of us that UK national reporting, on all channels, will state that the education secretary has said that something is going to be implemented in all schools, without reference to the fact that it would be only in England. I often scream at the television.

[262] **The Presiding Officer:** We have often done it two years before, thanks to our Ministers, which makes it even more annoying.

[263] **Lorraine Barrett:** That is right. I go along with everything that has been asked, and I am grateful for your response. The digital age will be presenting you, as a public service broadcaster, with even more challenges in helping us to get the message out to the people of Wales about these changes and how it will work. Do you have anything to say about that? Everything else that I wanted to ask has been asked.

Mr Ahir: In the first instance, the only thing that I can think of is whether we would increase our coverage of daily proceedings, if there were more committees and sittings on Mondays. We must look at that in conjunction with S4C, which owns the multiplex on which we broadcast the live coverage.

[264] **Carl Sargeant:** Thank you for coming. You have made some very interesting points, but we need to clarify some, if I may, Chair. When we talk about the Welsh Assembly Government and the Assembly, people, even in north Wales, where I live and where the Assembly perhaps does not have such a high profile as it has in some areas, know that it is based in Cardiff and know what we do. I cannot think of anybody—and certainly not people in Asda in Queensferry—other than those of us in the room, and some of this morning's witnesses who would know what this was about if they heard anyone talking about the White Paper or its impacts.

It is increasingly difficult to sell the Assembly or politics in any way. When will the big bang for the White Paper happen and how will you sell that? There will be a point when it will be meaningful for Mr or Mrs Jones in Shotton. Up until then, it is significant to us, but it may not be as significant to the general public. So, how will you sell that point, and what will be the most important and sellable point of the White Paper?

Mr Ahir: We had this situation when the document was published, in a sense. People asked what difference it would make even if it went through in its simplest form, what do Orders in Council mean, what kinds of things could come through council? That is the tipping point. The point is when something is granted through council quickly and efficiently, and people

say, 'It was worth doing that' and say that they are glad that the Assembly, or the Assembly Government—whichever they want to refer to it as—is doing that, and ask whether it is a new law and find that it does not need to be a new law. That is the tipping point. Until everything is in place and we have an Act, that cannot happen. It is important for politicians across the board, in terms of the political background, to really get across to their public, as much as we do to our audiences, what that will mean in practical terms and the kind of things that could happen if this stuff became an Act. We can only do so much because we reflect back the political arena. We search out and try to examine the political structures and ask what has not been looked at.

I believe that you had representatives from the Institute of Welsh Affairs here today. Think-tanks are few and far between in Wales. There are not a lot of ideas floating around in Wales as there are, for example, in Westminster, where you have tonnes of think-tanks throwing things at the media and policy makers. What is important is for us, collectively, journalistically, is to look into what the opportunities are, and it is important that politicians and political parties look at what the opportunities are. When the Government of the day, whatever name you give it, comes forward and says, 'Actually, we have asked for these Orders in Council and it means that we are going to do this within six months or a year', that makes things newsworthy and interesting to your person in Asda in Queensferry. However, until that point comes, I am not sure how people, in Queensferry or wherever, will get a greater understanding of what is going through. It is one for us to mull over, but, at the forefront of what we are trying to do is say, 'Okay—simplicity—you are not going to get a St David's Day holiday out of this by the look of things, but you might get something else to do with tourism', for example.

[265] **Jane Hutt:** I will briefly follow that through. There is an opportunity now to explain that we have more powers in relation to decisions about smoking in enclosed public places. That is a very clear example of where we have a piece of framework legislation, namely the Health Improvement and Protection Bill, to which we have given extensive consideration, and on which we have taken evidence, through our cross-party group, in terms of what policies we would like in Wales. It is about having powers for a purpose—I used that expression earlier on today—and having tools for the job and giving examples, and that is a very clear example that we can use now to show that what that means is that Wales can do what it wants to do, even though that might be different to English policy, on the back of a Bill and a piece of legislation.

[266] **The Presiding Officer:** Thank you very much. That is the end of our public session.

Daeth rhan gyhoeddus y cyfarfod i ben am 12.39 p.m.

The public part of the meeting ended at 12.39 p.m.

**Cynulliad Cenedlaethol Cymru
Y Pwyllgor ar y Papur Gwyn—Trefn Lywodraethu Well i Gymru**

**The National Assembly for Wales
The Committee on the Better Governance for Wales White Paper**

Dydd Iau, 7 Gorffennaf 2005

Thursday, 7 July 2005

QQ267-360

Aelodau o'r Cynulliad yn bresennol: Dafydd Elis-Thomas, y Llywydd (Cadeirydd), Leighton Andrews, Lorraine Barrett, Jocelyn Davies, Jane Hutt, David Melding, Kirsty Williams.

Tystion: Jeremy Colman, Archwilydd Cyffredinol Cymru; Christine Gwyther, Panel y Cadeiryddion; Phil Jarrold, Cyngor Gweithredu Gwirfoddol Cymru; Ian Summers, Swyddfa Archwilio Cymru.

Swyddogion yn bresennol: Paul Silk, Clerc y Cynulliad.

Gwasanaeth Pwyllgor: Siân Wilkins, Clerc.

Assembly Members in attendance: Dafydd Elis-Thomas, the Presiding Officer (Chair), Leighton Andrews, Lorraine Barrett, Jocelyn Davies, Jane Hutt, David Melding, Kirsty Williams.

Witnesses: Jeremy Colman, Auditor General for Wales; Christine Gwyther, Panel of Chairs; Phil Jarrold, Wales Council for Voluntary Action; Ian Summers, Wales Audit Office.

Officials in attendance: Paul Silk, Clerk to the Assembly.

Committee Service: Siân Wilkins, Clerk.

Dechreuodd y cyfarfod am 4.13 p.m.

The meeting began at 4.13 p.m.

**Papur Gwyn—Trefn Lywodraethu Well i Gymru: Tystiolaeth
The Better Governance for Wales White Paper: Evidence**

[267] **Y Llywydd:** Fy mhleser yw [267] **The Presiding Officer:** It is my pleasure to welcome the Auditor General, Jeremy Colman, a'r dirprwy archwilydd, Ian Summers. Jeremy Colman, and the deputy auditor, Ian Summers.

Who would like to begin the questioning?

[268] **Lorraine Barrett:** I will. Thank you.

[269] **The Presiding Officer:** Sorry, I should have thanked Mr Colman for his paper.

[270] **Lorraine Barrett:** I have a rather simple question to start off with, though I do not know for how long my voice will hold out. Should the Assembly establish a finance committee to scrutinise its budget proposals?

Mr Colman: I do not have a view on whether you should or should not do that. There are precedents in other legislatures for such a committee. It has some advantages but you can manage in other ways. From the point of view of the legislation, it would be best if the Assembly were left free to decide from time to time what model suits. It is certainly not a bad model and I would not argue against it, but I suggest that the choice should be kept out of the legislation and be a matter for the Assembly from time to time.

[271] **Kirsty Williams:** Paragraph 2.18 of the White Paper sets out the procedure for how money will come to the Assembly, and how the Assembly will then be able to vote for resources. This could include the establishment of a consolidated fund, which I believe is the model in Scotland. In the past, some people have been slightly critical of the scrutiny of the House Committee budget as it is currently constituted at the Assembly. What do you think should be the essential procedures available to monitor and to properly scrutinise this process of voting and allocating money to the legislature?

Mr Colman: I am not sure that I completely understand the question, so if my answer is off-beam, I have no doubt that you will say so.

[272] **Kirsty Williams:** Apparently, according to the First Minister, it is the funny way that I ask questions that is the problem. That is what I was told this week.

[273] **The Presiding Officer:** It is no problem at all as far as the Presiding Officer and Chair of this committee is concerned.

Mr Colman: Anyway, the concept of the consolidated fund in British parliamentary history is very old. It dates back to the seventeenth century. The idea then was that financial control would be greatly improved if all revenues were paid into a single fund, and all expenditure met out of that single fund. That basic principle is still true today. For my part, a consolidated fund model for Wales in the future is absolutely consistent with the thrust of the proposals—which I support—of separating the legislature from the Executive. Expenditure from a single fund is monitored and controlled as a single entity.

In my written evidence, I referred to an aspect of the management of a consolidated fund that probably very few people in the world know about, but I mention it for completeness. It is what is called the ‘comptroller function’. The principle is that, despite having a consolidated fund, the Assembly Government’s budget is divided into sub-heads and that it would be inappropriate for money to be paid from the single fund unless there is specific authority for that expenditure as part of the budget. So, the function of confirming that, literally day by day, drawings from the fund are within the authorised amounts and are being used for the authorised purposes is the comptroller function, which is an integral part of having a consolidated fund. This is why I recommend that that function be created. It would normally fall to the Auditor General to perform it.

On the question of the House Committee, I am not sure. Maybe Ian Summers can speak on this.

Mr Summers: I will just elaborate on that. With the separation of the Executive and the legislature, the Government will be required to prepare a budget and to submit it to the Assembly membership for approval and a proper scrutiny process will need to be put in place. That may be a finance committee or some other model, but the end result will be the Government putting forward a budget and the membership approving it. That budget will include amounts that will need to be drawn from the consolidated fund to meet the payments that will be due in the forthcoming financial year. As the Auditor General for Wales said, he

will effectively act as the gatekeeper for that consolidated fund. When the Government wants to use the money, he will satisfy himself that it is in line with the lawful budget resolutions and release the money.

As regards the remainder of the patch, the Assembly will presumably need a corporate body to manage its day-to-day affairs. That corporate body will need to prepare a budget, which will consist of the salaries of the Members and their support staff, the costs of accommodation and so on. I would argue that, as a public body, that budget should be subjected to no less scrutiny than the Government's budget, even though it is not subject to ministerial control. It will still need to be met from public funds—the Welsh consolidated fund—and for money to be drawn from it. So, a budget scrutiny process should be put in place for both elements.

4.20 p.m.

[274] **Leighton Andrews:** May I ask about the suggestion in your paper that the Auditor General should be the comptroller function? Would it bring the Assembly into line with Scotland, Northern Ireland and Westminster?

Mr Colman: Yes, it would. It is a logical consequence—if you have a consolidated fund, it makes sense to have a comptroller function as a day-by-day control on the moneys going out of the fund. Without it, there is a risk that money will be drawn from the fund beyond the limit for individual items, although contained within the total. That is a diversion of funds, even if it is within the total, that has not been approved by law. So, that is the purpose of the comptroller function—to ensure, day by day, that the funds are drawn only for the purpose for which they were originally approved.

[275] **Leighton Andrews:** What would be the implications for your office in terms of staff and so on? Is it likely to require additional staff?

Mr Colman: Hardly. It would possibly require one person on average over the year, so I would not be wanting to demand a lot more money for that function.

[276] **Leighton Andrews:** Are there alternative operations elsewhere in the UK in respect of this kind of function?

Mr Colman: I am not aware of any, unless Ian is?

Mr Summers: No, there are none. In Westminster, Scotland and Northern Ireland, there are separate consolidated funds. For the person who works for the Auditor General operating this comptroller function, it is a very small part of his or her job. I do not think it costs hardly any extra money.

I would add to the answer already given that the Auditor General, acting in the comptroller function, is there to look after the interests of the Assembly Members who approved the budget. He will ensure that the money is drawn as and when needed to meet the budget. It is a job that is done on behalf of the Assembly Members, if I can put it that way. The consolidated fund is an account that will, presumably, be held with the Paymaster. It will be looked after by the Assembly Government's finance group, which will have to account for it. However, Members' interests are looked after by the independent Auditor General with this comptroller function.

[277] **Leighton Andrews:** In that comptroller function, do the equivalents in Westminster,

Scotland and Northern Ireland report back to the equivalent of the Assembly's Audit Committee as a public accounts committee, or whatever? I understand that it is the way you do it in your auditor role, but is that the way it would be done in your comptroller role?

Mr Colman: Technically, that is correct—they do. As Ian has explained, the function is performed for the benefit of Assembly Members. Most of the time, in most centuries—if I can put it in those terms—there is absolutely nothing to report, because the existence of that control means that funds are only demanded for approved purposes. I would not want to make too much of this—it is important, but not large, if I can make that distinction.

Mr Summers: I will elaborate a little more, if I may. The account of the consolidated fund has to be prepared every year. I would strongly recommend that the legislation requires an annual account of the consolidated fund to be prepared, in terms of the amounts coming in and drawn out, and that the account is submitted and laid before the membership here, and published.

[278] **Jane Hutt:** I want to follow up the points you made about the Audit Committee, and the important role that it has played in terms of holding the public sector to account, and, indeed, Ministers to account, via reports that have come out through the Wales Audit Office and the Auditor General, which helps to improve the scrutiny of how we do government in Wales in relation to public services. I appreciate that you have only been in the post for a relatively short time, but over the last six years it has played an important role.

You suggest in your paper that the timescale in our Standing Orders is appropriate for getting the Government to respond to that. We are also interested in this particular role because we see that some of our committees might be more engaged in legislative responsibilities. Perhaps scrutiny may not take such a front-row role, although there will be a balance to be struck, and we are discussing that at the moment. I just wanted to explore that with you. Also, we see the role that we should be taking as being set out in Standing Orders as much as possible, with just the principles being taken through the White Paper and into the Bill and the Act. Would you agree with that?

Mr Colman: I agree with that, with the slight gloss, if I may—and it does not contradict what I said earlier about giving the Assembly flexibility to modify its arrangements as and when necessary—that I support the idea that the existence of an audit committee should be stipulated in the legislation. It should be a requirement that there is an audit committee. A committee that operates as the current Audit Committee does, on cross-party lines, is, in my view, an absolutely essential part of holding the Executive to account. The new arrangements for Wales would be weaker, in my view, if there were not a requirement for such a committee to be constituted. Although I have only been in post for a little over three months, I have seen enough of the Audit Committee to know that it does an excellent job. That is particularly because it operates on cross-party lines and does not divide on party-political lines, which other committees have been known to do from time to time. It is quite appropriate that they should do so, but the Audit Committee should not and does not, which is a great strength.

[279] **The Presiding Officer:** One of the interests of our committee is that we are charged to look at the implications of the White Paper in terms of increased scrutiny. Therefore, I was very interested in the sections of your paper devoted to the issue of resource accounting in relation to the way in which budgets are prepared and the lack of transparency, perhaps, that may exist at present, and in particular by the following sentence—I do not want to quote your own paper back at you, but I happen to have it in front of me—in which you recommend that:

‘the legislation creating a legally separate Ministerial executive authority for Wales should

require Ministers to prepare an annual budget on a resource basis for approval by the Assembly Membership.'

Could you expand on that, and in particular, highlight how it would improve the budgetary scrutiny process by Assembly Members?

Mr Colman: The basic point here is that the expenditure against the budget approved by the Assembly should be capable of being checked against the original budget by looking at the accounts. At present, it is quite impossible. This is a considerable defect that the Assembly approves a budget, and that some time later, accounts are produced and audited by me. I regret to say that those accounts will throw very little light on whether the budget is being complied with. Therefore, the proposals in my paper are simply that that situation should be remedied and that a budget in apples should be monitored by reference to accounts in apples, rather than pears and oranges as is the current situation. I do not know whether Ian has anything more to add to that.

Mr Summers: I think that what is needed is a combination of a change in the way that the budget is currently compiled and presented to the Assembly membership, and, underpinning that, a statutory framework. With the separation, I think that the Government will need to prepare a budget. One of the important roles of the Assembly membership will be to scrutinise and eventually approve that budget. In doing that latter role, which should be a statutory requirement, in my view, they should be able to see a budget which will eventually be matched by the accounts, as the Auditor General said. I think that we need an underpinning statutory framework, and also some changes to the way in which the budget is currently presented.

4.30 p.m.

[280] **The Presiding Officer:** Does this compare with the current situation in the UK Parliament, the Scottish Parliament and the Northern Ireland Assembly?

Mr Summers: The Scottish Parliament operates along the lines that I have just suggested. Obviously, the resources that it is allowed to consume are derived in part from the Treasury through the comprehensive spending review. However, in taking that resource allocation, which is given to the Scottish devolved authorities, the Scottish Executive will be required to convert that into a form that says what the Executive will consume in the year and the amounts of money that will be drawn from the Scottish consolidated fund. It is presented in that way so that there is a resource control and a cash control, which is approved by the Scottish Parliament.

The Northern Ireland Assembly is currently suspended, but, nevertheless, the budget that it was approving is now approved by the Westminster authorities and a similar approach is followed.

[281] **The Presiding Officer:** You do not have to answer this if it is an embarrassing question, but you have been around the NAO function in relation to the National Assembly and the previous structure for a long time. Ian, why do you think that it never happened here that there was resource accounting in terms of how the budget was structured?

Mr Summers: Resource accounting was introduced around the same time that the Assembly came into being. I remember auditing the very first Welsh resource account, which happened to also be the first account for the National Assembly. Resource budgeting in the UK context came in two years later, in 2001. The Government Resources and Accounts Act 2000, which

introduced resource budgets in UK Government departments, did not specifically apply to Wales, because the devolution settlement gave the National Assembly the freedom to adopt its own budget-setting processes, and the processes that were adopted by the corporate body model here, if I can put it that way, chose to sub-divide the comprehensive spending review. The Westminster-Whitehall authorities do not do that; they do the conversion process so that there is a resource control and a cash control for parliamentary approval. We do not yet have a part-Westminster, Whitehall-type structure here, so, for what I think are perfectly reasonable reasons, the comprehensive spending review settlement was sub-divided and presented to Members here for approval.

[282] **The Presiding Officer:** So, what you are telling us is that we now have an opportunity to get this right.

Mr Summers: Yes. I think that the legislation requiring the budget-setting processes, together with a bit of administrative work, is an ideal opportunity to get this in a way that will help Members to understand what they are being asked to approve far better and also in terms of accountability, in comparing budget against audited outturn.

[283] **Jocelyn Davies:** We could do that best with a finance committee, could we not?

Mr Summers: I am not sure that a finance committee is the only model. What is right is to have a budget that is presented in a form that is comparable with how the Assembly is required to account. Resource accounting is the norm in the UK and in many other countries now, and I am quite sure that that will continue for some time, if not indefinitely. Therefore, it is right that the budget should be presented in a way that is comparable to the accounts. How that budget is scrutinised, as the Auditor General said earlier, ought to be a matter for the Assembly to decide for itself, and having a finance committee, as the Scottish Parliament does, is one way of doing it. Westminster used to have an expenditure committee, but more recently, the departmental select committees have been looking at departmental budgets. So, there is more than one way of skinning that cat.

[284] **Jocelyn Davies:** Even though the White Paper says that there should be an Audit Committee in the legislation—and you have confirmed that that would be your preference—would you advocate any changes to its functions?

Mr Colman: No, I do not think that I would. I think that the functions of the Audit Committee, as presently constituted, are just fine. It has very wide powers to summon witnesses, and I have very wide powers to report, as and when I see fit, on more or less anything that I want to report on. So, it is a very flexible arrangement, as long as it sticks, as I emphasised, to operating on cross-party lines. If there is a change that I would recommend, it is not to the functions of the Audit Committee, but to its name. Its name is not the best possible choice because, these days, every central Government body and every Assembly sponsored public body has an audit committee. The corporate body which is likely to be formed to look after the affairs of the Assembly, will have an audit committee, which may or may not be called an audit committee. The name 'audit committee' is probably not the best choice these days. I would very rarely recommend to anyone here that something be copied simply because it happens in Westminster, but the Westminster Public Accounts Committee is quite a good name and less confusing than 'audit committee'.

Mr Summers: The audit committees that ASPBs and many public limited companies are required to have, and most UK Government departments now have, are an essential part of the governance of the organisations; they are there to assist with that governance and that is their role. The Audit Committee of Members here is in no way meant to assist with the

governance of the organisation; it is there to hold organisations to account. I would add that as a good reason for a name change, although far be it for me to tell a committee what to call itself.

I would add one other thought in terms of the role and the powers of the Audit Committee. If there is any thought around whether the Assembly's current powers of summons should be changed—I am not sure whether that is part of this White Paper or the forthcoming legislation—the Audit Committee has on occasion invited people who it is not able to summons to give evidence, and they have usually come willingly. However, there have been one or two areas of friction, if I can put it mildly. If there are any changes that are being made to the Assembly's powers of summons, we might want to look carefully at the Audit Committee's interest there.

[285] **Jocelyn Davies:** Yes, sure. The other thing that I wanted to mention to you is that we have learned from our contact with the Scottish Parliament that the Auditor General there can produce reports to subject committees, not just to its equivalent of the Audit Committee. How do you feel about that?

Mr Colman: I have no problem at all in producing reports. My reports are actually addressed to the Assembly as a whole, and it is a matter for the Assembly to decide how those reports are then handled. I would expect them, predominantly, to be taken by the Audit Committee, but I would feel completely at home with those reports being taken by other committees. Indeed, in my first week in office, I gave evidence to a subject committee, and I was very pleased to do so, on the basis of two reports that predecessor organisations had produced. That is something that I am completely comfortable with.

[286] **Leighton Andrews:** I wish to take you back to this question of having a finance committee. Regardless of whether the Audit Committee is called that or the public accounts committee, do you think that there might be a danger, if we had a finance committee, of there being confusion between the roles of that finance committee and your audit/public accounts committee?

Mr Colman: I will think about that, if I may think aloud. I can recall the days of the expenditure committee in Westminster, and the functions that it performed were completely different from those of the Public Accounts Committee. If there is anything wrong with the name 'Public Accounts Committee', it is that it implies that that committee spends its time looking at accounts. In my experience, the Public Accounts Committee only rarely, and then unwillingly, actually looks at accounts—it is happy to receive reports from the Comptroller and Auditor General and look at those—whereas the expenditure committee did look at accounts.

4.40 p.m.

The disadvantage of the current arrangement in Westminster, where budgets are scrutinised by departmental select committees, is that those committees vary very much in their interest in the scrutiny of expenditure. Some of them are very interested in policy and not very interested in expenditure, others are very interested in expenditure but not very interested in policy. The advantage of having a finance committee is that you have a consistent approach for the Assembly's scrutiny of the budget. The risk of confusion with the Audit Committee, or whatever it is called, is theoretically there; in practice, that was not a problem in Westminster.

[287] **Leighton Andrews:** It would be possible, would it not, to address the issue of the lack of interest by the committees by inserting within their remits a specific obligation to review the expenditure of the departments that they are monitoring?

Mr Colman: My point about the departmental committees in Westminster is not that there

was doubt about their function but that there were varying degrees of interest in the intensity with which they performed the function. I do not think that anything that I have said should be decisive one way or the other in whether the Assembly should have a finance committee or not. I can see arguments for it and against it. The argument for putting scrutiny of the budgets in the hands of the departmental committees is that, by hypothesis and in truth, those committees know about the work of the relevant departments, so the defence committee is full of people who are interested in and know about defence, and, therefore, potentially bring a greater forensic mind to examining the budget of the Ministry of Defence. That is the argument for a departmental approach. I am quite indifferent between one and the other.

[288] **The Presiding Officer:** Do colleagues have any other questions? In relation to the Audit Committee title—Pwyllgor Archwilio—I believe that it was another onerous burden that we had to bear when the original Government of Wales Act 1998 became our constitution. Do you have any creative names for titles apart from public accounts, which seems to be slightly jaded from having been used for a long time in Westminster? If you have any ideas between now and when we write the report, we would certainly be grateful.

Mr Colman: I will let you know of any thoughts that we have.

[289] **The Presiding Officer:** One further question before we finish. You mentioned that you would be prepared to present reports to other committees; do you see yourselves in the new Wales Audit Office as another arm for Members in pursuing their scrutiny?

Mr Colman: Yes, I do. Perhaps it would be helpful if I explained that, generally, the approach that I take to the operation of the Wales Audit Office is to identify what the office is there to do. I have made it clear that it has, broadly, two functions: one is to promote improvement in public services in Wales, and the other is to hold to account those people who are in charge of public services, whether central Government, local government or the NHS. In pursuit of those high-level aims, I have at my disposal a wide range of tools; some of them are statutory tools—the right to report to the Assembly, whether as part of a programme of work or on the basis of immediate reports on matters that have come to my attention.

I also have non-statutory tools, which include organising conferences, seminars, teach-ins, and, in particular, responding to correspondence. Any letter that I receive will be treated very seriously, and will get a considered reply. Any letter, particularly any letter from Assembly Members, will be treated fully. In responding to those letters—and we are happy to have conversations; communications do not have to be in writing—our aim is to support Assembly Members in carrying out their functions of scrutiny. That is an important part of my work. I expect, and in fact it has already happened, that matters raised in correspondence will provoke published reports by me, rather than simply a reply to the letter. I consider that to be a useful way of discovering things that require investigation. I am more than ready to respond to ad hoc requests, and to use the WAO's resources in establishing the facts of any matter relating to economy, efficiency and effectiveness in public services. There have been cases in the past, and there are likely to be cases in the future, where an ad hoc report by me can help resolve a dispute very effectively. I would certainly want to do that.

That is a long, complicated answer to a question that I could have answered by saying 'yes'.

[290] **The Presiding Officer:** I am glad that you did not say 'yes', because it set out very clearly for us your relation to what we do. We are very grateful to you—diolch yn fawr.

Croesawaf gynrychiolydd Cyngor I welcome the Wales Council for Voluntary
Gweithredu Gwirfoddol Cymru, a fydd yn Action representative, who will give us

rhoi tystiolaeth inni.

evidence.

[291] **Jane Hutt:** Welcome, Phil, and thank you for your written evidence in the paper for this afternoon's session.

Rightly, and I think in your evidence to the Richard commission, you highlighted the importance of the voluntary sector scheme and how it has been recognised internationally. I remember being engaged myself in the voluntary sector in the lead up to the Government of Wales Act 1998. We need to be clear, I am sure, through this afternoon's evidence-giving discussion, that the White Paper makes it clear that Welsh Assembly Government Ministers must make provision for a voluntary sector scheme, and I know that you are seeking that recognition and endorsement that would be the duty for us to have a voluntary sector scheme. Many of the achievements that you have outlined over the last six years relate to how you influence Government. Therefore, although separation will have an impact, clearly, in terms of your relationship with Government, and with the legislature, these are the areas that we need to tease out this afternoon.

Perhaps you could just highlight what you feel are the challenges, if you like, and the opportunities and threats in relation to the separation. If there is a duty on Ministers to have a partnership scheme, we may be looking at more of a sort of compact kind of relationship. There has been a great deal of benefit from the working of the partnership council, and bringing in backbenchers from across the parties as well as the voluntary sector around the table for taking forward discussions and holding the Government to account. Therefore, do you want to elaborate on what you feel are the issues for the voluntary sector?

Mr Jarrold: First, may I extend apologies from Graham Benfield, who would have been here today? I deputise for Graham on the partnership council, so you have me today.

4.50 p.m.

I suppose that what we have tried to highlight in the paper was what we see as the strengths of the current arrangements, and, in particular, the fact that the partnership council brings together the three arms: the Government, Assembly Members and the voluntary sector. We have perceived many strengths from that three-way dialogue. The Government's engagement is critical, and we have seen, over the Assembly's lifetime, a commitment by Government to addressing the issues debated at the partnership council and the issues that the sector has raised. That has been followed through by positive action, which has been very well received. The partnership council also has a scrutiny role. One of the big issues that came out of the independent commission's review of the voluntary sector scheme after the first term was the need for its consistent application across Government and all those acting on behalf of Government. Our judgment is that having both the Government and Assembly Members, together with the voluntary sector, as part of the partnership council, exercises that scrutiny role as to how consistently the scheme is being implemented.

Since the independent commission's report, one of the developments has been the creation of a compliance sub-committee of the partnership council, which demonstrated the intention of the partnership council to take seriously that recommendation about consistent application. That involves Assembly Members and voluntary sector representatives, and its role is to look at how consistently the Government is implementing the scheme, and to consider cases of potential non-compliance that voluntary organisations want to bring to that committee. We feel that that is important. One of the independent commission's findings is about the need to communicate the scheme and its benefits to the widest possible sector. We suspect that, for many organisations, knowing that there is some sort of scrutiny arrangement within the

partnership council is an important way of communicating, because people then know that there is a route to raise issues. That is a powerful way of getting people interested.

I suppose that those are the strengths that we see. I am conscious that the paper that we have produced, while raising questions, does not set out answers, and, to be honest, I do not think that we are sure what those answers might be. However, the exploration that we hope we might make relates to whether there are ways, under the new arrangements, that would keep alive that three-way dialogue.

[293] **Jane Hutt:** I think that it was very innovative, but it is not in the Government of Wales Act 1998 that there should be a partnership council. Only the scheme is laid down in that Act. It is also possible to look at other vehicles or to learn from the partnership council, and, as you said, the relationship with Government is key in terms of the statutory obligation, which would be vested in the Bill, and it is in the White Paper. Therefore, it is important that we do not lose those opportunities for cross-party partnership and scrutiny involvement in the council. I am sure that others will want to raise questions or take that forward.

[294] **David Melding:** Mr Jarrold, in terms of deciding whether or not to continue with the partnership council—I do not think that there is any argument that it has not been a great innovation—given that the obligation to have a scheme would fall on the Government rather than on the body corporate technically, as it is now, do you think that this tripartite system could survive, since it would have to straddle Government, policy making and the legislative side? Are we not going to have to come up with a model that respects the fact that we are going back to the roots of the British parliamentary tradition, which separates the executive and legislative powers?

Mr Jarrold: In some ways, the past six years have shown that it has worked. We have been able to maintain that dialogue with Assembly Members and with Government. Some issues have not been clear under the current settlement. In general, the new proposals are about addressing those issues. The past six or seven years have shown that a system is capable of working. Whether the new regulations would force that to come to an end, or whether there are ways of building into new arrangements a role for the legislature as well as Government, I do not know. At this stage, we are aware of some of the questions that the White Paper poses. I am not a constitutional lawyer, so I am not sure what the precise answer to that would be.

[295] **The Presiding Officer:** I do not think that many do. We have found some disagreement even between constitutional lawyers.

[296] **David Melding:** The influence that you have had on the policy-making process has been materially increased with the scheme and the partnership. You could trace the influence—perhaps someone is writing a PhD thesis on it at this very moment. However, to be frank—and this is not your fault or the sector's fault; it is simply what has happened in the partnership between the legislative and Executive arms—it has produced next to no impact on the legislative work of the Assembly, has it not?

Mr Jarrold: Do you mean in terms of voluntary organisations using the legislative machine?

[297] **David Melding:** I do not just mean using, but influencing the way in which legislation has been scrutinised, adapted and changed.

Mr Jarrold: The sector is on its own learning curve.

[298] **David Melding:** I am not being critical of the sector; this is just what has happened. If

there is any blame, all partners are equally to blame.

Mr Jarrold: I take that point, but, within voluntary organisations, people need to be more aware of how the system works and where the opportunities are. Going back to the review of the scheme, comments were made by some Assembly Members that there were opportunities for a sort of ballot to bring forward proposals that voluntary organisations could take more advantage of. There is probably a role for the WCVA there in working with the Assembly to raise awareness of those opportunities and of how people can use them. Some organisations have done that very effectively. I do not want to generalise, but that has not been done by a larger number.

[299] **David Melding:** It is a perfectly reasonable point that the possibilities open to the voluntary sector have been transformed with the arrival of the Assembly, but that you do not instantly get the capacity to be able to draft suggested subordinate instruments and so on. It is not particularly easy to do, even if you have the wherewithal. Would the new arrangements allow the sector to examine ways in which this side of the work could really be enhanced and developed? Would some form of partnership, just with the legislative arm, not be welcome? Could it not also involve looking at the enhanced legislation and whatever mechanism is going to be used for the Orders in Council, which may be analogous to the passage of a Bill in Parliament?

One witness—I cannot remember who—suggested that if the Assembly is to be able to carry out its legislative scrutiny effectively, it will need much wider expertise than is available among the 48 or so backbenchers. The witness suggested that one way to do that would be to bring in experts and people from other sectors as members—non-voting presumably—of Bill committees who would have the right to participate and even suggest amendments. Could such a model be reasonably explored, and is it not one that would focus on a more exclusive relationship with the legislative side, rather than the successful relationship that has been developed with the Government side?

5.00 p.m.

Mr Jarrold: The sector will always want it both ways, or different bits of the sector will.

[300] **David Melding:** I am certainly not suggesting that it would not be, but I think that there would be a separation in the mechanism—it would not be the same body that did it, perhaps.

Mr Jarrold: Yes, and I think there would be scope to explore that. The Committee on Equality of Opportunity has gone some way down that road, has it not, with standing advisers to it? Certainly, with other subject committees, it would be possible to identify quite considerable expertise within the sector that could help. Some of those organisations are actively involved in the Assembly Government's mechanisms. I am thinking of the mental health developments for example, where you have significant involvement from voluntary organisations in steering the implementation of mental health policy. That same expertise could, and should, be available to subject committees in their scrutiny role.

[301] **The Presiding Officer:** Before we move on, I am sure that you are aware, from the White Paper, that, of necessity, there would only be one statutory committee, which would be audit, and, therefore, we could be facing an opportunity to transform our whole committee structure. That will no doubt re-emerge in our next session, with the representative from the Panel of Chairs. Are there any aspects of committee scrutiny that you would recommend us to continue with, given your experience over the last six years? What is valuable from the old model for committees to be taken on, if possible, to a new one?

Mr Jarrold: Again, I think, from the voluntary sector point of view, I know that a number of organisations have been quite successful in briefing committee members on issues. I am thinking of some of the housing organisations and some of the environmental organisations, and I suppose that

relates partly to David's question about identifying where expertise lies and exploiting that. Certainly, there are organisations that would bring quite a clear perspective and quite an evidence-based perspective from their own work to committees' proceedings.

[302] **Jane Hutt:** Just to follow up on that, we have also had a lot of valuable evidence presented to subject committees' policy reviews, for example, and we draw on the voluntary sector, as well as partners in the public sector, for policy reviews across all subject areas. This goes back to the Presiding Officer's point about the policy development side of our committee system and whether that has been a valuable vehicle for the voluntary sector to raise its voice and influence policy development. The follow through of that is how much those committee policy reviews have then influenced Government, which I believe we can demonstrate they have.

Mr Jarrold: Again, there are two recent reviews that we have had some involvement with. One is the Economic Development and Transport Committee's review of economic inactivity, where there has been a lot of interaction between the committee and voluntary organisations. The committee has visited some of the sector's schemes around economic inactivity, and I suppose the fruits of that are seen in its reports. There is also the current Social Justice and Regeneration Committee's review of substance misuse services. The substance misuse organisations across Wales have been working together—I suppose only recently, in the last nine months—but, through doing that, they have been able to put together some quite powerful evidence, and, again, I suppose that that is an area where voluntary sector substance misuse organisations are really at the coalface in terms of dealing with people. They are providing most of the services and, in some areas, the only services available to people. So, those are two examples where the sector has put forward compelling evidence, and we await the social justice report. Certainly, the Economic Development and Transport Committee's report reflected, I think, some of the expertise within the sector, both in the analysis of the issues and in some of the practical ways of addressing the problem of economic inactivity.

[303] **Lorraine Barrett:** While it was very interesting, David Melding had about five bites at the cherry and covered one particular area that I wanted to ask you about, namely how you see the WCVA or the partnership council working with the legislature as opposed to the Government?

I will play devil's advocate for a moment. We all agree that the partnership council broke new ground; we hit the ground running when the Assembly was set up with all the partnership councils. The voluntary sector partnership council was very innovative, and I was a member of it for some time though I got a feeling after a while that it had become rather unwieldy—you would need a room at least the length of this one to accommodate everyone, the papers were extremely thick and I sometimes felt that the voluntary sector on the ground was not having its say or did not know enough about how the whole thing worked. However, it was new and exciting, and I think that it set a good platform for us to start from, with regard to working with the voluntary sector. I hope that the strength of that partnership working continues, albeit in another guise.

David has covered a lot of what I wanted to try to get out of you today, but I would like to know how you see yourselves, either the WCVA or the partnership council, working with the legislature, but also continuing that important work with the Ministers? I presume that that work still happens. I think that Jane was instrumental in setting it up, so that each sector within the voluntary sector has regular meetings with the relevant Minister. I presume that you would want that to continue and that it would probably be part of a new scheme. Do you see it as an opportunity to work more closely with us, as individual Assembly Members, the legislature, and committees—whatever form the committees may take? As the Presiding Officer has said, we do not yet know quite how they will work. Do you feel that you are geared up, or gearing up, to be able to take on these new ways of working? Do you think that the sector is open and ready enough to take on those changes and challenges?

Mr Jarrold: As I said earlier, we need to work with both. However the new formal

arrangements pan out, it seems to me that organisations will want to work with the legislature and the Executive. The ministerial meetings have been a significant development. I think that how they are working is being looked at elsewhere in the UK. In fact, I went over to Northern Ireland with Sanjiv recently to talk about that experience. The importance of the meetings with the Ministers concerns what is conducted in the meeting, but also what it represents in terms of the variety of ways in which Government is working with the sector.

The meeting itself involves a small deputation from the sector, and the issues that you raised about how well that deputation reflects a wider range of organisations, particularly more local ones, are important. One of the things that we are currently looking at is how local networks feed directly into that process. The meeting itself is important, but what is also important is the Ministers' report to the meetings, setting out how they have engaged with the sector. Of course, the real engagement is often not with the people around the table at the formal meeting; it takes place in all forms involving specialist organisations around specialist areas of activity. The meetings give direct interaction with the Minister, but also an important overview of how wide the contact is between the Assembly Government and the sector in all sorts of ways. So, we would want to continue with that, and we are actively working on proposals to enable local networks to feed in more effectively to that process.

In terms of working with the legislature, as I said in reply to an earlier question, I think that the sector is still learning how to do that better. Some of the bigger organisations that perhaps have experience of working through Parliament, and have a longer track record there and know how to use the system perhaps more effectively than other organisations. We have done some work recently on providing training for organisations on how to influence, how to lobby and how to use the systems that exist. We would want that to continue. The more that we can work with Assembly Members to find ways of doing that, the more effective that will be because, clearly, the sector needs to hear your take on it—what is working and what is helpful and unhelpful for you.

5.10 p.m.

[304] **The Presiding Officer:** To wind this section up, could that work continue whatever committee structure we had, or however Members operated in a new legislative/select committee/scrutiny model?

Mr Jarrold: Yes. For us, the voluntary sector scheme was always about adding more formal and institutionalised ways of working with the Assembly. From our perspective, it was never meant to undermine or replace the kind of interaction that will always go on. The more interaction that goes on at different levels, the better.

[305] **The Presiding Officer:** One area in which we have not been successful is that of promoting, under Standing Order No. 31, the equivalent of private Members' legislation at Westminster. Various members of your organisations have been approaching Assembly Members with various possibilities that have not always been successful. If we were in a position to do more legislation, however we get agreement to do that in relation to Westminster and how that is carried through, it may be that there would be greater opportunities for a vibrant relationship with Members as legislators, rather than what we have now.

Mr Jarrold: We would hope so.

[306] **The Presiding Officer:** Thank you. No-one is indicating that they want to ask another question. I am grateful to you for representing the partnerships at our inquiry. As you know,

we are hoping to produce a report rapidly on account of various timescales, but if you have any further ideas following our discussion or any further information that you would like to produce for us, we would be very happy to receive it.

Mr Jarrold: I would welcome that opportunity. As I said, we are trying to understand these implications—

[307] **Lorraine Barrett:** Are not we all?

Mr Jarrold: And we may well have further thoughts.

[308] **The Presiding Officer:** I think that Members would concur: are not we all? Thank you very much.

I am very relieved to see our senior member of the Panel of Chairs return safely from the Committee on European and External Affairs meeting. We are still in public session, unless Members would like to break for a quick coffee to revive themselves. I see that you do not; we will, therefore, continue. I defer to Members' needs.

Who would like to begin? I am looking to our colleague on the Panel of Chairs—colleague Melding. I cannot call you 'Chair', as there is another Chair sitting here.

Christine Gwyther: Comrade Melding, please.

[309] **The Presiding Officer:** Okay, comrade Melding or comrade Chair.

[310] **David Melding:** I am quite happy to be called comrade, though I understand that another member of my group does not like it.

[311] **The Presiding Officer:** What about comrade and friend?

[312] **David Melding:** I have certainly been called worse things here. [*Laughter.*]

[313] **Lorraine Barrett:** Careful, there will be a verbatim record of this.

[314] **David Melding:** There we are; I think that I have been in enough trouble this week anyway.

With the legislative work increasing—and we do not quite know how the model will operate, but it seems obvious that it will be enhanced quite significantly, perhaps quite fundamentally in terms of the work that Orders in Council may generate—how do you think that the committee structure, as it is presently constituted, could cope? Could it cope?

Looking at Scotland, committees meet more than once a week for several hours to look at legislation. I suspect that my committee, the Health and Social Services Committee, would be at one end and your committee, Economic Development and Transport Committee, would be at the other. It would possibly be lightly affected and would have a lot of time to do the excellent policy work that it does and hold inquiries. So how sustainable do you think the current structure will be?

Christine Gwyther: I will just set my reply in the context of a discussion that we had in the Panel of Chairs this week on Tuesday evening, when we spent about 30 minutes on the possible ramifications of the new arrangements. We were all of the same mind: the present

arrangement is not sustainable for various reasons. One reason was, as you outlined, David, that different committees look at different things and have vastly differing responsibilities.

One thing that came through very clearly was that the committees as they stand are too large to operate in the new system that will be created. Would you like me to amplify and talk around the subject?

[315] **The Presiding Officer:** Yes, please. It would be very useful.

[316] **David Melding:** I think that committee size is an important point, so if you want to develop that, you should.

Christine Gwyther: We even got as far as tying it down to having maybe between six and seven members per committee on average. However, we were also aware that some committees might need to be larger than others, depending on the amount of work that they did and the nature of the portfolio that they were following. We talked about the idea of Members sitting on subject committees for policy review work and scrutiny and then sitting on different, ad hoc standing committees for line-by-line legislation scrutiny. We decided that that would be very difficult, because people develop useful skills and competences and we did not want to lose them when examining the legislative part of the work.

For instance, as a Chair, I sit on the Legislation Committee, and I have noticed over the last year or so that Members often pick up fine detail in legislation because of their previous experience. It is not because they are particularly good at fine detail, but because they understand that subject very well, so they pick up things much better. That has helped to form my opinion that we should retain subject committees in some shape or form and that Members should be allowed to develop expertise in those subjects. When they are asked to sit on committees for legislation, they should somehow be attached to that subject.

[317] **David Melding:** I suspect that a colleague will ask about how party balance may be affected if there were seven or so members of a committee, or certainly fewer than 10. Perhaps we could just ignore that for the moment and pursue this point of having committees constituted of something within the range of six to eight members. Would this allow for more committees? For instance, if the present subject committee system survived, you would have to divide the Health and Social Services Committee at the very least and perhaps the Environment, Planning and Countryside Committee too. It seems to me that some of those committees could not survive. If there were seven-ish members on a committee, would that be enough to accommodate extra committees, or would you still hope to have a model with a backbench Member only being a member of one subject committee and not doubling up? Would that then release the capacity that would be needed to do the line-by-line scrutiny of legislation? Could you flesh that out, if you can, though I do not know whether you got that far?

Christine Gwyther: We did not go into that sort of detail, but I have thought about it. Again, it will depend on what committees you happen to be a member of. For instance, if you were on one committee that had a huge burden of legislation, you could also sit on another committee that did not. There could be some sort of cross-play in that way.

5.20 p.m.

I will answer your point on party balance, because it may affect some of the other questions that come through. We are in favour of the Scottish model, where there is overall party balance on the committees, but not necessarily on every single committee. While that may

not find favour with every party at every time, it seems the fairest way, if you must have different sizes of committees. Again, there would have to be some kind of horse-trading between the party business managers as to where the party balance was perhaps more favourable on whichever committee. It is not an issue for the Panel of Chairs to get into, but if there was an overall party balance on the membership of the committees, there could be a different party balance on each committee.

I think that I may have strayed from your question, I am sorry.

[318] **David Melding:** There are so many facets that can be followed up—we have started in a very strong and robust fashion. I do not want to ask anything else.

[319] **Kirsty Williams:** Christine, do you or your fellow Chairs see a danger that some committees could just become a legislative committee, responding to the work coming from the Executive, and have very little time to do anything else, or dictate their own agendas, and be constantly having to respond to the Government's request to look at legislation? Did you discuss how that might be balanced in some way, and how committees could, if they so wished, look at a broader cross-section of work? The Economic Development and Transport Committee will have plenty of time to go off to do its policy reviews. As we were told in Scotland, there is much angst that the economic development committee is always off on foreign trips and has plenty of time to do wonderful reports, and that it never does any legislation. Therefore, do you foresee that the Economic Development and Transport Committee could promote its own legislation, as the committees are able to do in Scotland? Should a mechanism be found for the committees to look to request Orders in Council to allow them to pursue a particular legislative opportunity that they felt was desirable?

Christine Gwyther: There is no reason why they should not. We did not discuss the issue in the Panel of Chairs, but I do not see why they should not. It will be up to the members and Chair of the committee, because in this new world there will be many opportunities. The Panel of Chairs was clear that we would not want to see the Act closing down any opportunities for us. So, for instance, we were quite comfortable that Ministers and Deputy Ministers would not have to be members of the committee. In terms of the Economic Development and Transport Committee, some of the best evidence and policy-making sessions have been held when the Minister was not present—and other Members may want to back me up on that—simply because debate is more robust and less personal.

[320] **Leighton Andrews:** And less adversarial.

Christine Gwyther: Yes, less adversarial. So, the Panel of Chairs was very comfortable with the idea of not having Ministers and Deputy Ministers present. However, we were clear that we did not want to see a plethora of ad hoc or standing committees being established to look at specific legislation. We do not want to see that in any Bill, so that then gives the committees more latitude to look at their own programme of work. I think that fits in with your question, Kirsty.

An issue that did not come up, but which I have thought about since, is that every Member, if he or she is not a member of the Government, should be required to sit on at least one committee. It means that the work is shared equally. As we go down the years, it has already become a bit of an issue, and I do not want to see it develop. I would prefer it to be in our Standing Orders, at least, that every Member should sit on at least one committee and share the burden with the rest of the Members.

[321] **The Presiding Officer:** Should they be required to turn up? That has been the issue,

has it not?

Christine Gwyther: If you recall, Chair, we have changed our Standing Orders to say that Members do not even have to give a reason for their non-attendance.

[322] **The Presiding Officer:** I know—it is because the Presiding Officer found it very difficult to determine the validity of reasons.

[323] **Lorraine Barrett:** I disagree with the Presiding Officer on that, but there you go—we usually agree on many things, but we do not on that. You have hit on something that I was going to ask, Chris.

Christine Gwyther: I think that I have hit a raw nerve.

[324] **Lorraine Barrett:** Not mine. I was going to ask whether we should look at a Standing Order that every Member must sit on at least one committee. When the Culture, Welsh Language and Sport Committee visited Scotland recently, we found out that the committees can cover a couple of portfolios. The committee that covered economic development, culture and tourism also covered, I think, a part of education or training. There seemed to be a whole range. You have said yourself that the Chairs felt that this is an opportunity for some imaginative thinking. I suppose that we would need to look at everything imaginatively.

You said something that I had not thought about, that you felt, as a panel, that Ministers and Deputy Ministers—who will probably have a different status to that they currently have—should not sit on committees. That cuts the numbers down, so I presume that your thinking is that the committee should be smaller. None of us know the legislative workload that this will bring post-2007. Do you think that, with 60 Members, we can cope with all of this, even with longer working hours and more working days here, as opposed to in our constituencies?

There is another issue that people have raised. I do not know whether you have discussed this as a panel, but what do you think about bringing in outside experts to sit on different committees at different times, depending on what the committee might be discussing, whether they have voting rights or not?

Christine Gwyther: We did not discuss this as a panel, but I can give you my own view. I would certainly accept it. I am not sure at this stage whether I would welcome it. It happens in some county councils and can be problematic. However, if you need to bring in expertise to help you with a thorny issue, that route should be available to you. I am not totally against it, and we did not discuss it as a panel, therefore I do not want to be too dogmatic on that. I have seen it cause problems in county councils, so it would have to be handled very carefully.

An issue that we have not discussed is the timing of committee meetings. We discussed it in the Panel of Chairs and thought that there should be the freedom to hold committee meetings during Plenary. I do not know whether this strikes a chord with anyone at this table. It will cause problems in terms of voting; I am sure that, as a whip, Lorraine is already getting upset about it. Therefore, arrangements would have to be made for timed voting at the end of meetings, or in the middle of meetings or whatever. However, we were all of the same mind about having that freedom, especially if there is a rush on with some legislative work, when we might have to meet several times in one week. The only way to do that is to allow us to meet during Plenary.

[325] **The Presiding Officer:** In the new building there will be only 5m between a committee room and the main Chamber, which might facilitate activity.

Christine Gwyther: Are you thinking of a scurrying-back-and-forth type of committee?

[326] **The Presiding Officer:** I was thinking of adjourning a committee, and then voting and having a cup of coffee.

[327] **Lorraine Barrett:** It fills me with horror. I cannot imagine any Members wanting to be away from the new Chamber once they get in. I cannot imagine them not wanting to sit there through the entire Plenary, because it will be such a lovely place to be, apart from the interesting issues that we will be discussing.

[328] **David Melding:** Dr Pangloss would love you.

[329] **Lorraine Barrett:** I am still concerned about that one, Chris, from the point of view of sheer numbers. If you take away Ministers and Deputy Ministers from speaking in Plenary in general debates, and those Members who might be in a committee meeting, and the few who might be having a cup of tea or stretching their legs, I am concerned about numbers. We are just 60 in total. Did you take that into account?

Christine Gwyther: We did, because Ministers and Deputy Ministers will be quite free throughout the entire Plenary, because they would not be sitting in an adjacent room, as we would be, going through legislation line by line.

[330] **Lorraine Barrett:** Normally, Ministers—and, I think, Deputy Ministers, when they have a more structured role—would probably not join in the general debate on issues, although there is nothing to stop them from doing so, I suppose. I am just throwing that in as a concern.

5.30 p.m.

Christine Gwyther: Clearly, it is a concern, but that is yet another reason to reinforce the idea of having smaller committees: you would only have six people out of the Chamber, rather than 10 or 11.

[331] **Leighton Andrews:** Some of this assumes that there will be a heavy legislative burden on committees. Has the Panel of Chairs considered how much legislation each committee might have to deal with in any year?

Christine Gwyther: No, not to any great extent. That is probably a piece of work that needs to be done. We have looked at the list of what was in the latest Queen's Speech, and we are already allocating that to various committees. The work behind that, however, and following on from that, will be absolutely enormous and, as far as I am concerned, not quantifiable at this stage.

[332] **Leighton Andrews:** It is not necessarily analogous, either, is it? If Bills come to particular Assembly committees, it is not necessarily the same as discussing an Assembly measure or proposal for an Order in Council, is it?

Christine Gwyther: No.

[333] **Leighton Andrews:** Okay. If further work is to be done here, who should be doing that? Should that be the Panel of Chairs? One of the other questions that might need to be asked is whether, if we have these new legislative routes, if I can call them that, of Assembly

measures and proposals for Orders in Council, it is possible that we might have less secondary legislation to consider, which might free up time.

Christine Gwyther: It is possible, and that may be something that the Chair of the Legislation Committee should be considering at the moment. I know that you have already received evidence from the Chair, and I do not know whether that point came up in that session.

[334] **The Presiding Officer:** Not in any great detail, but there have been subsequent discussions.

Christine Gwyther: Then that is possibly a role for that committee to take on at this stage—not that I am ducking the work or anything.

[335] **The Presiding Officer:** No. Going back to an earlier point, if legislative committees were meeting, Ministers and/or Deputy Ministers, I assume, would be involved in them. However, because the meetings will be in close proximity to the Chamber, that might not be a problem. I am assuming that we never do more than two Bills concurrently, but you never know.

[336] **Jane Hutt:** Thank you, Chris. You seem to have done a lot of work on Tuesday night in the Panel of Chairs discussion.

[337] **The Presiding Officer:** That is because the Chair of the panel was here. [*Laughter.*]

[338] **Jane Hutt:** Is that so? Well, it is very helpful because it addresses many of the issues and people are really getting in to what it could mean in reality. Obviously, what is emerging from what you are saying is very much the Scottish model of committees, where they combine policy review with legislative scrutiny but without a role for Ministers, who only appear when they have a statutory instrument. The scrutiny of Ministers is done in the Parliament.

To pick up on Leighton's point about the likely legislative workload of a committee post 2007, and how we prepare for it, there was one thing on which I agreed with John Osmond from the Institute of Welsh Affairs this morning, which was about people asking, 'Well, what about the opportunity for committees or the Assembly to be developing legislation?', to which he said, 'Well, look, one thing you have to recognise is that committees have to scrutinise the legislation that is coming from Government, from the Executive'. Of course, that is the crucial issue with regard to the workload and role of committees in relation to Orders in Council, and we will have more framework legislation. However, moving on from that, do you agree that we will not be able to do everything? We have mentioned committee size, and Lorraine has mentioned the size of the Assembly. In Scotland, committees still do not meet when Plenary is held, although that possibility is being considered at the moment. Do you agree that committees will have to prioritise what they do with regard to policy review and legislative issues, and that the crucial role for the convener/Chair of the committee, with the committee, will be to prioritise, and to remember that this is about quality and not quantity, and getting a job done for the purpose of policy development and scrutinising the Government and legislation?

Christine Gwyther: I think that we are already prioritising, and we are doing so more and more. In May 1999, the committees were presented, I suppose, with a sort of *fait accompli* work programme because the Government was getting going and there were things that had to be scrutinised there and then and policy that had to be looked at. Committees have had the

opportunity since then to spread their wings, and, as a Chair, I would like to see that become the model for even greater freedom for committees to prioritise their own work.

[339] **Jocelyn Davies:** I would be very suspicious of attempting to scrutinise a lot of legislation that the Executive gives you, because I would be worried that they are trying to keep me busy with all this legislation so I do not notice all the other things that it is up to. Another point on which John Osmond and Jane Hutt probably agreed this morning was that a Government can do an awful lot without legislation, and you have to keep an eye on all of that as well.

We learnt from our Scottish trip that they had two identical committees with identical portfolios because of the burden of the legislation. Sometimes committees were dealing with two Bills at the same time in that they were finishing one off and starting another. So, some of them did nothing else. I think that we should be cautious about exactly how much legislation we want to take on. It is also the nature of governments to want to do things. It is for the Government to control that.

You mentioned earlier that you would welcome the opportunity for subject committees to initiate requests for Orders in Council, and that you certainly would not want to place any barriers in that regard. How might that happen, because it does imply that if a committee has an idea its needs to make that request? Currently, as we know, the White Paper suggests that there will be some sort of request from the Assembly to the Secretary of State for Wales, although I suppose, in effect, what will normally happen is that the Executive will make the request to the Secretary of State. However, if a committee wants to start that, it does imply some sort of direct access, either to the Secretary of State or to Parliament.

Christine Gwyther: I am not sure about direct access. At the moment, we have things such as backbench legislative opportunities. I do not see any reason—and we have not discussed this at length on the panel—why there should not be committee-generated opportunities of that kind. Whether the Welsh Assembly Government would have to be the conduit to pass them on, I do not know, but something could be written in our Standing Orders to legitimise that.

[340] **Jocelyn Davies:** Yes, it is okay as long as what the committee or a backbencher wants to do is already within the powers, but if a request were needed for one of these Orders in Council, because it was more ambitious than that, then we would need a mechanism that allowed the request to be made. It may be one of the issues that we need to think about, because you would not want a subject committee to be in the position of having to get the approval of the Executive before the request was made.

Christine Gwyther: Perhaps our Standing Orders should be such that approval would not be necessary, or that it would be the approval of the Assembly and not the Welsh Assembly Government that would be necessary. I do not know. We are going into uncharted territory here, and I am obviously not mandated by the rest of the panel to talk about this. However, if you are happy for me to talk about this, I am more than happy to do so.

[341] **The Presiding Officer:** Absolutely.

Christine Gwyther: I am very doubtful whether we could actually insist that that was in the Bill.

[342] **The Presiding Officer:** Or not in the Bill, which may be equally important. We could think of it in terms of our Standing Orders.

Christine Gwyther: Yes. As a committee Chair, I would be very interested in that because it clearly opens the way for innovative Welsh thinking, and I am all for that. The actual mechanism will have to be bottomed out.

5.40 p.m.

[343] **Jocelyn Davies:** We have asked many people who have been giving us evidence, should the request be between the Assembly Executive and the Secretary of State and so on. I do not think that anyone has given any thought to the precise detail. There is constant confusion of the Executive with the Assembly and the Secretary of State with the Parliament. The idea of direct access to certain requests ought, perhaps, to be considered by us to be more democratic and more appropriate.

Christine Gwyther: It could be more democratic but, as a pragmatist and realist, if I had spent three months or so working up a committee proposal, I would want it to receive an affirmative answer. Having some sort of intelligence, whether down here in Cardiff or in London, would be very useful. I think that that will involve the Welsh Assembly Government. That is my gut feeling.

[344] **The Presiding Officer:** This is all very fundamental, and if it is helpful, it is not just here; Parliament is now considering establishing a joint committee to try to work out what are the conventions that operate between the two Houses of Parliament. It is not as if we are immature on the block; it is an issue there as well.

[345] **Leighton Andrews:** I wanted to ask you about staffing resources for committees. I have heard the point of view expressed that one of the advantages of having to address new forms of legislation, such as Assembly measures or proposals for Orders in Council, would be to give a better focus to the work of the Assembly Parliamentary Service in terms of providing briefings. What is your take on that?

Christine Gwyther: At this stage, I do not have a defined take on that. There are already informal channels, if not formal ones, between our parliamentary service and the Westminster parliamentary service. I am sure that our staff are up to the job of taking on a more focused role. We will have to leave it to those channels to operate to get a clearer picture of how that would work.

[346] **Leighton Andrews:** My point, in a sense, was that Plenary debates are very often—though amendments are tabled—on motions, not on detailed legislation. The briefing material that is supplied can, therefore, be rather general because it has to cover a broad subject area rather than a focus on a specific piece of legislation. From talking with colleagues, I know that some find that more useful than others. My thinking was that it might enable the staff to develop greater depth of expertise and to be able to focus more sharply on the issues that come to light in respect of specific measures.

Christine Gwyther: I am sure that you are right, because going through anything line by line will lead to you amassing a wealth of knowledge that will stay with you for some years, and you would be able to read around that subject far more effectively than if you were going to it cold; that is obvious. You are right to say that, certainly at the moment, the parliamentary service relies quite heavily on Welsh Assembly Government staff to give them the information that they need. We need to get away from that, so that we have a truly independent picture.

[347] **Lorraine Barrett:** Following on from that, Chris, thinking of these committees of the future and the amount of work that would have to be done by the clerks and the translation unit and so on, has the panel thought about the level of staffing that we might need? I know that none of us knows how it will pan out, but have you discussed that?

Christine Gwyther: We are aware that we will need more. I cannot remember if it was in the discussion on Tuesday night, or whether it is in the margins somewhere, but someone told me about a piece of legislative scrutiny that was done recently in Westminster, and the reports were very thick and were produced within a fortnight. Most of that work must have been done by the parliamentary service; it cannot have been done by Members.

Therefore, I am sure that we will need to have a greater number of people supporting us if we are to come up with that sort of detailed work in the sort of timeframe in which we will be required to do it.

[348] **Leighton Andrews:** Do you have any evidence of that? One may argue that the staff may be refocused in terms of their work. For example, a committee will no longer, on a monthly basis, be providing scrutiny of a Minister—almost certainly not, if we look at the experience in Scotland. That is an element of work that is no longer being done and, therefore, there is no need for the Assembly Parliamentary Service to provide briefing on the Minister's report, for example, which it sometimes does. Therefore, has any analysis been done about the number of staff needed per standing committee, or whatever else, in Westminster or in other institutions?

Christine Gwyther: Nothing that has been reported to the Panel of Chairs at this stage. However, you may know otherwise, Llywydd.

[349] **Jocelyn Davies:** May I make a point about statutory instruments? These will pass to the Ministers, but they will need to be scrutinised. However, I think that there has been some analysis of how much time is normally spent by committees on scrutinising statutory instruments, and passing that over to the Legislation Committee will not save an awful lot of time.

[350] **Kirsty Williams:** I do not suppose that not having to do a briefing on the Minister's annual report will save very much time for the poor research service either.

[351] **Leighton Andrews:** Hang on a minute, it was not the annual report, but the monthly report.

[352] **Kirsty Williams:** Yes, sorry, the monthly report.

[353] **Lorraine Barrett:** It was just an example.

[354] **Leighton Andrews:** My point on secondary legislation is that if we are—

[355] **The Presiding Officer:** Order. I am becoming authoritative now, late on.

[356] **Jocelyn Davies:** I think that there has been an analysis of how much time that that takes up.

[357] **Leighton Andrews:** I understand that. However, my point was that if we are heading towards more primary measures, some of the secondary legislation may get accommodated within the new kinds of measures that we have. That may well not absorb as much as time as possible. It is simply that this is analytical work that can be done. It appears that it has not, in total, been done, and it would be valuable to know that. That is my point.

[358] **The Presiding Officer:** I believe that the Richard commission and Karin Phillips from the Assembly Parliamentary Service have done work on this area, and no doubt more will be done. Do you have any final message for us, Christine?

Christine Gwyther: My final message is that this has been a really interesting half hour for me. It has thrown up that, even if we only do a desk study of grabbing all the statistics that Jocelyn and others have talked about, there are some serious decisions for us to make and we need to be geared up.

[359] **The Presiding Officer:** This has been very helpful to us, from our point of view, and it shows the value of the collective wisdom of the Panel of Chairs and the particular wisdom of someone who has

been a Chair for a substantial time here and is, of course, a former Minister. I suppose that it points us in the direction that the important thing is to get as little as possible prescription on the Bill, but then our work starts in terms of getting the Standing Orders functioning and our committee structure. However, that again may be a flexible beast, as it were, but I could not possibly anticipate that in my role today.

Christine Gwyther: Absolutely.

[360] **Y Llywydd:** Diolch yn fawr, Christine.
Dyna ddiwedd y sesiwn gyhoeddus.

[360] **The Presiding Officer:** Thank you very much, Christine. That brings the public session to a close.

**Cynulliad Cenedlaethol Cymru
Y Pwyllgor ar y Papur Gwyn—Trefn Lywodraethu Well i Gymru**

**The National Assembly for Wales
The Committee on the Better Governance for Wales White Paper**

**Dydd Llun, 11 Gorffennaf 2005
Monday, 11 July 2005 QQ361-468**

Aelodau o'r Cynulliad yn bresennol: Dafydd Elis-Thomas, y Llywydd (Cadeirydd), Lorraine Barrett, Jocelyn Davies, Jane Hutt, David Melding, Carl Sargeant, Kirsty Williams.

Tystion: Yr Athro Robert Hazell, Sylwebydd Gwleidyddol; Rhodri Morgan, y Prif Weinidog; Jenny Randerson, Cadeirydd y Pwyllgor Busnes; Hugh Rawlings, Cyfarwyddwr Grwp Llywodraeth Leol, Gwasanaeth Cyhoeddus a Diwylliant; yr Athro Rick Rawlings, Sylwebydd Gwleidyddol; Roger Sands, Clerc a Phrif Weithredwr Ty'r Cyffredin.

Swyddogion yn bresennol: Paul Silk, Clerc y Cynulliad.

Gwasanaeth Pwyllgor: Siân Wilkins, Clerc.

Assembly Members in attendance: Dafydd Elis-Thomas, the Presiding Officer (Chair), Lorraine Barrett, Jocelyn Davies, Jane Hutt, David Melding, Carl Sargeant, Kirsty Williams.

Witnesses: Professor Robert Hazell, Political Commentator; Rhodri Morgan, First Minister; Jenny Randerson, Chair of the Business Committee; Hugh Rawlings, Director of Local Government, Public Service and Culture Group; Professor Rick Rawlings, Political Commentator; Roger Sands, Clerk and Chief Executive, House of Commons.

Officials in attendance: Paul Silk, Clerk to the Assembly.

Committee Service: Siân Wilkins, Clerk.

*Dechreuodd y cyfarfod am 9.15 a.m.
The meeting began at 9.15 a.m.*

**Cyflwyniad, Ymddiheuriadau, Dirprwyon a Datgan Buddiannau
Introduction, Apologies, Substitutions and Declarations of Interest**

Y Llywydd: Bore da a chroeso i'r cyfarfod hwn ar y Papur Gwyn, Trefn Lywodraethu Well i Gymru.

The Presiding Officer: Good morning and welcome to this meeting on the Better Governance for Wales White Paper.

**Cofnodion y Cyfarfod Blaenorol
Minutes of the Previous Meeting**

Y Llywydd: Yr eitem gyntaf o fusnes ffurfiol yw cadarnhau cofnodion y cyfarfod diwethaf.

The Presiding Officer: The first formal business is to ratify the minutes of the last meeting.

Do we agree the minutes?

*Cadarnhawyd cofnodion y cyfarfod blaenorol.
The minutes of the previous meeting were ratified.*

Y Papur Gwyn—Trefn Lywodraethu Well i Gymru: Tystiolaeth The Better Governance for Wales White Paper: Evidence

[361] **The Presiding Officer:** I welcome Jenny Randerson, Chair of the Business Committee, to our select gathering this morning. Would you like to make a brief opening statement, or go straight into questioning from Jocelyn Davies?

Jenny Randerson: First, I would like to say how delighted I to be here, and say what an important topic this is. If all Members have had the opportunity to read my paper, I am content to go straight into questions.

[362] **Jocelyn Davies:** I assume that you have been following the work that we have been doing so far, and that you are aware that another witness was of the view that the idea of setting up a special commission to draft the Standing Orders of the new Assembly would be both unnecessary and partronsing. What is your view of that?

Jenny Randerson: I think that it is unnecessary, and it would not be an efficient way of drafting Standing Orders. Over the years, the Business Committee has drafted, and steered through the Assembly, hundreds of amendments to Standing Orders. We have built up a body of expertise, and I think that the most efficient and effective way of drafting our Standing Orders would be for the Business Committee to take that through. It would be inappropriate to be put in the position where, if Standing Orders were to be given to us by the Secretary of State, in effect, we would be able to change them afterwards to suit ourselves.

There is another issue here of what happens if the Business Committee cannot successfully steer through the Assembly a whole raft of new Standing Orders. One of the ways that we need to deal with this is to have a series of backstop positions. If we did not get a two-thirds majority for the new Standing Orders, as they come through, we would have to have a backstop position within the Assembly—a kind of troubleshooting team, which, in the past, has been the four party leaders working together. That would be put in place to deal with any problems. I cannot believe that there would not be compromise in the end, given the spirit with which we have approached other difficulties over Standing Orders over a period of time. We have had difficulties, and we have worked through them. Only after that would the special commission come into play, if we needed to deal with any ongoing problems; I do not foresee that there would be any.

If the Business Committee takes on this work, there will have to be additional, dedicated meetings for that work, and I suggest that it would be appropriate for the Presiding Officer to attend those committees. I do not take the Scottish view that the Presiding Officer should have nothing to do with Standing Orders. The Presiding Officer is always represented on the Business Committee, and he may wish to attend himself when Standing Orders are dealt with.

[363] **Jocelyn Davies:** I am sure that we can all think of a number of occasions when the Presiding Officer has suggested changes to Standing Orders, which we have then taken up. The point being made in Scotland was that the person who interprets Standing Orders should play no part in drawing them up. That probably does not apply to us, although it is certainly the Scottish view.

In your paper you mention the scrutiny of Ministers. From the visit to Edinburgh, it seemed that many subject committees were busy with legislation, and were falling down on their

duties to carry out other things. Could you expand on that, and perhaps say how we may avoid that?

9.20 a.m.

Jenny Randerson: We had a very successful and informative trip to Scotland. I think that everyone would say that that has been extremely useful in relation to the current exercise. However, one worrying thing that that trip revealed was that some committees devote virtually all their time to legislation. They do not deal with the scrutiny of Ministers in any other context—they only scrutinise Ministers in relation to legislation. They also do not do any policy development work. I would greatly regret it if the committees here went down that path. The problem in Scotland may be because the committees were set up with a role that encompassed everything, without anticipating that the legislation would grow to the volume that it has. Some committees still do the policy development role, but others do not, simply because it has been forced out. We need to anticipate that the bulk of legislation will increase as time goes on, and we must be aware of that.

There is a fairly difficult logic to get your head around, in that we will be restricted to 60 Assembly Members—Scotland finds it difficult with 129. In the long term, having 60 Members is totally unsustainable, but that is what we must accept. In that respect, we must find a way for our committees to work as efficiently and effectively as possible. However, the scrutiny of legislation must be absolutely rigorous. When you consider that a straightforward Bill can take 100 hours of scrutiny, that is a phenomenal amount of work for committees. Therefore, committees will have to adopt the Scottish model of working much more flexibly, meeting regularly every week, with the option to cancel a slot if they do not have business, obviously, and fitting in additional meetings when there is legislative pressure.

Although I do not have firm views on this, we might want to consider whether to set up specific committees for pieces of legislation. I am not 100 per cent convinced of that, simply because I cannot see where we would fit it in the timetable without denuding people from Plenary. That is a real issue—Plenary sessions would suffer in terms of people being absent to scrutinise legislation on special committees for that purpose.

[364] **Jocelyn Davies:** We had a suggestion last week that committees should sit at the same time as Plenary. I think that they disregarded this in Scotland, even though they admitted that the attendance in their chamber was poor, and generally confined to those people taking part in the debates. However, there are only so many hours in the day.

I also wanted to ask you about subordinate legislation, and how you think, after the changes, that that may be scrutinised.

Jenny Randerson: Our current Legislation Committee needs to be developed into a subordinate legislation committee, in the fullest sense of that term, along the Scottish model. It is very important that we have a rigorous system for scrutinising subordinate legislation, but that, at the same time—and this is my personal view—the process by which subordinate legislation goes through should not be entirely in the hands of the Executive; the Assembly must have a say in how subordinate legislation goes through. The Legislation Committee would be one way to deal with that process, although the rights of all backbenchers involved in the process would be important. With regard to the current role of the Legislation Committee, it has been greatly underdeveloped. It should have had a much more prominent role. That situation has led to the Business Committee picking up that role, which is not something that it should be doing. I have long felt that we should be concentrating on procedural issues and business programming. We should not be doing the work of the

dedicated Legislation Committee.

[365] **Jocelyn Davies:** On the existence of the Business Committee, the White Paper states that the only committee that we must have is the Audit Committee. How do you feel about the possibility of there being no Business Committee? Apart from deciding the timetable, what roles should the Business Committee take on?

Jenny Randerson: The Business Committee has proved to be a very effective way of dealing with business programming. It allows all parties to have a say in the way that business is programmed. It fits the new model. Scotland has a Parliamentary Bureau and a Procedures Committee, which deals with the matters that I see as forming the work of the future Business Committee. Scotland has separated those roles, but with only 60 Assembly Members, there is no way that we could separate them; we must keep those roles together. I have never seen a clash between the two roles. The members of the Business Committee have always separated the two parts of the agenda and dealt with them in different ways. A modern parliament, if I can put it that way, needs a business committee. It does not need to go back to the old-fashioned Westminster approach of discussions in corridors and 'via the usual channels' and so on. One is well aware that you, as business managers, have discussions outside the Business Committee, but the Business Committee provides a formal structure for dealing with issues and for the Business Minister to put her point of view.

[366] **Kirsty Williams:** To come back to the issue of Standing Orders, I agree wholeheartedly about the appropriateness of your approach. As there will be extra meetings of the Business Committee, are there enough staff to take us through the process? If it were to fall to the Business Committee, would we need additional staff? The Business Committee has struggled with making private Member's legislation more effective and with providing more opportunities for it. We have spent many hours trying to devise a way to make that mechanism more effective. Does the new set-up have the potential to improve the situation, or, indeed, to make it worse?

Jenny Randerson: To take your second question first, the issue of private Member's legislation is very important. In future, if it is going to be effective—and seen to be effective, in the short term at least—the committee is going to have to be able to request the Executive or the Assembly, depending on which process we follow, to ask the UK Parliament to grant the right to legislate in a particular area. We have discussed that in the past, and now is the time to enable that to happen. Private Member's legislation is still an area of difficulty, and if we are really going to enable it fully, then we must have the widest possible interpretation of how that could work. It is also important to remember that we need to have a process for committee legislation. If subject committees are going to be developing policy, then they need to have a role, or a potential role, in being able to put committee legislation together and steering it through the Assembly.

9.30 a.m.

In relation to staffing, I think that there will clearly be a need for additional staff, because there will be a massive body of work to be done on Standing Orders. That will be a short-term demand on additional staffing, but it is a useful opportunity to raise the question of staff resources in general. If we are going to do legislation effectively, we have to increase our capacity. You know that there are serious issues with capacity in relation to legislation from time to time anyway and, therefore, there will be phenomenally increased pressure. If we are going to do it, we must do it well. The fewer Assembly Members you have, the more staff resources you are going to need as back-up. We are stuck with our 60, so we will need the additional staff resources to ensure that that full technical expertise is available to us.

[367] **David Melding:** Jenny, you talk about the time constraints on our work. One thing that has not been touched upon yet, if we move towards being a more standard parliamentary body, is the number of days on which we sit. In effect, we only sit on a Tuesday and a Wednesday at the moment, with the occasional overspill into a Thursday. Monday and Thursday, or possibly Thursday and Friday, with Monday free, will have to be used for parliamentary business, will they not? We will have to sit for four days a week during our sessions, and that is surely unavoidable.

Jenny Randerson: If you look at the evidence I gave, you will see that in the first Assembly, we devoted only 9 per cent of our time to legislation. Scotland devoted 25 per cent, and the message we received was that that is actually an increasing percentage. I think that we should welcome the fact that legislation comes as an addition to the other work that we do, and there are certainly ways or other mechanisms to make some of the things that we do less onerous in terms of time, but we cannot throw out all the things that we currently do in Plenary sessions. Therefore, legislation and proper scrutiny, Second Reading debates and so on, will have to come as additional Plenary time. As Chair of the Business Committee, I have given reports to Plenary in the past indicating that we must accept that the focus is going to change slightly, and that we are going to find our centre of activity much more here rather than in our constituencies or with other organisations and so on. I think that it is inevitable that we become primarily parliamentarians.

[368] **David Melding:** My expectation of a four-day parliamentary week would not be far off, do you think?

Jenny Randerson: What we are in danger of doing currently here is being seen as a two-day-a-week organisation. Occasionally, you do a Thursday morning, and very occasionally, you have to do a Thursday afternoon. In terms of formal sittings and committee meetings, we have to accept that we are going to move towards being a three-day-a-week organisation, that we will have to be here from Tuesday morning through to Thursday afternoon inclusive, and that there will be other things that will intrude on a Monday or even a Friday, depending on how we arrange our calendar. It was noticeable in Scotland that several committees were held on a Monday. We will have to adjust our expectations of our role, as will the public, to fit that.

[369] **David Melding:** The other point is how committee work will be structured. You indicated that, at present, we are doing about 9 per cent of work on—

Jenny Randerson: That was in Plenary time.

[370] **David Melding:** Was it less in committee?

Jenny Randerson: Yes.

[371] **David Melding:** This is the time spent looking at secondary legislation. The reality is even more skewed than the statistic suggests, because only two or three committees of the seven do nearly all of that work at the moment. Is it not the case that, if this package takes us down the road to being a more standard parliament with a more enhanced legislative role, if my committee, the Health and Social Services Committee continues to exist, it will do nothing other than look at legislation? There will be the occasional window when the Government is not active in that sphere, but that will be very infrequent. Other committees will have next to no legislation in a whole four-year term.

The only way to get out of that is to have Standing Committees but, of course, I would anticipate that a Standing Committee on health or on social care would share a substantial amount of its membership with the Subject Committee, because those people would have the expertise needed. It is going to take an awful lot of development to adapt the current structure, is it not? Do you think that the Assembly, which I understand would no longer have to mirror ministerial portfolios, will have to have a good long look at this issue? A committee as large as the Health and Social Services Committee will just not be viable, will it?

Jenny Randerson: I would agree with your analysis. One issue with the current Government of Wales Act 1998 is that, having set up a very prescriptive committee structure—not in terms of the names of the committees, but in setting up Subject Committees—there has been a wish to consider them all as the same. I will not use the term ‘equal’. They have to meet with the same regularity, and they must have the same structure in terms of membership and what they do. We have to be a great deal more flexible on that and recognise that some committees may have to be split up, because they will have such a major burden. The other committee that has a really big burden is the Economic Development and Transport Committee, which also covers energy and seems to continually expand. It recently took on Ofcom, creative industries and so on. It seems to me that those two committees are currently overburdened, although maybe the burden of economic development legislation will not be that great, so that will not apply in the future. That points to the complexity of the whole issue.

We need to take an open-minded look at this and say either that some committees will be burdened and will have to be treated differently, or that there will have to be a Standing Committee structure. What we also need to address when Members are appointed to committees is that they have different interests. Clearly, that is already reflected in the committee that you are on, but some Members may want to be involved in legislation regularly, while others will prefer to be involved in the policy development side of it. There will have to be a more flexible approach, from us as Members and in the set-up of the committees’ structures. Although every element of a Minister’s portfolio needs to be covered, perhaps that does not have to be exactly reflected in the committee structure.

9.40 a.m.

[372] **David Melding:** Finally, we are an Assembly of 60 Members and, if there are at least 12 Ministers, that will give us an effective pool of 48 Members—well, fewer than that once the Presiding Officer and his deputy are taken out of the equation. One witness said that a possibility would be for Standing Committees, as we will call them for the moment, in looking at legislation, to co-opt experts from the business sector, the voluntary sector, legal experts or whatever as non-voting members, and that that would increase the pool of expertise. Do you think that that idea should be investigated?

Jenny Randerson: I would need some persuading that that would be an appropriate approach generally. We have that kind of structure on the Committee on Equality of Opportunity, and it works very well in that scenario. I wonder whether it would necessarily work elsewhere, such as in the health scenario, for example. That does not mean, however, that you cannot always refer to experts. For particular people to have regular membership of a committee is perhaps not appropriate, but committees will rely on expert advisers much more often. We will not be able to do our work unless we have a stronger draw on expertise.

[373] **Jane Hutt:** We have a lot to learn from Scotland, and our visit there a few weeks ago was very useful. What struck me about the parliamentary bureau role was the fact that it seemed to be an efficient way of doing business and agreeing it. Much was said across all

parties about the true spirit of compromise. There was negotiation, which obviously took place through normal channels prior to the bureau meeting. There was also a great deal of flexibility. Do you foresee that that kind of development, in terms of the maturity of this body, would have to emerge as a result of taking on these extra powers?

Jenny Randerson: Yes, I do. Although I would say that, for practical reasons, we cannot separate our Business Committee's two roles, I do not see any reason why that could not develop further. In practice, we do most of what the bureau does in Scotland. However, we do not undertake the procedure committee's role in launching investigations into particular aspects of how the Parliament does business. Pressure of time and diversity have prevented us from doing that, perhaps, but I think that we would want to do that anyway after two or three years of the new structure. I think that the Business Committee might well want to undertake that. However, in terms of the bureau aspect of the Business Committee's role, I think that we do most of what they do, and it seems to me that it worked in a very similar manner. That is, it had evolved in a similar manner to the way in which our Business Committee has evolved with regard to its weekly role in business programming, in enabling points of conflict to be flagged up, and in encouraging full co-operation by all involved.

[374] **Jane Hutt:** Of course, that means that matters are agreed at the bureau, and that the business Minister does not present the business statement to be adopted, because the business is done at the bureau, which is a different direction to the one that we have taken with regard to the opportunity for Members to challenge the business statement in Plenary. My understanding is that a lot is agreed at the bureau so that it can do business more effectively and more quickly.

Jenny Randerson: Actually, my understanding was not quite the same. They do object to the business statement on the floor of the house, but rarely. That might just be to do with the individuals involved and the way in which things have operated. It could be to do with the party balance there, which is far less tight, given that there are two parties in Government and the significant majority there. Perhaps there is less point in opposition parties objecting. However, there is a process—and my recollection on this is very strong—by which the business statement is taken to the floor of the house and they can vote against it. However, they only ever vote against it if they have said that they might do so, or if they have reserved their position in the business committee.

[375] **Jane Hutt:** Yes, as you said, as much as possible is agreed through normal channels.

Moving on from that, I wish to explore the issue of secondary legislation and how we handle it. As you said, if we had a strengthened subordinate legislation committee looking at the technicalities as well as the merits of instruments, in terms of the affirmative or negative resolution, it would change the balance in the Assembly regarding the amount of time that committees spent looking at secondary legislation. As we work through what this could mean for us, we also have to take into account that, if we went down that route, the legislative balance would be through framework legislation and through Orders in Council measures coming to committees.

In terms of the role of the subordinate legislation committee, as you said, I am sure that this would be very different from what we have now, and Ministers, as you said in your paper, would take the lead responsibility in terms of their role. It is very early to predict this, but what would our timetable be in terms of legislative load, policy delivery and inquiry, which has already been referred to, and how would that emerge as a timetable for the Assembly?

Jenny Randerson: I think that what we have done in the last six years is to make the best of

our limited powers via secondary legislation. We have used them wherever possible to provide distinctive policy as far as it is possible to do that given the will of the Government at the time. Therefore, we have given it a great deal of attention. We will be doing far more under the new powers given to us by the UK Government on a Bill-by-Bill basis. Therefore, I think that subordinate legislation, statutory instruments and so on will need a more streamlined process. That is why the role of the Legislation Committee is called into play.

However, if you look at the Scottish parallel once again, you will see that, actually, they have a very complex process. As an ordinary Member, you can ensure that subordinate legislation is debated and reconsidered and so on. I think that it is important that that fall-back position exists and that it does not just become an issue of ministerial diktat. After all, a similar situation exists in the UK Parliament. I think that we need to look at the Assembly's process by which either committees or individuals can ensure that legislation is debated, however minor it may appear to be.

9.50 a.m.

[376] **Kirsty Williams:** Going back to this issue of the bureau in Scotland, would you agree that its experience has been very similar to that of the Business Committee in the sense that parties, as you said, state in the bureau that they reserve their position to vote against the business statement on the floor should they go back to their groups, which then find themselves unsatisfied with the decision that the bureau has come up with. Indeed, the Liberal Democrats themselves were being accused of playing fast and loose with the system, because they were signing up to things in the bureau, and then the stropy backbenchers would perhaps speak out against the business statement. In fact, that is very similar to what we have found happening in the Business Committee. So, with regard to making that distinction and saying that having a bureau system allows things to run more smoothly, it is not necessarily that different from what we have had here.

Jenny Randerson: I came away from that meeting with the distinct impression that there was a remarkably close parallel between the bureau and how the Business Committee does business and how that plays out on the floor of the house. I had the distinct impression that business was done through the business managers in the bureau saying, 'We are not happy with this or that, we reserve our position; or we will vote against this unless you do something, such as propose a particular debate'. Then they go through and oppose it on the floor of the house. The parallels even with backbenchers are there, because a Labour backbencher here speaks most weeks when we have the little debate on our business for the week. There is almost always a Labour backbencher calling for something—

[377] **The Presiding Officer:** It is usually the same one though, is it not?

Jenny Randerson: No, there are two, Presiding Officer.

One of the Liberal Democrat backbenchers was said to be doing the same thing in Scotland. The only difference in the process that I have detected is that people here vote more frequently against the business statement. As I said earlier, I think that that is down to the practicalities of the numbers.

[378] **Jocelyn Davies:** Coming back to the delegated powers, we would be in an entirely different position than Scotland, would we not, because the Ministers there hold delegated powers given to them by the Parliament that they sit in and are accountable to? The proposals here are different, because some of the delegated powers will be given directly by the UK Parliament to the Ministers here. That is entirely different, is it not? We are told that

important powers will be given to the Assembly and the unimportant things will be conferred directly on the Ministers, which seems to be a strange constitutional position to be in—to hold Ministers to account on powers that have been given to them by the UK Parliament.

Perhaps you have not thought about this aspect of it, Jenny, and there is no reason why you should have, but who will decide what is important? Will we be in a position sometimes where the Assembly holds powers and we may need to delegate again? So, perhaps we will be delegating to Ministers. The White Paper does not lay out that much detail, but we will be in a difficult position in holding Ministers to account for powers that we did not give them.

Jenny Randerson: That is one of the many anomalies. The process that we have been offered has attractions in terms of potentially giving us a lot more than we have now, but it is riven with anomalies, difficulties and practical problems, which we will have to face. It would be just as complex, certainly for many years, and until we have delegated to us a very significant bundle of powers, we will be facing all these issues daily in the same way that we do now, for example, we can deal with some a certain matter in subordinate legislation, but the UK Government still has power over other aspects and so on.

One of the problems that we need to address in our Standing Orders is how we deal with creating a structure that is as parliamentary as possible, that divides the Executive from the Assembly, but still ensures that Ministers are held to account by the Assembly as a whole. You are right that we will have to re-delegate powers on various occasions. It is fatal for anyone ever to say that something is important while something else is not, because the strangest things become important in particular circumstances. You would require the judgment of Solomon to say what is important and what is not.

[379] **Jocelyn Davies:** You campaigned when the last White Paper was published, and I guess that you fell into the same trap as us, in that you completely oversold what would be possible under that White Paper to the people of Wales. Do you feel that there is a danger that history could repeat itself, and that we completely oversell the potential powers; we are referring to the powers that we might have and the powers that we will be getting, but the powers could actually be quite puny.

Jenny Randerson: Having experienced six years of endless frustration about our lack of legislative power, the opportunity to take greater legislative power should not be rejected; we should not do anything other than welcome it wholeheartedly. However, it is important that we bear in mind that those opportunities mean that we have capacity issues, both for Assembly Members and officials. It is very important that we look at those difficulties. We need to ensure that we maintain our scrutiny and policy development roles as an Assembly. The key problem will be when we have an Assembly that is not politically in tune with the Government in the UK Parliament. When it is not able to ensure the smooth passage through of the Assembly's wishes on legislation, we will have difficulties. I noted that Peter Hain, in an article in the *Western Mail* on Saturday, said that he believed that if a Secretary of State turned down a request from the Assembly for powers over a particular piece of legislation, I think that his words were more or less that that would be a trigger for the need for a referendum. Whether he would be granted it, is another matter.

[380] **The Presiding Officer:** I think that he may be about to say that now, just over the road. To conclude, I would like to ask you what has become known in this committee as the David Melding question, or one of the David Melding questions. Could you expand on this sentence at the end of your eighth paragraph:

‘The implications of the requirement for the Assembly effectively to scrutinise draft

legislation in both English and Welsh simultaneously should not be under-estimated’.

Could you expand on that a little to guide us further?

Jenny Randerson: We have the additional responsibility and privilege of providing bilingual legislation and conducting all of our business bilingually. If we are to provide more legislation, then that responsibility has to be carried out efficiently, effectively and fully. We already have a trend that legislation is held up because of translation. I cannot explain why quite a lot of the legislation does not come through, other than capacity issues in general. We have a trend of doing things later than England. There are, therefore, capacity issues in general.

10.00 a.m.

However, occasionally we have a piece of legislation that we have to put back because the translation is not ready. There is a hidden waiting list for legislation, because it has to be translated. Therefore, we have to make sure that we have a body of lawyers here, who are able to work in both languages. That is a rare expertise. Bilingual legislation is best done when drafted simultaneously in both languages, rather than translated. At the moment, we are on the receiving end of a load of stuff from London that we translate. When we make our own legislation, I hope that we will be approaching it in a different way, and doing it truly bilingually. That will mean considerable extra burdens.

[381] **David Melding:** Would you see a distinction then? Whatever we call the enhanced powers, they are more akin to primary powers, so would you see us concentrating our resources in terms of doing the work bilingually in that regard, and then saying that a lot of the secondary legislation that we currently deal with may have to go through in English only, if it is not scrutinised or picked up? We simply do not have the capacity to do both. Could you envisage that happening?

Jenny Randerson: I would very much regret our going down that route. I do not think that we should be doing that. We should be adhering to the principles that we have already established. There are things that we do not translate currently. One of the criteria that we use would be in relation to an immensely technical document, where the vocabulary would be similar in many ways. We also look at the usage of the document. I think that it would be a retrograde step if we were to turn around and say that we are not going to translate secondary legislation. I was also trying to say in my answer that the additional capacity that we would need would not just be translators.

In terms of the number of pieces of subordinate legislation that we pass each year, the additional burden—even in full flow—would be around 10 pieces of legislation, and I would anticipate that it would take a couple of years to work up to that. The Scottish Parliament has done 72 pieces in six years. The Scots have a separate judicial system, which sparks an additional demand. Let us be generous and say that it would be 10 pieces a year. The demand on translation related to that volume of legislation is not going to be that massive, compared with the volume of subordinate legislation that we do at the moment. However, we will need people who can draft bilingually from the start, rather than producing legislation in English, and then doing the Welsh as an afterthought.

[382] **David Melding:** In that case we would have to have a legal adviser who can conduct a conversation on legal concepts in Welsh; otherwise it is not a bilingual process.

Jenny Randerson: That is an additional issue. The demand for legal advice for committees will, clearly, be much greater than it is now.

[383] **Jocelyn Davies:** I have a comment, but I could phrase it as a question. It is important for us, is it not, Jenny, that co-drafting is the concept that everyone understands rather than things being translated? If you translate, then, obviously, the law is to be found in the English, which is translated into Welsh, rather than the law and the interpretation of law being able to be found by looking at both languages side by side. I think that that is very important in a bilingual nation, and in an institution that produces its law bilingually.

Jenny Randerson: I agree with you totally. The important issue is equal status, which can only truly be achieved if you do these things so that they are presented in both languages from the start as opposed to eventually emerging in both languages.

[384] **The Presiding Officer:** I am tempted to go a little way down this road again. You said, did you not, earlier in evidence, that a trend was developing whereby you were not receiving the texts of Assembly instruments in both languages at the same time? Is that my understanding?

Jenny Randerson: We have had some examples in recent weeks whereby we have not received both the English and the Welsh, and we have had to defer consideration of the legislation by the Business Committee. There is an ongoing capacity issue, which has gone on for many months, in terms of the availability of sufficient translators to do that.

[385] **The Presiding Officer:** There is a legal issue here. Section 122 of the Government of Wales Act 1998 is clear regarding texts in English and Welsh, for all purposes, being of equal standing. Clearly, if they are not produced at the same time, they cannot be of equal legal standing.

Jenny Randerson: That is why we do not consider it; we do not consider it in the Business Committee if it is not available in both languages.

[386] **The Presiding Officer:** Would you recommend that we take a further look at this in terms of capacity?

Jenny Randerson: Yes. It is an issue; if you look at the Business Committee minutes you will see that we have expressed our concern.

[387] **Jocelyn Davies:** I wanted to make the point that we say that they are not produced in both languages at the same time, but what we mean is that we always have the English version; I do not believe that we have ever been in a position, Jenny, where we have had the Welsh version and been without the English version.

Jenny Randerson: You are absolutely right. However, from the point of view of how they are presented to us as the committee, we will not consider them if they do not come in both languages, and are not available in both languages at the time of the committee meeting.

[388] **Jane Hutt:** It is perhaps just a matter of record, because this is a key issue for the Welsh Assembly Government. It is a matter of capacity, but it is only on rare occasions that we have had to defer. I am happy to follow this through after this meeting in terms of clarifying the position.

[389] **The Presiding Officer:** That is very helpful, Minister, thank you. It is always good to have a Minister on the committee—giving undertakings that will be on the record.

[390] **Jane Hutt:** I have to put the record straight.

[391] **The Presiding Officer:** We are very grateful to you, Jenny, for your paper and for your evidence this morning.

Jenny Randerson: Thank you.

[392] **The Presiding Officer:** Thank you, Roger Sands, for giving us of your presence and your time. We seem to be doing rather well in this committee—we have had a former clerk of Parliament, and now we have the clerk and chief executive of the House of Commons. We are very grateful to you.

Mr Sands: You have had Sir Michael.

[393] **The Presiding Officer:** He is a kind of resident here—after the Richard commission, and all that.

[394] **Kirsty Williams:** Mr Sands, could you explain to me the powers that committees in the House of Commons have to summon persons, papers and records, and any advice that you could give us on what powers our committees should have to do the same?

Mr Sands: There will be a significant difference, because, in the UK Parliament, the powers stem from the sovereignty of Parliament, whereas in Scotland—and I imagine that the same pattern will be followed in Wales in the future—they stem from statute, and so they are limited. Therefore, when Parliament confers on a committee the power to summon persons, papers and records—we call it PPR for short—it confers on the committee the Parliament's own powers, which are inherent, to use a rather grand expression. What they mean in practice is, of course, a completely different thing. As you probably know, there has been a long running debate between Parliament and the Executive as to what PPR means in practice in relation to Government documents and Government civil servants. I can expand on that if you like, but it is a very long story.

10.10 a.m.

[395] **Kirsty Williams:** Perhaps you could give us the abridged version.

[396] **The Presiding Officer:** It is a story that has already featured in this committee in evidence from the Permanent Secretary, and I know that Kirsty Williams has a great interest in these matters.

[397] **Kirsty Williams:** Yes, and if you will forgive me for pursuing that interest a little further this morning, I would be ever so grateful.

[398] **The Presiding Officer:** I think that it would be appropriate.

[399] **Kirsty Williams:** Perhaps you could give us the abridged version of the story. It has always struck me as strange in this institution that, for instance, a committee does not have the power to call the lead civil servant of a department, who has the day-to-day responsibility for running that department and the responsibility for the performance of that department. I wonder whether you have had the same problems in the House of Commons. The Permanent Secretary here seems to be of the opinion that the committee should not have the power unless the Minister allows the civil servant to come, so we could not make an independent request to see the civil servant. I just wonder whether you could explain some of the difficulties that perhaps you have had. My understanding is that Sir Nigel Crisp was a regular

attendee at the Health Committee.

Mr Sands: I have to preface what I say by saying that in 90 per cent of cases—probably more—no trouble arises over this at all. A committee indicates its interest in pursuing an investigation on a particular topic, and the civil servants who give evidence, and the documents that are provided by those civil servants, come from the area of the ministry that is directly concerned with the subject and no problem arises. The problems that have arisen have arisen when a committee has chosen to focus on an issue where there is a very high political content. The classic case in point was the Westland helicopter affair, which led to a senior Cabinet Minister walking out of Government. When a committee tried to focus on how this had happened, and get behind the basic decision and the reasons for it into the interstices of the exchanges between ministries on this issue, it then started to tread on toes. At that point, the Government took the view that if a committee was going behind the decisions and the basic information underpinning them, then Ministers ought to be coming to answer the questions and not individual civil servants, and that there was a danger that civil servants would be before a committee acting almost as a disciplinary tribunal, rather than investigating the work of Government. That is one inhibition that has definitely been imposed. It is for Ministers and senior civil servants to discipline other civil servants, not for a parliamentary committee.

The other inhibition imposed by the Government is that, as you say, if push comes to shove, and only occasionally does push come to shove, it is the responsible Minister who decides which of his or her civil servants should answer to the committee. The committee could, in the final analysis, because the power is absolute, summon a civil servant, and, if it got that Order through the house, which would be most unlikely, the civil servant would be obliged to attend. However, at the same time, the civil servant is bound by his terms and conditions of office which require him to answer on behalf of the Minister. So, if he is asked a question by the committee that the Minister does not want him to answer, he will just say so and there will be a stand-off. A committee will ask the question and a civil servant will decline to answer. Everyone realises that that is a waste of time, so the issue has not been pressed to a point of resolution.

[400] **Kirsty Williams:** Though I hate to admit it on public record, I find Mr Heseltine's memoirs very interesting indeed on the Westland affair. In the end, as you said, the committee, by virtue of the powers given to it by the UK Parliament, has the right to demand that a civil servant appears—

Mr Sands: It has the ultimate right.

[401] **Kirsty Williams:** It has the ultimate right to demand. Do you agree that it is not beyond the wit of Members of Parliament or Assembly Members to know what questions are appropriate or not appropriate to ask a civil servant, or the Minister, and that they can differentiate between the two?

Mr Sands: I am sure that they can differentiate, but they do not always do so.

[402] **David Melding:** Mr Sands, in this committee we have discussed with other witnesses the idea of using Orders in Council to enhance our legislative powers. Basically, diametrically opposite models have been proposed to us. One is that an Order in Council would be the conclusion of a process, so the Government or a committee of the Assembly would say that it wishes to modify, adapt, extend or repeal legislation in a particular subject area. We have used an example in relation to the welfare of children, but it does not matter what it is. The initiator would identify the current applicable legislation and how it would

want to change that, and we would go through a sort of mock-Bill process in the Assembly. It would be fleshed out and agreed, packaged and sent up to Parliament where it would then appear under a simple Order in Council, which would be subject to an affirmative vote after a relatively short debate.

Others have said that it could not possibly work that way, because that would be far too liberal a procedure, and the power would come from and be identified in the Order in Council; it would have to be agreed after extensive debate in Parliament and would be narrowly focused, because Orders in Council tend not to be over controversial matters. The power that would come to the Assembly would be much more limited, and the power of initiation would not really rest with the Assembly, because it would have to get agreement for the Order in Council to proceed in the first place. Which of those models do you think is more likely?

Mr Sands: You are taking me into an area where I have relatively little expertise. I should say that of the three devolved assemblies, if I can lump them together like that, this is the one that I know the least about. I know the most about the Northern Ireland Assembly, because I have had a lot to do with that body. So, I come to this hearing on the back of considerable ignorance, but I have read the White Paper fairly closely. I agree that that is a key part of the proposals, but how it would work exactly is not clear in the White Paper.

10.20 a.m.

One has to start by asking what an Order in Council like this would look like. Would it simply define a block of legislative responsibility and transfer it to the Welsh Assembly, or would it be much more detailed, as you describe, not just transferring responsibility, but doing so on a basis of law, which was what the Welsh Assembly wanted? It could then be modified in future if and when the need arose. What one thinks an Order in Council would look like depends on what procedure you think might be appropriate to it. If it is just a piece of framework, one can imagine a relatively simple debate in the National Assembly as authority for the Executive to put this request to the UK Government, and then, quite probably, a fairly straightforward debate at Westminster. The block of responsibility then goes over and that is it; you have got it and you make what use of it as you decide. If it comes over with a lot of baggage attached to it—if I can put it that way—obviously, the process of debate somewhere has to be a lot more detailed. However, whether the detailed discussion takes place here, before, as you say, the almost draft Order in Council is sent up to Westminster for rubber stamping, or whether just an outline request is sent up and the detailed discussion goes on in Westminster—I would have thought that the latter was less likely—is a matter for discussion. Exactly what was intended, however, I am not clear, but it will have to be clear by the time the legislation, which we have to pass in Westminster, is formulated.

[403] **David Melding:** Given that Orders in Council are currently used in areas that are not regarded as being particularly controversial, and that they will develop considerably if they are to be used as a device to give us more legislative authority in areas that would be controversial occasionally, if not frequently, is it not likely that Westminster will want to do some of the scrutiny on Orders in Council, or do you think that it would be happy not to have the traditional, narrow, non-controversial approach and be more expansive and say, ‘Yes, fine, over to the Assembly’? It seems rather a complicated way if it is just going to give the Assembly authority. Why go through the loop of an Order in Council? Why not just say, ‘Well, that is a delegated policy area—you have primary powers on it’? I cannot yet quite understand what the Westminster side is there to guarantee or deliver.

Mr Sands: An Order in Council is just a piece of machinery. I do not think that I would agree with you that it is necessarily always used for non-controversial items. In the Northern Ireland context, for example, when the Assembly is suspended, as it currently is, alas, Orders in Council are the means by which the United Kingdom Government legislates for Northern Ireland. These may be controversial as they are the equivalent of primary legislation for Northern Ireland, and I have no doubt that some of them are quite controversial. Certainly, some of them are very detailed; they have all the detail of a statute. So, I am not quite sure that I share your starting point.

[404] **The Presiding Officer:** To pursue this a little further with evidence from the House of Lords, when Lord Evans repeated the statement on the White Paper, one possibility that he described in answer to a question was that an Order in Council would probably have been phrased in the same way as the long title of a Bill. Could you conceive of it as being as permissive and as broad as that in general circumstances?

Mr Sands: Yes. I must admit that when I heard Peter Hain's oral statement, before I had read the White Paper, my immediate impression was that the sort of thing that he had in mind was that the Order in Council would be a very short document that would just convey a chunk of legislative competence over to the Assembly with not much baggage attached to it, and defined in terms of existing statutes or something of that sort.

[405] **The Presiding Officer:** Sorry, David, I interrupted you. Do you want to continue?

[406] **David Melding:** No, that is fine.

[407] **The Presiding Officer:** Fine. Jocelyn?

[408] **Jocelyn Davies:** We can guess that the Assembly will have more legislative powers through new Acts of Parliament and these Orders in Council. We all accept, therefore, that the way in which we scrutinise Ministers must change, and, obviously, we would like to draw from your experience. Is there anything that we should not do in the future? Do you think that we could learn lessons not just from best practice, but in terms of things that we should not consider?

Mr Sands: Coming from a big Parliament that has never had the luxury of sitting down with a blank sheet of paper and saying, 'This is how we should do it', and one that has always had a huge inherited conglomerate of custom and practice and little power cells here, there and everywhere, which are very difficult to break down, it is difficult for me to try to give a lecture to a much smaller parliament that does have that luxury. One thing that you probably should not do is overcomplicate the situation. I think that that would be a great mistake. If you have a huge range of pieces of machinery and people are rushing from one to another, that probably diverts attention and focus, whereas if you have flexible pieces of machinery that can be used as and when required and in a way in which each particular piece of business requires, it is probably more efficient.

[409] **Jocelyn Davies:** Obviously, with a small number of Members, we do not want to be dashing around all over the place. Certainly, there would be no need to create work for people because I think that we will have enough to do. Have you any advice to give us on how best to scrutinise Ministers? As you have probably already heard today, some of the committees will not have time to scrutinise Ministers. When we visited the Scottish Parliament, I was disappointed that the opportunities to scrutinise Ministers seemed to be very limited.

Mr Sands: Is that scrutiny of Ministers within committees or just within the house?

[410] **Jocelyn Davies:** Well, it was confined to the chamber. Some committees did not scrutinise Ministers apart from when a Minister appeared at committee to champion the piece of legislation that that committee was considering. Ministers and Governments do a great deal more than just produce legislation. One of my concerns is that if the Government keeps Assembly Members busy with legislation, then perhaps they will not notice everything else that it is doing. It is important that we are able to scrutinise the Ministers on their Executive action as well as on the legislation that they are proposing.

Mr Sands: You raise a very profound point. One of the difficulties for any parliament is to strike a proper balance between doing things that are the Government's agenda and setting your own agenda. If I have a criticism of our departmental select committees, which are the equivalent of your subject committees, it would be that they set their own agenda too much and just totally ignore other issues. A ministry has a number of issues at any one time that are big in its head and are what it is concentrating on. If a committee hauls them off to think about something else that it is not really thinking about, it will obviously respond and it will dig the papers out and so on, but you are probably not connecting with it in the way that will be the most fruitful from both sides.

10.30 a.m.

On the other hand, you cannot afford to let committees set the agenda to such an extent that there is a problem there that they do not want you to get at. You have to have the capacity to get at it, pull it out and expose it to public gaze. Striking the balance between those two things is the most difficult thing for any parliament. This applies not only to committees, but to the way in which time is disposed in the chamber and elsewhere, and the amount of time that the parliament spends on legislation. I think that we spend too little time on legislation in the House of Commons. The tendency has been to timetable it—the word is 'programmed', but 'timetabling' is what it means—and constrict the amount of time spent on legislation, and to allow much more time for Members to raise topics that are of concern to them. We have a huge range of subjects usually just under the adjournment debate, where there is no issue to be decided—this is when a Member raises a subject of local concern to his constituency or region; we are very generous with opportunities like that. The Minister comes under scrutiny there but, because those Members are not paying attention to the detail of the legislation that is going through in the way that they perhaps used to, it is possible to query whether they are doing their job as legislators.

[411] **Jocelyn Davies:** We mentioned earlier the scrutiny not just of the primary legislation or these important powers that we will have under the Orders in Council, but the subordinate legislation. We currently have robust procedures for dealing with the scrutiny of subordinate legislation—we can table amendments, committees can consider them, and we debate them in Plenary. Do you have a view on how we might deal with scrutiny of subordinate legislation along with everything else that we will be trying to do?

Mr Sands: We draw a clear distinction between what I describe as technical scrutiny—making sure that a piece of delegated legislation has complied with the powers given to the Minister by the parent Act, and does not make any unusual use of them and that sort of thing—and the merits of the policy underlying the instrument. We have some solid and fairly well-resourced machinery underpinning the technical scrutiny. We have a committee that meets weekly more or less and does nothing else, and we have three legal advisers who go through every instrument and give advice to the committee on that. We are much weaker on the merits side. Generally speaking, the vast majority of negative instruments, which are the

ones that do not have to be approved by Parliament, are not debated at all and are not looked at from the point of view of merits. The House of Lords has tried to plug this gap a bit recently by setting up a committee to look at the merits of instruments, but there is such a huge range of them that it is a very difficult job. You have to be selective and accept, eventually, that delegated legislation means what it says—you are delegating a power and there has to be a safety net to catch the really bad ones that might otherwise slip through, but you cannot look at everything.

[412] **Jane Hutt:** We do not have the luxury of starting from scratch, as you said earlier on, Mr Sands, but we can certainly learn, as we hope that we are doing—not only from you, but from Scotland, Northern Ireland and other administrations. One issue that we are interested in is the parliamentary service and the civil service. As you will be aware, until now, all staff are civil servants and, with separation, we will be developing a difference between them. Do you have any comments on this issue, in terms of the principles of the parliamentary service in relation to the civil service? Do you think that we could continue to have some permeability between the parliamentary service here and the civil service in terms of the roles that have to be played?

Mr Sands: I would advocate permeability. When I joined the House of Commons service more years ago than I care to think of, the tradition was that, once you took the decision to enter the House of Commons service rather than the civil service, that was it. We even had reservations about bringing in people on secondment from ministries because we thought, ‘We will not know where their true loyalties lie; will Members be able to trust them?’. We have got over those reservations recently.

We have realised that the great drawback of an impermeable parliamentary service is that it can get sclerotic and set in its ways; it is not open to outside influences. We send our people out on secondment when opportunities arise—it is difficult to organise, but there are a few opportunities—and, increasingly, as we have recently expanded our committee service, we are bringing in people on secondment from various bits of the public service. Some degree of permeability is good for both sides: it helps the mainstream civil service to understand a bit more about how parliamentarians think and work and how Parliament works, which, frankly, they are often very ignorant about, and, from Parliament’s side, it gets people in who bring with them fresh thinking and a fresh approach to the job.

[413] **The Presiding Officer:** We understand, although it is not specifically in the White Paper, that we are about to have something called the National Assembly for Wales commission—modelled, presumably, on the House of Commons Commission. How does that work in terms of day-to-day management? You have experience of the history of this issue, including the time before there was a commission. It would be useful to compare and contrast how it has worked.

Mr Sands: It has made a great difference to the House of Commons, having its own centre of authority for administration and its own budgetary authority. That was the key change made by the House of Commons (Administration) Act 1978: it set up a body that had the virtually unfettered power to set a budget for the House of Commons. Before that Act, such a body did not exist. When you go to Westminster and find that we have grand new buildings and an office for every Member, at last, it is because the House of Commons has its own budgetary authority. From that point of view, it has been a success. There is still disagreement in some quarters on the make-up of the commission, such as whether the Speaker should chair it and whether it should be a more openly elected body than it is now.

At present, the Speaker is *ex officio*, the Leader of the House of Commons representing the

Government is ex officio and there is a nominee of the leader of the main opposition party, usually the shadow leader of the House. That leaves just three of its six members to be elected from the backbenches. That process of election, like any election that takes place in the House of Commons, is not obviously transparent in that way. Many discussions go on behind the scenes, but it is not a secret ballot, if I could put it that way. There is a growing body of opinion that perhaps the commission ought to be a body more representative of the ordinary Tom, Dick and Harry backbencher, but it is still in the minority.

10.40 a.m.

[414] **The Presiding Officer:** Have any issues involving the political management of officials arisen as a result of this system?

Mr Sands: No, I do not think that it has not been a significant issue, partly because of the strong tradition of the Speaker's impartiality, and I suppose that officials shelter behind that. The commission has the statutory power to appoint any member of the House of Commons service but, in practice, at a very early stage, it delegated the power to appoint heads of department to the Speaker, and delegated the power over all other appointments to heads of departments. That has effectively minimised any risk of political interference in appointments. The other factor is that we now have a very powerful Commissioner for Public Appointments, and if an appointment were made to a senior position in the house in a way that was not open and transparent, I am pretty sure that the commissioner would say something about it.

[415] **The Presiding Officer:** Are there any other questions? We are very grateful to you, especially for giving us your interpretation of the White Paper, because we also tend to view that there is not absolute clarity as to how the legislative process might work.

Finally, I know that it is early days yet, but would you envisage the House of Commons or both Houses jointly seeking some way of scrutinising the draft Orders in Council by way of a committee? Might it be a role for the Select Committee on Welsh Affairs or some successor body?

Mr Sands: I am sure that the Select Committee on Welsh Affairs will want some kind of role in considering which areas of legislative competence should be devolved to the Assembly. If my interpretation of the intention of the White Paper is wrong, and it is envisaged that these Orders in Council might be quite detailed and convey quite a substantial body of legislative provision as well as competence over to the National Assembly, there will need to be that kind of joint consideration, possibly even jointly between Parliament and the National Assembly, which has happened with one or two pieces of legislation so far. On Wednesday this week, we will be renewing the power that it gave in the last Parliament to the Select Committee on Welsh Affairs to meet concurrently with the committees of the National Assembly. I have no doubt that it would be a suitable use for that power.

[416] **The Presiding Officer:** Thank you for bringing us that good news. It is something that has worked very well and which we have all benefited from. Could I ask you to consider another favour in return, which you do not necessarily have to answer this morning if it is invidious of me to ask it? We will go down the route of rewriting our Standing Orders in some form or other, however that is done, as a result of the separation and changes in structure. Would you feel able to assist us in that if we called upon your services?

Mr Sands: Yes, I would be willing, but I am not sure whether I would be the best person to do it. I could certainly offer some skilled assistance from within the Clerk's Department. I

had something to do with the drafting of the Northern Ireland Assembly Standing Orders, and it is certainly a fascinating exercise. I would add to my advice that it is much better to leave plenty of space between the lines, if I can put it that way, rather than to be too detailed or prescriptive.

[417] **The Presiding Officer:** Thank you for that very helpful answer, and for the rest of your evidence.

Dyna ddiwedd y sesiwn gyhoeddus ar hyn o bryd. Byddwn yn torri am 15 munud ac yn ail-ymgynnull am 11 a.m. i holi'r Prif Weinidog. That brings us to the end of our public session. We will now adjourn for 15 minutes, and then reconvene at 11 a.m. to question the First Minister.

*Gohiriwyd y cyfarfod rhwng 10.45 a.m. ac 11.01 a.m.
The meeting adjourned between 10.45 a.m. and 11.01 a.m.*

[418] **Y Llywydd:** Bore da, Brif Weinidog; croeso i'r pwyllgor hwn. Yr wyf am ofyn i un o'ch Gweinidogion agor y batïo, os nad ydych am wneud datganiad. [418] **The Presiding Office:** Good morning, First Minister; welcome to this committee. I will ask one of your Ministers to open the batting, unless you wish to make a statement.

[419] **Jane Hutt:** First Minister, we have had some very positive responses from witnesses over the past week in terms of the opportunities that the White Paper offers us. It has been described as an infinitely flexible settlement. However, what the people of Wales want to know is what it will mean for them in terms of measures, delivery of Government, and policy objectives. Could you do anything to illustrate, or clarify, how we can take this forward, and explain what the particular route of the Orders in Council will mean? There has been quite a lot of discussion about the scope, the breadth of fields, and the opportunities that we have in the Assembly to lay the terms of that in relation to then submitting it through procedures to Westminster. Is there any way that you can clarify or explain what this would mean in terms of policy objectives for the people of Wales?

The First Minister: Yes. Well, I hope so. However, short of listing a 'such as' here, and a 'such as' there—because I am not sure that it really helps matters if you do—there is an important principle here, which is that you should never seek additional powers for the purpose of aggrandisement or status, but to have the tools to do the job, and to deliver what you believe, through the political and democratic process, the people of Wales want from their Assembly. That principle is what lies behind the approach taken in the White Paper—it is for a purpose, not for status reasons.

You then try to illustrate that, and you are immediately into this territory of listing 'such as' examples, which can mislead, confine or, occasionally, just simply be in error; it is rather a risky procedure to start listing a 'such as' this, and a 'such as' that. However, if we try to replay what has happened just recently in terms of the Assembly being able to have the power to operate within a framework Bill—whether it is a framework Bill that, by accident, has used a kind of 13.2 set of principles—then the Education Act 2002, which gave us the power over student finance to make our own determination in the end, is a good example of a framework type of Bill, even though it preceded the provisions of the White Paper. It enabled us to make our own decision, taking into account the very different circumstances in Wales and England in terms of higher education.

You might say that the public health Bill, which is an England-and-Wales Bill, but which will, in effect, enable Wales to make its own decision, either in advance of, or differently

from England, will possibly be the first example of a 13.2 type of Bill, now that we have the White Paper preceding that Bill—it is called the Health Improvement and Protection Bill, I think, in England. Therefore, it will be an England-and-Wales Bill, but the Wales bit will be ‘For Wales, we are leaving it to the Assembly’, and the power will be transferred to the Assembly. Therefore, that is an example of how it may work in the future.

There were other examples where we thought, for example, ‘What about the Mental Health Bill?’, which is a very interesting and complicated one, because there are non-devolved aspects to it because there is a lot of Home Office stuff in there. However, we had this joint committee of the Lords and Commons—not a joint committee involving the Assembly, but both Houses of Parliament—and you would think to yourself, ‘Well, the mental health services in Wales work in a particular way and they have developed differently from those in England’. You then have to try to move out the Home Office powers and just concentrate on the health powers. That would be a good one for trying to apply—maybe it is too late to apply it—a kind of framework principle, at least to the devolved parts of the Mental Health Bill. I just come back to the original principle that you do this not for the purposes of conferring status on us as Ministers, or everybody as Assembly Members, and so on; it is not about status, it is about delivering services.

[420] **Jane Hutt:** It is also, of course, about having a mature relationship between the Assembly and Westminster in order to improve and deliver services that meet the needs of Wales. Do you agree that we have achieved that mature relationship in terms of joint scrutiny for the Transport Bill, for example, and, indeed, in ensuring that we have Wales-only Bills? The Children’s Commissioner for Wales Bill was the first and perhaps most publicly understood and well-known one, but concern has been expressed about what would happen if there was a Government in Westminster of a different political complexion to that in the Assembly. However, you robustly counteracted that when you made your statement in June. Can you comment again on that issue in terms of the new circumstances that we will have in the future with regard to this maturing relationship?

The First Minister: There are three points there. One is that the more that Assembly Members and MPs work together on an issue, the more they will wish to do so further in the future, because what you are doing is overcoming a kind of inhibition and the need for flexibility in timetabling things and in ensuring that you reduce the length of time and the silly nonsense of people having to do things twice over, provided that you can overcome the physical obstacles. If you are going to have joint scrutiny, it involves being in the same place at the same time. However, the more used you get to doing that, you can see that, for the public outside, it is far more sensible than a House of Commons committee doing something and then the Assembly doing something separately. If it can be done on a joint basis, it is quicker, better, and it is much better overall for witnesses, who do not get paid to be full-time politicians. Secondly, there is the issue of how you think the British constitution works, and then, finally, I will come on to the cohabitation question.

I believe, and there are others like me, that the British constitution—others will take a different view, especially academic constitutional lawyers, who take a strict view that the British constitution should all be written down, so that you can discuss it, admire it and write papers about it—evolves in a very flexible way. Provided that you can establish custom and practice about the Assembly and the Houses of Parliament evolving a satisfactory set of working arrangements in which Parliament can release powers to the Assembly, then that fits in very much with a tradition of the British constitution evolving flexibly according to the time, rather than according to a strict set of constitutional rules that are set down and which you then cannot change without some massive constitutional upheaval. In America, for example, you have to have 75 per cent of the states agreeing to change in their own referenda,

or their own congresses and so forth. If you have a written constitution, you have to work out how you can change it, because you cannot have it so that you cannot ever change it, whereas the British constitution, in not being written down, is much easier to change.

Finally, on cohabitation, what happens, and is the White Paper proposal workable with regard to cohabitation? It is something that you want to see designed for cohabitation. Obviously, as a democratic politician in a competitive contest of politics, I do not want cohabitation—I would rather have Labour staying in power here and in Westminster forevermore, but I know that that is absolutely not possible. In any democracy, the tide always turns and the pendulum always swings the other way.

11.10 a.m.

Therefore, the question is whether this is workable, and more workable than the present system. Provided that custom and practice have been established, and there is an opportunity for there to be some exercise of the new provisions of the White Paper—and you cannot predict the outcome of the 2007 Assembly election—a change of Government in Westminster following getting a few Orders of Council under our belts in a typical session would lead to people saying, ‘That is how it works. That is fine; we know how it works and we can continue to operate that system’. Whereas under the present system it is very hard to see why, when we make an approach from here for primary legislation to be passed on our behalf in Westminster, any future Conservative Secretary of State in Westminster would take the time to take a non-Conservative Assembly administration’s Bill through the Houses of Parliament, when he or she did not believe in a single word of it.

[421] **Jane Hutt:** So the strength of our present settlement and the backing of the Assembly, and the fact that we are talking about devolved functions that are in our purview anyway, are important in terms of a message coming through from the Assembly. It could be an Executive measure or a committee or a backbench measure, but with the backing of the Government here.

The First Minister: You have to have something that provides for someone outside the ministerial set-up here to also have the ability to put a measure to the Assembly. If the Assembly passes the measure, it should have the ability to go into the Order in Council procedure as a measure coming from Ministers; in the same way that private Member’s Bills in the House of Commons have a chance, though it is not always a great one without some measure of Government support. The same would probably apply to any private Member’s Bill here, it would have to get some kind of Government backing, otherwise the Government would not find the time for it, but I do not think that proposing measures should be exclusively a matter for Government. There must be some sort of safety valve for backbenchers to have the right to come in with measures, provided that they get the backing of the Assembly, and to persuade the Government that it is a sound and sensible thing to do, even though it was not its original priority, in the same way as the private Member’s Bill in Westminster.

[422] **Jane Hutt:** I have one more question, which is about the capacity of Government in terms of taking this forward, particularly in relation to the drafting of Orders in Council. Do you have any comment or thought about how we would have to build the capacity and competence of Government in this respect?

The First Minister: It is probably no different from what we have gone through over the past six years, in that we all accept that the history of administrative devolution, that is pre-1999 devolution, was very different in Scotland and Wales. The Scottish Act of Union 1707

preserved the Scottish legal system as separate, therefore there was always a body of legislation to be updated, so there were four or five Scottish Bills a year going through Westminster between 1707 and 1999, updating legislation on commercial law, bankruptcy, fostering and adoption or whatever it might be. No law lasts forever, and every 50 years or so you have to modernise your body of legislation. We did not have that in Wales. We had hardly any body of Welsh law that required updating, and therefore we were distinctly rusty and out of practice in 1999. We have coped reasonably well with the uplift in legislative input, in going from one Act every five years to one a year. This will enable our legislative competence to evolve and develop, and enable the civil service, legal, non-legal and ministerial, as well as the Assembly, in scrutiny terms, to move up another notch. It is not such a huge rise that it would give me doubts about the Assembly's ability to cope. I am sure that we will be able to cope.

[423] **Lorraine Barrett:** How do you believe that secondary legislation should be scrutinised post-2007? Do you have any views on the important kinds of legislative Orders and strategic plans that should continue to rest with the Assembly?

The First Minister: It is a bit difficult for First Ministers to start laying down the law about how secondary legislation should be scrutinised; that is primarily a matter for the Assembly as a legislature. In being much more of a legislature in the future, it will want to make its own decisions on how to achieve scrutiny.

I have said on many occasions that if the legislative input or the proportion of time spent by the Assembly on legislation were to rise from the present 10 per cent to 50 per cent, or something of that sort, which is what I would anticipate, the Assembly will get a lot better in terms of teams of backbenchers scrutinising. It is a maturing of the Assembly right across the board, as I said at the end of my answer to Jane's last question. That maturing will apply to civil servants, lawyers, Ministers, backbenchers and Chairs of scrutiny committees, in order to go through the legislation. However, I will not say whether it should be done by subject committees, special committees, standing committees, or scrutiny committees. I do not think that I should prescribe it.

You mentioned strategic plans and legislative Orders. Hugh, do you want to deal with the question of legislative Orders? I am sorry; I did not introduce Hugh Rawlings earlier.

[424] **The Presiding Officer:** I think that we have met Mr Rawlings before—he was once seen masquerading as a Presiding Officer, but I have forgiven him for that. [*Laughter.*]

Mr Rawlings: That was a long time ago, Presiding Officer.

The issue concerning secondary legislation is that if we are talking about the measures that the Assembly will make post 2007, I would expect that the Wales Bill will stipulate some sort of basic principles, standards or procedures that will have to be observed in the scrutiny of those measures. For example, I could refer you to section 36 of the Scotland Act 1998, which talks about a Scottish Bill having to have a discussion of the general principle, a consideration, effectively, of line-by-line scrutiny, and then a final vote to decide whether to approve it or not. We might well have something like that for the way that measures are examined in the Assembly. However, the precise way in which that would be done, how the flesh would be put on those bare bones, would be a matter for Standing Orders.

The First Minister: In other words, it depends on what exactly you mean by secondary legislation. If, as Hugh put it, you include an Order in Council, which, I suppose, is a form of secondary legislation, but with a lot of meat on it, then it is hard to imagine another process.

It would be nice to be totally original about these matters, but having gone round the block and thinking ‘We must do things in a new and different way,’ you come back to having some sort of Second Reading debate on the principle, setting up a committee to go through it line by line and then a debate, in the end, on the amended Bill, which is boring because it copies the procedure used in Scotland and Westminster. However, until somebody comes up with a better one, you are still going to come round to that kind of model.

I do not know whether we could have an exchange of views in writing on this question of the legislative Orders and the strategic plans—the spatial plan is the obvious example. Perhaps we could come back to how you would deal with the approval of something at that level, which is not strictly speaking legislation. We could put a few ideas to you, as a committee, or you could put a few ideas to us—I do not mind which—and we could bounce them back and forth before you complete your work by the end of the month, or the end of August, whenever you are going to complete it.

[425] **Kirsty Williams:** Coming back to the issue of how you would put the meat on the bones, so to speak, the committee has received conflicting evidence about how the Orders in Council might work. The Minister, who repeated this statement on the White Paper in the House of Lords, said that the Orders in Council may contain little more than the long title of a Bill. However, Professor David Miers, who has already given evidence to this committee, believes that the intention outlined in the White Paper is that the Order in Council be much closer to a worked-up Bill, having gone through the procedures that you have described before going any further to London. What is your expectation of how the procedure will work?

11.20 a.m.

The First Minister: I would side with the Government. I read David Miers’s paper; it is a wonderful paper, and it really is a very good eye-opener into the constitutional-lawyer type of mind, if you like, but I think that he is quite wrong about the issue of what it is that Parliament is being asked to devolve. It is being asked to devolve a scope, rather than a set of details. Therefore, that would fit in much more strongly with what the Minister said in the House of Lords, namely that it is something akin to the long title. You could not have a situation in which the Assembly had to write and debate the Bill before it even went to Parliament, with Parliament then giving you the right to pass that particular Bill, thereby turning it back to the Assembly to go through it again. That seems to be completely unworkable. It is something much more akin to the long title, and it is the appropriateness of transferring the scope contained in that long title, and not the details of the Bill that has already been filled in in all its lines by the Assembly. The Assembly could have gone to an awful lot of abortive work in trying to write a Bill, only to find that the Secretary of State does not like the principle.

[426] **Kirsty Williams:** To come back to this issue of appropriateness and inappropriateness, and to test Professor Miers’s evidence a little further, he pointed out the Lords’ committee definition of contentious. How would you anticipate defining the parameters of what is politically contentious before proposing an Order?

The First Minister: Hugh may want to come in on the back of this because I think that he knows some of the examples better than I do. However, we do not share that view, and the whole purpose of this is that you could call it ‘not a politically contentious issue’; in other words, it might be constitutionally contentious, but not politically, in the partisan sense, contentious. That is, is it appropriate, given the Assembly’s powers, and given the case made by the Assembly, to transfer this power to legislate in a particular area within this scope to

the Assembly from Parliament? Here is a request from the Assembly, now you have to ask whether it is politically contentious. In one meaning, no, it is not, as it is a constitutional issue, is it not? It is about the appropriateness of making that transfer of a capability or competence from one body to another.

I think that he was being unduly pessimistic about the view that the House of Lords would take. However, again, it is a matter of how the British constitution works. This is a unique proposition, and if their lordships test it in their consideration of the Bill and the White Paper and they approve it, then it sets up a precedent, as something that is being done for the first time. Everything has to be done for the first time, as does this, and once it has been done for the first time, it will be done on several more occasions. It will be a different matter once they have got used to a particular type of National Assembly Order in Council transfer of powers, and all previous precedents relating to regulatory reform Orders are not strictly relevant.

Hugh, do you want to add any examples of this issue of political contentiousness in Orders in Council?

Mr Rawlings: I will make just one, if I may. The most recent example—in fact, the only example that I am aware of—in which the Lords threw out a regulatory reform Order as being inappropriate for that process was an Order that attempted to make major and significant reforms to the registration of births, deaths and so on. Bearing in mind that this was a 75-clause Order, and that it amended primary legislation quite significantly, and that the process that was envisaged was that it would just go through on a regulatory reform Order without the possibility of Second Reading, Committee Stage and so on, in that case, I think that the committee was saying, ‘Sorry, wrong procedure; this is stuff that needs to be examined from a political standpoint as there could be different points of view on this’, therefore it was deemed inappropriate for that procedure. I think that the situation that we are talking about, where, as the First Minister said, you have a relatively self-contained question—whether it is appropriate for a particular subject matter, on which the responsibility for legislating is sought, to be transferred or delegated to the Assembly—is a different kettle of fish from a 75-clause regulatory reform Order.

[427] **Kirsty Williams:** Would you, therefore, say that Professor Miers was also being unduly pessimistic, First Minister, when he suggested that the two-step process of applying for the Order in Council, getting it and using the power to achieve something in the Assembly, could take up to two or three years in timescale?

The First Minister: In answering these questions, I want to avoid sounding as though I am ‘Miers-bashing’; I am not. He is doing his job as an academic constitutional lawyer extremely well. In other words, he is probing the areas where he may see weaknesses, or he may have a completely different model in his mind, and may believe that we should be going down an entirely different road—I do not know.

With regard to timing, on average, Bills are now increasingly subjected to the draft Bill procedure in one parliamentary year, the full Bill procedure in the following parliamentary year, and a commencement date usually in the following January or April. It would normally take about two and a half years to go from the starting point and the inception of a publication of a draft White Paper or a draft Bill, to the commencement of its powers. Depending on what happens to the draft Bill stage, the procedure should not take any longer than the present average of two and a half years. Some Bills are going through this year without a draft Bill stage, so sometimes it can be 18 months or so. Two to three years is not being unduly pessimistic—two and a half years is the average time from White Paper or draft Bill publication to commencement; three quarters of Bills are subjected to draft Bill

procedure in the devolved fields. We can be at least as quick as that, if not quicker.

[428] **Kirsty Williams:** You have said that the new set-up would be more robust and that a Conservative Secretary of State was unlikely to find the time to take a Bill through Parliament if it were on something in which he did not believe. If he were not prepared to do that, how much more likely would he be to allow Orders in Council to go through for something with which he fundamentally disagreed?

The First Minister: To a degree, it is more likely. In other words, provided that precedent has been set up and that a system is in place, it depends on how you think the British constitution works. If there was a Conservative Secretary of State in the future, for example, would it be worth the row with the Assembly to say ‘We are rejecting this, and we will not take it through—we will not transfer this power to you’? It would depend on how many previous precedents there were of powers in the same field being seen as appropriate to transfer. At the moment, the argument from the point of view of time will be overwhelming. Under the present system, there are 75 bids every year for new legislation, and there are about 25 slots in a typical 12-month parliamentary year, although the present year is 18 months long. In a typical mid-parliamentary period, there are three times as many Bills as you can possibly get through, and it is much more likely that the Assembly Bill will find itself among the 50 rejected anyway, even from your own Ministers on your own side, than among the 25 that will get preference and which will appear in the Queen’s Speech. You cannot use the time argument as regards failure to transfer an Order in Council—you must come out into the open and say that you do not agree with transferring the Bill. That may happen, but it is less likely than under the present system.

[429] **Kirsty Williams:** It is just perhaps whether you want to pick a row or not with the Assembly. Let us hope that David T.C. Davies never rises to those heady heights, or we could be in trouble.

[430] **David Melding:** Is that a nomination?

[431] **The Presiding Officer:** It is not appropriate for us to discuss absent friends.

11.30 a.m.

[432] **David Melding:** First Minister, from what you have said, it seems to me that Orders in Council are a very profound development of constitutional practice in this country. While the British constitution is not written down in one document somewhere, on display in the National Archives, it is slightly misleading to say that it is not written down anywhere. It is based on statute, and that statute, I suppose, is not as difficult as fundamental law to change. That is different to the United States’ constitution, whereby there are all sorts of other requirements in terms of majorities. We do not have free rein; there are established patterns of behaviour in British political experience, and I want to explore that.

On how the system would survive a change of administration in London, and if there were a Conservative Government, for example, in Westminster and a Labour Government in Cardiff, from what you have said, it seems to me that if the Assembly is minded to adapt, modify, change and repeal legislation in a particular area via an Order in Council route, that request, because it has come from a democratically elected institution, which the Assembly undoubtedly is, is in most practical cases something that a Secretary of State for Wales could not decline to take forward. Is that a fair summary of what you think will be the machinery that will be in place here?

The First Minister: The Secretary of State would undoubtedly have the right to not take it forward, but the question is about whether the Assembly had made its case—that would be one of the key issues—and how well it argued that it was appropriate for the Assembly to have this power to act in the scope that is being requested for transfer. That is when I argue the bit from custom and practice as well. In Parliament, people will have to get used to this idea of not arguing about the merits of a subsequent Bill, if you like, or the Assembly’s use of the legislative power to be transferred. It is not about whether you like the legislation that might emerge from this, but whether you believe it is appropriate for the legislation to be made at the Wales level and not the UK level. It is about getting used to the idea of the appropriateness argument, or the argument from principle, and deciding whether it is right for this scope of legislative competence to be transferred. It think that that idea takes a bit of getting used to, because Members of Parliament are used to asking, ‘Look, what are the merits of this measure?’, and now they do not have a measure to consider the merits of, but rather a set of principles in the long title of a Bill, and they are arguing about the appropriateness of transferring it and not about the line-by-line scrutiny of the actual detail. It takes a while; a couple of years I would have thought. After half a dozen examples to work through, you begin to get it and to understand this argument about appropriateness. Once that argument has been established among Members of Parliament, it will, I hope, survive the cohabitation situation.

[433] **David Melding:** I believe that the Scottish White Paper that led to the establishment of the Parliament initially stated that the Secretary of State could not recommend for Her Majesty’s Assent a Bill on policy grounds. By the time the debate started, that was withdrawn because it was seen to be incoherent that a Scottish Bill, having gone through that process, could then be blocked on policy grounds. Are you saying to me that a Conservative Secretary of State could, feasibly, block a request for an Order in Council on policy grounds, or is that what you are trying to prevent through this mechanism?

The First Minister: Yes, we are trying to prevent it, but you cannot rule it out. I was not aware of the situation in Scotland that you described, but I am not denying what you said at all. You set against that the way in which the Sewel motion procedure has evolved between the Scottish Parliament and the UK Parliament. In principle, what we are talking about here is a very general principle of how the Assembly works with the British Parliament, and it is no different to the way in which Sewel motions have evolved as a co-operative venture on the passing of legislation. Co-operative arguments over Sewel motions have been quite extraordinary, but it is just custom and practice; over six years it has very rarely led to disputes. In theory, you could have imagined enormous constitutional punch-ups over Sewel motions, but it has not happened. Why? That is the evolution of an unwritten constitution.

[434] **David Melding:** I am tempted to pursue the question of whether there is any difference in this system fundamentally from granting us primary powers, but we have accepted in the working of this committee that we should recognise the parameters of what is in the White Paper and how it might practically work, so I am keen to do that.

If the Government here makes a request to change policy and adapt legislation via this process, it seems to me that it would be wise for a Conservative Secretary of State, or whoever, to grant it if that request has been formulated in a coherent way. The parliamentary end of this procedure is going to be fairly minimal, is it not? It will be a simple long-title Bill, as was described in the House of Lords, and, yea or nay, the powers are granted. If we do not want parliamentary interference to start and for the practice there to change, when the powers come to us and we go through more or less the debate in principle, the Committee Stage and then the Third Reading, if we are not doing that scrutiny effectively as an Assembly, it will invite Westminster to say, ‘There is no scrutiny going on here and this is a Government

getting legislation very quick and fast, so, we may have to do some of this scrutiny and require it to come back before it gets voted through and the Order in Council is given'. It may come up with a different mechanism, saying, 'In principle, we grant this, but we want to see what you will produce'. Do you agree that at the scrutiny end, what the Assembly does as a legislature is crucial for you as a Government, because if that is weak, it could lead to a division in the relationship between Westminster and the Assembly?

The First Minister: I agree with all of that, but you have to set it against the context of the agonies of self-doubt that, in particular, the House of Commons has gone through regarding the quality of some of its own legislation, even that which was passed on a cross-party basis, such as the Dangerous Dogs Act 1991. Some of the legislation passed in the early 1990s is ranked as being among the worst legislation ever passed. People sometimes argue very strongly that the bicameral system is absolutely essential, meaning that the House of Lords, in its function as a revising chamber, is essential, as the House of Commons can sometimes simply pass legislation following a lot of stories in the *Daily Express*, the *Daily Mail* or *The Sun* about dog bites man or man bites dog or whatever, which leads to its feeling that it must do something, so something is done. That legislation is usually done in a hurry and is pretty dreadful. So, people have said, 'Thank God for the House of Lords, because it can take a more cautious attitude'.

That is not an argument for the House of Commons to look, as it were, in a very lordly way, down at either the Scottish Parliament as a unicameral legislature or the Assembly as a unicameral body with some legislative competence and say, 'We do things right, and you might do things wrong', because it has gone through huge self-doubts in this area. The Scottish Parliament is still unicameral, and can, therefore, pass things twice as fast as the Houses of Parliament. On the other hand, the House of Commons almost accepts the argument that it will sometimes do things on the basis of a political tide running very strongly, and it then needs the House of Lords to stop it drafting things on the basis of a tide of public opinion, which causes rash judgment in bringing in legislation that has not been properly thought through. That is the reason for the huge change that has happened over the last seven or eight years, with the bulk of legislation now being submitted to the draft legislation procedure. That means that it takes twice as long, but it enables proper witnesses to come in and give evidence based on their knowledge rather than the traditional line-by-line scrutiny by backbench Members of Parliament in committee challenging the Minister. This is largely seen to have been a waste of time by comparison with witnesses who know something about the subject giving evidence, rather than trying to pick out and say, 'Well, if you move that comma from that line to that line it would have a big bearing on the meaning of this particular clause'. The House of Commons has also gone through agonies of trying to improve the quality of its legislation. So, I do not think that it would be looking down on the Assembly. Everyone is interested in getting better scrutiny, and making sure that you do not legislate in areas on the basis of a political whim, but on the basis of having thought through properly the implications of an Act of Parliament.

11.40 a.m.

[435] **David Melding:** To try to push this a bit further, have you given thought to how many pieces of legislation you would be hoping to pass each year via the Order in Council mechanism, assuming that this process is robust and works effectively after 2007? You use the changes occurring in the mental health legislation as an example, which is a good one if you could disaggregate the non-Home Office side of that. It is important that the Assembly does not take on so much that it cannot effectively scrutinise. So, I am asking for some order of magnitude—four, five pieces of legislation? What would we be thinking about?

You also touched on another question. Most of us would acknowledge that the move to publish Bills in draft has been very welcome and helpful, and has allowed all kinds of bodies, voluntary organisations, experts and the public to comment in evidence sessions. We need to preserve that system, do we not? Once we have the long title passed as an Order in Council, we would need a draft mechanism, presumably under that, before our formal procedure started. Is that how you are thinking?

The First Minister: This is more a matter for the Business Minister, in a way, than for me, as First Minister, but I am a strong believer in the draft legislation procedure. This does not mean that it has to be applied to every Bill. I probably voted for some of the rotten pieces of legislation that went through the House of Commons frequently because you could not have disagreements across the floor of the house on this or that subject, because they were so important. The only product of the failure to have the usual level of political contention was the passing of very dubious legislation. The key thing missing was not the political contention, but the expertise of witnesses, which you would have had with a draft legislation procedure. I follow the line taken by the late John Smith, who was a very strong believer in draft legislation. I think that it is very important, but that is not to say that you must do it every time. By and large, however, it is a much better system because witnesses from a particular field can indicate what they think a piece of legislation would do to the affected stakeholders. It is a much better method than the tried and trusted, but overrated, line-by-line scrutiny of legislation.

[436] **David Melding:** So, on the order of magnitude, will it be four, five or however many pieces of legislation?

The First Minister: That is a difficult question to answer, but I do not think that you are far off. It could be three, four or five, yes.

[437] **Jocelyn Davies:** I would agree with you, Rhodri, that the British constitution is incredibly flexible, which is why you can have this ingenious mechanism for getting what some people would say is the equivalent of primary powers without having to have a Bill that says so. Some people—devolutionists and anti-devolutionists—would, of course, find it objectionable as a concept to have a mechanism allowing something not contained in a Bill. You get a parliament, or a virtual parliament, in all but name.

You mentioned the Sewel mechanism, and that is certainly something that we would have to think about, although I suppose that we would call it something else. Our visit to the Scottish Parliament highlighted that there were definitely two views on that—as there are at least two views on everything. The expectation was that Sewel motions would decrease in number over time, when, in fact, the opposite has happened; they have increased in number. Some say that this is because the Scottish Executive would prefer the Westminster Parliament to legislate on things for which it would be unpopular. Others say that it is very pragmatic not to waste your own resources by legislating on a matter that will be legislated upon elsewhere and when you agree with the policy. We will, of course, have to work out who is making the agreement with whom—the Assembly with Parliament, or the Executive with the Executive. You might agree with the policy, but, during the Westminster process, the policy might change a little and might contain things that you do not like. This could be a problem. You need to be able to revisit it if there are changes to the policy and legislation that you say that you have agreed. Therefore, I think that we need to think about that.

The First Minister: The point that I was making about the Sewel motions was that they are a reflection of the flexibility of a system. When you have, in that case, two parliaments—one sovereign and one not quite so sovereign—having a working mechanism, you then find that,

once you are used to the working mechanism, you use it more and more. Therefore, I am not surprised that Sewel motions have gone up in number and not gone down, as you say was anticipated by some people. It is simply that people find it convenient. There may be political reasons for the convenience, and not just pragmatism. There are sometimes issues in relation to popularity, or issues that are incendiary in Scotland and not elsewhere. On the other hand, however, it is a classic example of a flexible use of a constitution in an arrangement between two legislatures, which is what we are looking to establish here by custom and practice.

[438] **Jocelyn Davies:** But we must have a mechanism that allows us to revisit, if there are changes to exactly what you believe that you have signed up to, which I think is the—

The First Minister: I would never claim to be an expert on Sewel motions; I do not deny what you are saying.

[439] **Jocelyn Davies:** That is the failure of the current Sewel mechanism as it works between the Scottish and UK Parliaments. I am glad that you did not want to bash Professor Miers too much, because the most enthusiastic advocates of the White Paper that we have seen so far have been those from Cardiff Law School. I think that we would all agree that they were very enthusiastic about it. From his evidence, I felt that—you could argue about how worked up this idea needs to be before you present it—going on from what you have said today, you would need some sort of robust pre-request stage. I could argue that we should, on occasion, ask for powers just for the sake of it—for the empowerment of Wales and of the Assembly—as a principle. However, you say that you need to justify it for specific purposes, so implicit in that is a justification. Therefore, Professor Miers was probably right on those grounds and that you would need some sort of pre-request stage, which we must invent.

The problem with that approach is that you could say that you want this power to do A, B and C, and you might do A, B and C; then, later on, a future Assembly might do D, E and F, which was not envisaged when you applied. Therefore, when you go for the justification, and you say that it needs to be justified, these are going to be enduring powers, and there is a danger there that there may be a certain amount of caution, and caveats will be attached, envisaging that a future Assembly may do something completely different with the powers that have been granted.

The First Minister: Is that not the issue about appropriateness being the principle behind the parliamentary consideration of whether or not to transfer this particular scope to the Assembly? That is not to say, ‘What is it going to do with it, and we want to see it on a line-by-line basis before we even agree whether we can vote on transferring it or not?’. It is about getting used to that issue of arguing about the appropriateness of making a transfer of this scope, rather than about what the Assembly is going to do with it.

As regards the short term, you are right. If you take the present White Paper, which is likely to lead to a Bill, including a classic, good 13.2 example for us all to consider, for example, on smoking in enclosed public places—which originated with a private Member’s equivalent procedure for us in the Assembly, rather than, strictly speaking, with the Assembly Government’s request for legislative power—Members of Parliament, in considering the framework part of the Bill, when it becomes a Bill later this year, could say, ‘We are not going to transfer this power until we know whether the Assembly is going to ban smoking in enclosed public places, and we have had a plea from the Brewers’ Association in Wales not to do it, because it knows what the Assembly is going to do with it’, and so on. Parliament may look at it that way and say, ‘We demand some sort of assurances from the Assembly that it will not go any further than the English legislation’, and so on. One would like to think that

that argument would be slapped down, because the issue here is about the appropriateness of the Assembly making the determination for Wales, while the British Parliament will make the determination for England, on the basis of whether it is better determined in Wales or not, not on exactly what form the ban will take, and so on.

11.50 a.m.

It will be able to read our debates and look at the votes, and draw its own deductions as to what the consequences are. However, what it will determine is the appropriateness of making that transfer of scope to the Assembly, not demanding assurances about what you would and would not do with a power if you did transfer it. You are right that it is an enduring transfer. There could be a change of Government here, and the brewers' pleas to do something different about the ban in enclosed public spaces might persuade a Government of a different colour to change a ban. In two or 10 years' time, it could all go back the other way. That is democracy. However, the issue is the appropriateness of the transfer. We really have to work at getting that into everyone's heads in order to help people, including Members of Parliament, Assembly Members, commentators and constitutional lawyers, to understand. We must concentrate on the appropriateness of making the transfer, not what we are going to do with it.

[440] **Jocelyn Davies:** I certainly hope that that will be the case. I would not want to see caveats attached to the powers. From my point of view, empowerment as a matter of principle is very important. One of the examples given in the White Paper was the welfare and protection of children. I do not know whether you have read the transcript of our session with Cardiff Law School.

The First Minister: No, I have not.

[441] **Jocelyn Davies:** Some of us are very disappointed that the UK Government pulled back from a full ban on smacking children—you can smack your children as long as you do not leave marks on them. If we were to have powers over the welfare and protection of children, it seems obvious that Assembly Members would probably want to go a stage further and say that people could not smack their children. We would say that if people wanted to smack their children—still without leaving marks—they would have to take them to, say, Gloucester, but that while they were in Wales, they could not lay their hands on children. Using that as an example, I asked David Lambert whether such powers would be possible. He said that the mechanism of Orders in Council would probably allow that. Do you agree? He justified that by saying that the Orders in Council need not have very hard edges. They could be a bit fuzzy, and so we might be able to create a criminal offence. He said that there might be scope for incidental powers in non-devolved areas that could be granted specifically to approve that policy area.

The First Minister: I will ask Hugh to come in on the issue of incidental powers. I am familiar with, but not an expert on, the principle that we already have a small number of powers to exact fines, where they are implicit in the legislative powers that we have with regard to local government or whatever. There is a much wider issue, which may prevent legislative competence being transferred to us—as regards, for instance, the creation of an entirely new criminal offence of parents smacking their children—which is that it may take us into the field of criminal law *per se*, rather than being a case of incidental powers.

[442] **Jocelyn Davies:** A criminal offence already exists.

The First Minister: I understand that. I will ask Hugh to comment on that, because I am

getting into an area that I do not feel legally competent to deal with. It is a matter of where the line is between being able to argue that the criminal aspects are totally incidental and something that is seen as being definitely a matter of criminal law. Criminal law is not devolved, and therefore we could not ask for the transfer of a power in such a case. Hugh, do you want to show your erudition in these matters? It is far greater than mine.

[443] **Jocelyn Davies:** I asked David Lambert about this because his paper said that we could be given an Order in Council for the welfare and protection of children. The question was: what more could you ask for? An easy answer that comes to mind is: the removal of the right of parents to smack their children as long as they do not leave marks on them.

Mr Rawlings: To an extent, this is a question of how the Order in Council conferring enhanced powers on the Assembly is formulated. For example, if it were formulated on the basis that the Assembly was seeking powers to make amendments to criminal law in relation to assaults on children, it would not come within the framework that we are talking about, because it does not relate to a field within which the Assembly has executive functions. On the other hand, if this were seen to be an example of an incidental consequence of an Order in Council that was about the protection of children, that might be a possibility, because we are looking hard at exactly what sort of powers ought to be available to the Assembly in relation to enforcement and sanctions when it is given powers to legislate in any of the fields under an Order in Council.

So, I think that, to some extent, it is a question of how the request is formulated. If it is formulated in connection with action taken within a field in which we have functions already, it is much more likely to be an acceptable proposition than if it is done at large. As regards the amendment of the criminal law, we are not going to be putting in bids to allow us to change the law of murder, but it is that sort of thing. Why? Because that is not in connection with one of the fields in which we have functions. If we are talking about the protection of children, then it might be in connection with that, and therefore incidental powers might operate.

[444] **Jocelyn Davies:** Obviously, since 1999, we have had some experience of how warm the breeze has been blowing from Westminster and, in some areas, it has been more encouraging than in others. You know that we have had resolutions in the Chamber about granting us wide powers, and we all approved the Rawlings principles following the Assembly review of procedures and discussions there, but it has not been very consistent across departments. Certainly, I have read that the Department for Environment, Food and Rural Affairs actually opposed powers coming to the Assembly under the Pollution Prevention and Control Act 1999, because it was a bit concerned about granting us the same discretion as a Minister would have in Westminster. However, when the Richard commission sat, unfortunately, it did not speak to Government departments, so we have no idea whether that is still true. It is all very shady and cloudy and consists of rumours more than anything else, rather than being out in the open, because we did not actually speak to them. How confident are you therefore that all departments will see the light now and be more generous in the way that the drafting takes place and the way that powers are conferred upon the Assembly?

The First Minister: That is certainly the intention of 13.2 stage 1, namely that all departments are circularised by the Office of the Leader of the House of Commons to say 'Right, from henceforth, please follow the framework principle'. There may be exceptions of course for technical reasons where you just cannot follow the framework principle but, by and large, we expect the inconsistency to which you refer either to be a thing of the past already as a result of what was in Labour's manifesto, or to become a thing of the past pretty

rapidly. Previously, departments simply varied in the degree of empathy with the principle of devolution, or the way in which they latched on to that when framing a Bill. We hope that that inconsistency has been knocked on the head now.

[445] **Jocelyn Davies:** I have just one last question. Looking back now, I have concerns that the last White Paper was oversold on what we would be able to achieve. How will you avoid the danger of overselling this White Paper and giving people entirely the wrong impression?

The First Minister: On your allegation of an overselling of the previous White Paper, I think that most people have said that that has been far more true of Scotland than Wales. That is, there is much more of a school of devolution betrayed or creating disappointments in Scotland than in Wales. I think that expectations were lower in Wales and, therefore, it has been harder to disappoint. However, in any case, because this is the second White Paper on the same field within the space of eight years, I think that the danger of overselling is much less, and that is why I tend to emphasise—as I did in answer to Jane’s question almost exactly an hour ago—this issue of what it is for. It is not about status, and it is not about Assembly Members, Ministers, or the Assembly as a whole having ideas above its station; it is about wishing to have the tools to do the job, which we do not have now.

[446] **Y Llywydd:** Kirsty Williams nesaf, a [446] **The Presiding Officer:** Kirsty Williams is next, and then I will ask some brief and simple questions to close.

12.00 p.m.

[447] **Kirsty Williams:** First Minister, you said earlier that we were all in the business of improving scrutiny. What kind of powers do you think the committees of the Assembly should have to summon persons, papers and civil servants to come before them? Everyone that has appeared before this committee to date has unanimously said that the Assembly should draft its own Standing Orders. How amenable do you think the Secretary of State will be to this?

The First Minister: I see no reason why the power to call for papers and persons should be any different in the Assembly to the House of Commons. The only area of difficulty, outside the audit process, is where a committee will demand the presence of such and such a civil servant as part of its inquiries, but the Prime Minister in the House of Commons has the right to send a Minister instead of, or as well as, the civil servant. That seems to me to be the principle to which we should adhere here as well: from time to time, the First Minister may decide either to substitute or to add the Minister because of the principle of a civil servant acting on behalf of the Minister and therefore not having a separate personality, except in audit terms when functioning as accounting officer.

The second question was on Standing Orders. 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 that could arise. So, if the Assembly can come together to prepare a new set of Standing Orders that are appropriate to the consequences of the Bill, as and when it gets passed, and provided that we have solid evidence of cross-party consensus on it, I am sure that the Secretary of State can sign it off. He has to have a reserve power in case we cannot come to an agreement. That is the dilemma that we all face. We all accept on principle that it is better for the Assembly to do it than the Secretary of State, but how do we get going here, post Bill, if there is no agreement on Standing Orders. I hope that we can resolve that in advance of the next Assembly elections.

[448] **Y Llywydd:** Tynnaf eich sylw at ychydig o bethau, a'ch dwyn yn ôl at y cam cyntaf yma ym mharagraff 1.24, sydd yn dweud,

‘Yn gyntaf oll, mae’r Llywodraeth yn bwriadu dirprwyo – ar unwaith’.

Beth yn union yw ystyr ‘bwriadu...ar unwaith’? Hynny yw, a yw hyn wedi digwydd neu a yw’n mynd i ddigwydd cyn i’r Mesur ddod gerbron y Senedd?

Y Prif Weinidog: Fe’i disgrifiwyd fel 13.2. Hyd y gwn i, mae adrannau’r Llywodraeth yn San Steffan a Whitehall yn awr yn ymwybodol o egwyddor newydd pan ddônt at ddrafftio deddfwriaeth dros Gymru a Lloegr. Maent i fwrw ati ar ffurf fframwaith yn hytrach na’r modd traddodiadol. Nid yw hynny’n ddieithriad; efallai bod rhesymau technegol ambell waith sy’n golygu nad yw’n bosibl gwneud hynny. Fodd bynnag, mewn egwyddor, a hyd y gwn i, mae pob adran yn San Steffan yn ymwybodol o hynny.

[449] **Y Llywydd:** Mae hyn yn mynd i ddigwydd, felly.

Y Prif Weinidog: Yr ydym yn meddwl y bydd.

Mr Rawlings: All Bill teams currently working on the current legislative programme have had their attention drawn to the relevant paragraph in the White Paper.

[450] **Y Llywydd:** Felly, pe bai’r pwyllgor yn mynd ati i sicrhau bod hyn wedi digwydd drwy geisio tystiolaeth—ysgrifenedig efallai—oddi wrth yr adrannau, a fyddai problem ynglyn â hynny?

Y Prif Weinidog: Nid wyf yn dweud bod cylchlythyr wedi mynd at bob adran. Nid wyf yn siwr o hynny. Fodd bynnag, maent wedi cael neges bod y Papur Gwyn yn sefydlu egwyddor newydd. Nid yw hynny’n ddieithriad am fod rhesymau technegol dros ambell eithriad.

[451] **Y Llywydd:** Ond yr ydych yn deall pam y byddem am ymchwilio i ystyr ‘ar unwaith’ yn y cyd-destun hwn, onid ydych? Mae’n sefydlu’r egwyddor yn y pen cyntaf. Wrth gwrs, mae hynny’n golygu defnyddio pwerau is-ddeddfwriaethol i weithredu yn y

[448] **The Presiding Officer:** I draw your attention to just a few things. I return to this first step in paragraph 1.24, which says,

‘First, the Government intends immediately, to delegate’.

What exactly does ‘intends immediately’ mean? That is, has this already happened or is it going to happen before the Bill comes before Parliament?

The First Minister: It was described as 13.2. As far as I am aware, Government departments in Westminster and Whitehall are now aware of a new principle when they come to draft legislation for Wales and England. They are drafting along the lines of framework legislation rather than using the traditional method. That is not without exception; there may be technical reasons why that is not always possible. However, in principle, and as far as I know, every Westminster department is aware of that.

[449] **The Presiding Officer:** So this is going to happen.

The First Minister: We believe so.

[450] **The Presiding Officer:** Therefore, if this committee tried to assure itself that this had happened by seeking evidence—in writing, perhaps—from departments, would there be a problem with that?

The First Minister: I am not saying that a circular has been sent to every department. I am not sure about that. However, they have had the message that the White Paper establishes a new principle. That is not without exception, as there are technical reasons for the odd exception.

[451] **The Presiding Officer:** But you understand why we would want to delve into the meaning of ‘immediately’ in that context, do you not? It establishes the initial principle. Of course, that means using subordinate legislation powers to work

fframwaith hwn. Yr hyn sy'n dilyn o hynny yw pe bai pob adran y Llywodraeth yn Whitehall yn gwneud hyn, byddem yn gweld sefyllfa lle y byddai'r Senedd yn barod i roi i'r Cynulliad, drwy is-ddeddfwriaeth, mwy o bwerau nag a roddwyd i Weinidogion Whitehall—nid ydym yn arddel yr enw 'Neuadd Wen' yn Gymraeg gan ei fod yn peri dryswch.

Mae dadl ynglyn â rhoi mwy o bwerau i'r Cynulliad nag i Weinidogion Whitehall, oherwydd bod y Cynulliad yn gorff democrataidd. Fodd bynnag, oni fydd hi'n anaddas i'r pwerau hynny aros gyda'r Gweinidogion Cymreig ar ôl 2007? Pe bai hynny'n digwydd, a bod gan y Gweinidogion Cymreig mwy o bwerau, ond llai o graffu arnynt nag ar Weinidogion Whitehall, oni fydd hi'n angenrheidiol i'r pwerau a roddir i'r Cynulliad cyn 2007, a fydd yn bwerau helaethach na phwerau Gweinidogion San Steffan, gael eu gweithredu drwy Fesur ar ôl 2007? A ydych yn deall yr hyn sydd gennyf?

Y Prif Weinidog: Nid wyf yn hollol siwr. Mae'ch dealltwriaeth chi yn union yr yn peth â'm dealltwriaeth i o ran y gymhariaeth rhwng y pwerau a roddir i Weinidogion o dan y gyfundrefn bresennol, drwy bwerau Harri VIII ac yn y blaen, sy'n llai na'r pwerau yr ydym yn bwriadu eu rhoi i'r Cynulliad a'i Weinidogion.

Ar yr un pwynt allweddol, y grym i greu deddfwriaeth newydd yn hytrach na dim ond i'w gwella wedi'i seilio ar ddeddfwriaeth sylfaenol sydd wrth wraidd pwerau Harri VIII. Mae hynny'n weddus, yr ydym wedi dadlau, achos bod y Cynulliad yn gorff democrataidd â'r gallu i graffu ar waith Gweinidog, felly nid oes angen cymaint o rwystrau neu ffiniau ar y pwr a drosglwyddir oherwydd yr ydym yn siarad am gorff democrataidd yn hytrach na Gweinidog ac adran. Nid oeddwn yn siwr i ble yr oedd y gymhariaeth yn mynd wedyn.

[452] **Y Llywydd:** Y ddadl yw, os oes pwerau gan y Gweinidogion Cymreig ar ôl 2007, a fydd yn addas i'r pwerau hynny aros gyda'r Gweinidogion os bydd llai o graffu arnynt nag ar Weinidogion Whitehall?

within this framework. What follows on from that is if every Government department in Whitehall were to do this, we would reach a point where Parliament would be willing to transfer greater powers to the Assembly, through subordinate legislation, than to Whitehall Ministers—we use 'Whitehall' and not 'Neuadd Wen' in Welsh because it could cause confusion.

There is a debate about giving greater powers to the Assembly than to Whitehall Ministers, because the Assembly is a democratic body. However, would it not be inappropriate for those powers to remain with Welsh Ministers after 2007? If that were to happen, and Welsh Ministers had more powers, but less scrutiny than of Whitehall Ministers, would it not be necessary for the powers given to the Assembly before 2007, which would be more extensive than those given to Ministers in Westminster, to be done by means of a Bill after 2007? Do you understand what I am getting at?

The First Minister: I am not quite sure. Your understanding is exactly the same as mine in terms of the comparison between the powers transferred to Ministers under the current system, through Henry VIII powers and so on, which are lesser than the powers that we intend to give to the Assembly and its Ministers.

On the same key point, the power to create new legislation instead of only improving it is based on primary legislation that is at the heart of Henry VIII powers. We have argued that that is appropriate because the Assembly is a democratically elected body with the ability to scrutinise the Minister, therefore there is no need for as many restrictions or limits on the powers transferred because we are talking about a democratic body rather than a Minister and a department. I was not sure where the comparison was going after that.

[452] **The Presiding Officer:** The argument is that, if Welsh Ministers have powers after 2007, would it be appropriate for those powers to remain with the Ministers if they were to be scrutinised less than Ministers in

Dyna'r ddadl. Hynny yw, byddai ein Gweinidogion mewn sefyllfa lle byddai llai o graffu ar eu defnydd hwy o'u pwerau, o bosibl, nag y byddai Gweinidogion yn Whitehall yn ei wynebu.

Y Prif Weinidog: Mae hynny yn torri ar draws y ddadl wreiddiol ynglyn â'r broses a chryfder a dyfnder y broses ddemocrataidd yma. Dim ond oherwydd ffydd a hyder yn nyfnder a chryfder y broses a'r sialens ddemocrataidd y byddech yn barod i drosglwyddo pwerau helaethach i Gymru ac i'r Cynulliad nag y byddech yn ei wneud i Weinidog o dan y system bresennol.

[453] **Y Llywydd:** Un cwestiwn olaf sydd gennyf, ac yr ydym wedi trafod y mater hwn sawl gwaith o'r blaen. O ran paragraff 2.6, mae holl resymeg y Papur Gwyn yn pwysleisio'r gwahaniad rhwng Senedd a Llywodraeth ac mae hynny wedi digwydd yma, i bob pwrpas, o fewn fframwaith y Ddeddf bresennol, ac yr wyf yn gwerthfawrogi hynny'n fawr iawn a'ch cyfraniad chi, fel Prif Weinidog, wrth alluogi hynny i ddigwydd. Fodd bynnag, gyda gofid, gwelais, ym mharagraff 2.6, fod yr hen enw annwyl 'Llywodraeth Cynulliad Cymru' i barhau. Onid yw hynny mewn gwirionedd yn parhau â'r dryswch? Os oes dryswch, onid yw parhau i ddefnyddio'r un enw yn achosi dryswch? Mae rhai tystion, er enghraifft pobl o'r cyfryngau ac academyddion, wedi ateb y cwestiwn hwnnw yn gadarnhaol.

12.10 p.m.

Dyna oeddwn am ei ofyn iti. A ystyriwyd ymhellach enw symlach a haws ei ddeall yn ôl rhesymeg y Papur Gwyn?

Y Prif Weinidog: Nid mater o draddodiad yn unig yw'r enw. Gwyddom oll nad oes fawr o resymeg yn y teitl 'Prime Minister'—tipyn bach o Ffrangeg a Saesneg ydyw, ond mae pawb yn gwybod ei ystyr. Yn yr un modd, mae 'Her Majesty's Government' bach yn hen ffasïwn yn awr, gan nad yw'n cyfeirio at gyfrifoldeb y Senedd yn hytrach nag Ei Mawrhydi, ond mae pawb yn deall yr ystyr ac yn gyfarwydd ag ef. Nid yw hwn yn

Whitehall are? That is the argument. That is, our Ministers would be in a position where there was possibly less scrutiny of their use of their powers, than that faced by Ministers in Whitehall.

The First Minister: That contradicts the original argument about the process and the robustness and depth of the democratic process here. Only because of faith and confidence in the robustness of the process and the democratic challenge would you be willing to transfer greater powers to Wales and to the Assembly than to a Minister under the current system.

[453] **The Presiding Officer:** I have one final question, and we have discussed this matter many times before. On paragraph 2.6, the whole reasoning of the White Paper emphasises the separation of the legislature and the Executive and that has happened here, to all extents and purposes, within the framework of current legislation, and I appreciate that greatly and your contribution, as First Minister, in enabling that to take place. However, with concern, I noted in paragraph 2.6 that the dear old name 'Welsh Assembly Government' is to remain. Is that not, in reality, just prolonging the confusion? If there is confusion, will not continuing to use the same name only cause confusion? Some witnesses, for example people from the media and academics, have answered that in the affirmative.

That is what I wanted to ask you. Has any further consideration been given to a simpler name that is easier to understand according to the reasoning of the White Paper?

The First Minister: The name is not just a matter of tradition. We all know that there is little logic behind the title 'Prime Minister'—it is a little bit of French and of English, but everybody knows what it means. In the same way, 'Her Majesty's Government' is somewhat old fashioned now, because it does not refer to the responsibility of the Parliament instead of Her Majesty, but everyone knows what it

fater o ba mor resymegol yw'r teitl ac a yw'n bosibl i rywun gael ei gamarwain ganddo, ond, yn hytrach, a ydych yn gyfarwydd â'r teitl ac yn gwybod ei ystyr. Dyna'r rheswm am gadw pethau yn syml, ac i beidio newid enw, cyhyd â bod pobl yn deall yr ystyr. Dyna'r ddadl.

[454] **Y Llywydd:** Cofnodwyd hynny, ac ni chredaf fod diben inni fynd drwy'r ddadl honno ymhellach. Diolch yn fawr ichi am ddod, ac i Hugh hefyd am gyfrannu at y broses.

Y Prif Weinidog: Diolch yn fawr. Yr oedd yn bleser.

[455] **Y Llywydd:** Yr ydym yn awr yn mynd o un Rawlings at un arall. Croeso i'r Athro Rawlings a'r Athro Hazell.

[456] **Jane Hutt:** Welcome. To start, Rick, it would be helpful to have your response on how you feel that things have moved on with regard to the Rawlings principles in relation to the White Paper, following your book, *Delineating Wales*. Also, as you have heard the First Minister's evidence this afternoon, it would be helpful to have your response on that, particularly on the issue of the apparent dominance of individual departments in Whitehall in driving primary legislation. The First Minister said that he feels that the inconsistency has been knocked on the head. I think that it would be helpful to hear from you whether you think that we have the opportunity to move forward with the enhancing powers and opportunities and to tackle that or knock on the head the inconsistency that you feared would prevent us from delineating Wales appropriately. Robert might have a comment to make on that too.

Professor Rawlings: I will answer that question in two ways. First, the White Paper clearly does present a new opportunity, and the First Minister must be right on that. Coming down this morning, I was thinking of a metaphor to answer this question, and I came up with 'a flotilla of big ships'. You could think of each Whitehall department as being a very big ship, which is difficult to turn around. Trying to turn the whole flotilla around is even more difficult. We must accept, and I took the First Minister to take this point, that this will not happen overnight; it will be a difficult process to achieve, and I incline to the sceptical side about whether it will be achieved.

The second way in which I would like to answer the question is to pick up on a point that was the import of the Presiding Officer's question at the end. It seems to me that the committee could usefully ask the further question as to whether the committee would like to see the Rawlings principles in operation after 2007. It raises a profound question as to whom in the devolved administration these powers would be given. If we go back to the Rawlings principles, the argument that the Assembly and the Presiding Officer in particular were making, was that it was an essentially an argument based on the idea of a corporate body, in that the secondary powers were being given to the corporate body and that it had powers of full scrutiny. It owned them, in a sense, because it could amend draft legislation. It could do everything, in a way that Westminster could not. We must now project forward after 2007 and the division, because we will not be in that situation any more. We will have a legislative

means, and is familiar with it. It is not a matter of how logical a title is or whether it is possible for someone to be misled by it, but of whether you are familiar with the title and know what it means. That is the reason for keeping things simple, and not to change anything, provided that people know what it means. That is the argument.

[454] **The Presiding Officer:** That has been recorded, and I do not think that there is any point in our taking that argument any further. Thank you very much for coming, and to Hugh also for contributing to the process.

The First Minister: Thank you. It was a pleasure.

[455] **The Presiding Officer:** We now go from one Rawlings to another. I welcome Professors Rawlings and Hazell.

branch in the Assembly, and we will have an executive branch. I am troubled by the idea—and I think that this was the import of the Presiding Officer’s question—about giving to Assembly Members wider executive powers than the Parliament would give to UK Ministers in respect of England. I find it a very difficult idea, and therefore it seems that two things could flow from that. You might expect step 2—Orders in Council, to overtake step 1, and that step 1 would wither away. You would have England and Wales Bills, but you would have the same kinds of powers being given to Assembly Ministers—not necessarily the same powers, but the same breadth of powers—as a UK Minister would have in relation to England. So, step 1 would wither away.

The other point is—and again this was the import of the Presiding Officer’s question—that if we are to persist with step 1, the necessary corollary of that is that those wider powers under step 1 should not be allocated after the division to the Executive in Cardiff, but should go to the Assembly as the legislative branch of what we can call the devolved administration.

[457] **Jane Hutt:** I do not know whether Robert also wishes to comment on the question.

Professor Hazell: I have nothing to add. Please forgive me if I am a little reticent with the committee today—it is because of two reasons. One reason is that my offices in London are in Tavistock Square, so since last Thursday I have not been allowed back in, and I am not as well-prepared as I would have wished. The second reason is the strong reason that Rick is a greater expert on all these matters than I am. Such expertise as I have tends to be mainly towards the Whitehall and Westminster end of things, but, if I may, I will in general defer to Rick.

[458] **The Presiding Officer:** Do not worry, we will get to the Whitehall and Westminster end of things.

[459] **Jane Hutt:** To follow up that issue—I am trying to keep up with you, Rick, in terms of your response—we have to understand what powers and what opportunities that result from the transfer of those powers are transferring to the Ministers and the Assembly as a whole, and, with the separation, the need for the scrutiny of our Ministers will become clearer in relation to the Order in Council route, the framework legislation and secondary legislation. We have questioned witnesses on how we can acknowledge and build up that competency in terms of scrutiny, and it will mean many changes to the way in which we do business. As the First Minister said, do you see that that is an opportunity rather than a threat, and that it may be a challenge, and something on which we could build our competency in terms of our role? Do you also recognise, in terms of the points that were made earlier about what is appropriate in terms of an Order in Council, that that refers to what is appropriately determined in Wales and what is appropriately determined in Westminster? If that can be clarified, it means that the job of scrutinising the Executive and Ministers needs to be done here to a large extent.

12.20 p.m.

Professor Rawlings: Perhaps I have not put it very well; I will try again. What I am suggesting to the committee is that much of the discussion and the evidence—because I have seen some of the evidence papers—has naturally focused on the question of transferring powers from London to Cardiff, as it should, as that is a central issue. However, I am saying that the committee needs to take two questions together. The first is about the transfer of powers to Cardiff, and the second is about who in Cardiff gets them. That is the key point, and it plays for me in two ways. It is a constitutional question, because I sincerely do not think that Ministers in Cardiff should have wide Executive powers of a kind that Parliament would not give to UK Ministers in relation to England. There are issues there about the

balance between a legislative branch and an Executive branch. That is the first point. There is also a practical point, because I suspect—and I think that I have used the word ‘import’ during the Presiding Officer’s intervention four times already, but I will use it one more time—

[460] **The Presiding Officer:** I am enjoying it very much.

Professor Rawlings: Right. I feel that in Westminster, if parliamentarians are not assured that these wide framework powers are going to the Assembly as the legislative branch, rather than to Ministers as the Executive branch, Cardiff will have an up-hill task in terms of getting the powers in the first place, and for good reasons.

[461] **The Presiding Officer:** I wish to follow that very quickly, as you have been so kind to me this morning. Would you not perhaps think that the House of Lords Select Committee on Delegated Powers and Regulatory Reform would be very interested in commenting adversely if it were not the case that powers were devolved to the Assembly rather than to Ministers? Might not their lordships’ constitution committee also take a substantial interest in this matter and report accordingly before the Bill is debated in the house?

Professor Rawlings: I can respond only by saying ‘yes’ and ‘yes’.

[462] **The Presiding Officer:** I am grateful to you.

[463] **Jocelyn Davies:** I agree with you wholeheartedly, and I attempted to raise with Jenny Randerson this morning the idea that the Assembly would be expected to scrutinise the use of powers that it did not give to the Executive. I think that that would put us in a difficult position. I do not believe that any powers directly conferred on Assembly Ministers will be scrutinised at all by the Assembly. I wonder how we will have the time, never mind anything else.

The Business Minister said that we had moved on from the Rawlings principles, but I do not think that we ever got there. I think that we adopted them, but I cannot think of one example of when they were used. You might be able to, but I do not think that they have ever been adhered to. The White Paper says that, from now on—and I think that this is from about two or three weeks ago—the UK Government intends that all future Bills will give the Assembly wide and permissive powers. Have you any idea what ‘wide and permissive’ means in this context, because that depends on your interpretation, does it not? I do not know whether you heard me ask Rhodri Morgan earlier about the Sewel mechanism, Professor Hazell, but can you, with your experience of Westminster, give us some advice on what would be an appropriate Welsh alternative to the Sewel mechanism?

The last issue that I want to raise is paragraph 3.18 in the White Paper, which states

‘no Order in Council may transfer the whole of any fields listed in Schedule 2.’

Is that a sign that, in Westminster, there will always be an eye on limiting the powers given to the Assembly in order to meet this requirement? Or is this the mechanism by which powers are guaranteed to remain in Westminster if a referendum were ever triggered—that those powers could be tiny fragments and you would end up having a referendum on powers that were small and insignificant compared with the rest that had been transferred?

On the last White Paper, some of us fell into the trap of overselling it to ourselves as well as to the public, so are we in a situation where history might repeat itself?

Professor Rawlings: Shall I answer those first two questions, Robert, and then you can answer the Sewel question?

Professor Hazell: Fine.

Professor Rawlings: First on step 1, I came up with the phrase, ‘consistently permissive’—consistency on the one hand and the more liberal approach on the other. I have to repeat the answer that I gave to Jane, namely that there is an opportunity here, but I am on the sceptical side.

Just to draw that out a little, I was interested in what the White Paper did not talk about in relation to stage 1. It talked about those two aims, but it did not tell us how those two aims would be delivered. That was an interesting omission in a UK Government White Paper because, after all, that is within the realm of what the UK Government can do. So, for example, it did not tell us whether or not there might be change procedures at UK Cabinet level. Neither did it tell us about changing the guidance on drafting legislation and so on. So, it was what the White Paper did not say that struck me in that respect.

On the fields point, I take that restriction to be an attempt to distinguish between stage 2 and stage 3. However, in a sense, it is an attempt to deflect the argument that this is legislative devolution through the back door. If you are going to move away from the Richard commission stages 1 and 2 to White Paper stages 1, 2, 3, then clearly you must be able in some way to distinguish between those stages. It seems to me that a key, no doubt political, rationale for that restriction was to distinguish between stages 2 and 3. However, as you say, that then opens up the question, does it not, of whether a series of Orders in Council could achieve, in effect, legislative autonomy for the Assembly over a whole field?

It is interesting that that paragraph is drafted in terms of one Order in Council not being able to do it; it does not rule out a series of Orders in Council so doing. I do not want to engage too much in semantic analysis. There is a strong message there and one has to be realistic about it. I would be surprised if the powers-that-be in London, who were concerned to see that paragraph there, would then simply turn around and say, ‘well, it doesn’t matter, you can do it in two or three Orders in Council’. That does not, in my view, ring correctly.

Professor Hazell: I will also briefly, Chair, respond to your mention of the House of Lords delegation of powers committee and the Lords’ constitution committee because, as it happens, we organised a seminar last Monday to launch a book, of which Rick and I are the joint editors, and present at that seminar were the chairs of both those committees. I confirm that the concerns that you raised are by no means fanciful. They both spoke at the seminar, and they are very much alive to the issues that we have been discussing and to some of the risks that are involved. I think, and hope, that you can expect both of those committees to take a real interest in these matters.

12.30 p.m.

Jocelyn Davies asked me about the Sewel convention; first, on its frequency, in the first four years of the Scottish Parliament, 1999 to 2003, there were 39 Sewel motions covering 38 Acts of the Westminster Parliament. The Scottish Parliament gave consent to 38 Westminster Acts that trespassed on devolved matters in four years—roughly 10 Acts a year in which the Scottish Parliament is consenting to Westminster legislating on its patch. It has not increased in the second term of the Scottish Parliament, but it shows no sign of lessening. The frequency continues at approximately the same rate.

Secondly, in terms of the procedure, you are correct in what I think that you might have said to the First Minister in suggesting that this is largely an Executive to Executive procedure. The UK Government and its Bill teams negotiate with their opposite numbers in the Scottish Executive when they are preparing and drafting the Bill. If they identify that the Bill will trespass on devolved matters, they then ask the Scottish Executive whether it is content. If it is, then the relevant Scottish Minister will put a Sewel resolution before the Scottish Parliament, which sometimes includes a substantive debate, but more often it is nodded through. Thereafter, the Scottish Parliament rarely revisits the matter. One criticism of the Sewel procedure is that the Scottish Parliament is, in effect, writing a blank cheque to Westminster in terms of that proposed legislation.

As it happens—forgive me, you are probably well aware of this—the Scottish Parliament has been conducting quite a major inquiry, led by its procedures committee, into the operation of the Sewel procedure. That inquiry is well advanced, and the procedures committee should produce a report, if not before the summer break, then around September. That will be very interesting information and evidence for you on how the Sewel procedures operate from the Scottish end.

In terms of the different kinds of Sewel motion, they fall, broadly speaking, into three different categories. The first, probably the largest, but the least troubling, is where a Westminster Bill trespasses only in a pretty marginal and technical way on devolved matters. It may be a new criminal law power; criminal law is devolved in Scotland, and, therefore, Westminster needs to seek the consent of the Scottish Parliament for quite a lot of the ancillary powers related to some Westminster legislation.

Secondly, there are substantive Westminster Acts that trespass substantively on devolved matters. Sometimes those are, for example, to implement an international obligation, a new convention to which the UK is a signatory and there is not much disagreement in Edinburgh that it too will ratify and implement the convention; if Westminster is legislating on the same matter, then Scotland is quite genuinely content to say, ‘Since you are legislating anyway, legislate for us too’. There is then no need for a separate Holyrood Bill to give effect to the same international convention.

In that second substantive category, there are sometimes some more troubling examples; a current example would be the Civil Partnerships Bill, which is a devolved matter in Scotland. The criticism made is that this would be a very controversial issue in Scotland and, therefore, the Executive is perhaps pleased to avoid having that controversy and very difficult set of social and political issues debated in Holyrood, and it has consented to Westminster legislating on that matter, to include Scotland.

The third category of Sewel motions is one that perhaps had not been anticipated when the Sewel convention was originally enunciated. These are ones which confer executive powers on Scottish Ministers in devolved areas. Some people, including Lord Sewel himself, feel that that is inappropriate, and that the Sewel motions should be on legislative matters rather than on executive powers.

Professor Rawlings: I just want to add two comments. I proposed to the Richard commission that, after 18 months in the service of Wales, these should decently be called Richard motions, and I stick to that. My serious point is that this kind of motion has an even greater potential in relation to Wales than it does to Scotland because of our historical and geographical ties with England, and the whole idea of England and Wales as a legal and administrative concept. So, it seems to me that this is an issue with which the Assembly will

really need to come to grips.

[464] **Lorraine Barrett:** First, please excuse my coughing earlier when others were speaking.

Regarding the Orders in Council, should they be subject to any special parliamentary procedure beyond affirmative resolution? Would you expect any sort of pre-legislative scrutiny and, if so, how should the Assembly be involved? Our ad-hoc Committee on Smoking in Public Places came to mind. This was a cross-party group that took evidence for nearly a year and came up with recommendations that the Minister has now taken on board. I wonder what thoughts you would have on that.

Professor Rawlings: This brings me back to another question, and I apologise to you, Jane, that I did not pick up the appropriateness question that you asked. Process and content must run together here. What we think is appropriate process at Westminster surely must be informed by what we think is the appropriate set of questions that parliamentarians are asking. It seems to me—and I think that Peter Hain rightly said this in the House of Commons—that we cannot simply have an Order in Council procedure because that takes 90 minutes, and, more importantly, it is no amendment. So, if we only had that, there would be serious objections to proceeding in that way.

It seems to me that, given the nature of Order in Council procedure, one must have a form of pre-legislative scrutiny in Parliament, so that parliamentarians have a genuine forum in which to discuss the question and suggest amendments—perhaps A, B and C are appropriate, but perhaps not D, or, to turn it around, if it is ‘yes’ to A, B and C, why not include D as well, while we are thinking about it, to make a more coherent package?

12.40 p.m.

So, it seems to me that we have to build in to this process some kind of forum in Westminster where those questions can be explored, always remembering what the First Minister has said, that this has to be an appropriateness question, rather than a question of what the Welsh Assembly Government is going to do with the powers. I have always been strongly opposed to that question, because it seems to me to miss the logic of devolution, which is that, whatever the political parties or political belief in Cardiff, Scotland or wherever, this is democratic devolution, and policies in Cardiff and Edinburgh may change. In a sense, if we are devolutionists, or practitioners of devolution, we all have to sign up to that.

Therefore, the answer is, first, stick with the First Minister—it has to be an appropriateness question rather than an implementation question. Secondly, there has to be more than simple Orders in Council, as there must be machinery at pre-legislative stage. Thirdly, it follows from that that I see no reason why you cannot be creative and, building on what has happened in relation to Assembly committees and parliamentary committees, why you could not be creative at that stage, and bring in Assembly Members as well. However, I emphasise that it is terribly important not to confuse the two questions that one is asking. This has to be an appropriateness question, and Assembly Members would be contributing in those terms.

[465] **Lorraine Barrett:** Some of us have been grappling with what is an Order in Council, and we have been on a learning curve since we have been on this committee. From what you have just said regarding pre-legislative scrutiny by Parliament, and suggesting amendments, how could we, as an Assembly and as Assembly Members, fit in work with that process? I cannot quite see the picture of how that would logistically work.

Professor Rawlings: That in turn links to another thing, does it not, which is how the request for the Order in Council gets to London in the first place. In a sense, I would hope that there would not have to be too much involvement by the Assembly Members at the Westminster stage. I do not want to rule it out; I said that we can be creative about that and that we can have some partnership working. However, it seems that the prime focus of the discussion by Assembly Members is correctly in the Assembly itself. That raises important questions in terms of Standing Orders, as to who moves a motion to make this request for an Order in Council. Clearly, a Minister must be able to do so, and the question is whether others in the Assembly can move such a motion. The next question is to what extent that motion is amendable in the Assembly. That is a whole set of questions. In other words, to what extent will this be Executive driven? One would hope that it would be Executive driven to a large degree. The Welsh Assembly Government is in a good position to move this forward. However, there seems to be a constitutional question there about whether that should be a monopoly, or should other voices inside the Assembly be able to move this process forward, and to what extent those voices should be able to contribute to that process.

Therefore, I would be looking for something quite open there. Again, that is quite important, if you like, tactically and strategically, when it then comes up to Westminster, because the more that Westminster can see that the Assembly as a whole has had an input, the more impressed Parliament is likely to be when it comes to judge the appropriateness question. Therefore, in a sense, the message that I am trying to get over to the committee is how things hang together.

[466] **The Presiding Officer:** I believe that you have a comment on that, Robert Hazell.

Professor Hazell: There is not a single model of Orders in Council, and there is not a single model of Westminster scrutiny of Orders in Council. In a few policy areas, Westminster has developed something called, in shorthand, a super-affirmative procedure, on which I am sure Paul Silk has far more expertise than I do. I was going to do my homework, but, forgive me, because I could not get back into my offices, I have not been able to look up the books.

You will know that the House of Commons Welsh Affairs Select Committee will almost certainly, as soon as it is constituted in two days' time, start an inquiry into the White Paper. I hope that one thing that that committee will do is make some strong suggestions to the House of Commons about a suitable scrutiny procedure for the new Orders in Council. I do not know, but it might be open to some suggestions from the committee or the Assembly about some minimum desiderata that you would like to see in terms of that procedure. I imagine that the House of Lords will decide for itself what the scrutiny procedures will be at its end of the Palace of Westminster.

[467] **Lorraine Barrett:** You may have heard our discussion with the First Minister about different political parties being in control at either end, and about the idea that we could spend time in pre-legislative scrutiny here, only for it to go to Westminster to be thrown out on a whim, shall we say. I hope that that will not happen, particularly if Westminster sees that we are doing the work seriously. Will you give us your thoughts on that scenario? I imagine that there would have to be a lot of discussion at some level—I am not saying that it would be behind closed doors—as to whether we would be wasting our time to even think about certain matters. Do you have any thoughts on that?

Professor Rawlings: It is so difficult to judge. Listening to the First Minister, the message that he was conveying was that this is new territory and that there is going to be an element of exploration. We should all be open about that. I took the First Minister's point about Professor Miers's evidence to be that Professor Miers was reading across from a pre-existing

situation, and, in a sense, rightly, because he was pointing to many of the potential obstacles and pitfalls. I took the First Minister to be saying that you can only read across so far; we are dealing with the National Assembly for Wales, and it comes back to the point about appropriateness, as these are essentially constitutional questions. I am not sure that this is a very good answer to your question. In a sense, I see this as experimental and, because of that, it is very difficult for me to speculate about what is likely to happen.

[468] **The Presiding Officer:** I think that we have completed the questioning. We are very grateful to you both. I understand that you are appearing on another platform in another theatre later today. Good luck to you.

*Daeth y cyfarfod I ben am 12.48 p.m.
The meeting ended at 12.48 p.m.*

Cynulliad Cenedlaethol Cymru
Y Pwyllgor ar y Papur Gwyn—Trefn Lywodraethu Well i Gymru

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

Dydd Mawrth, 12 Gorffennaf 2005
Tuesday, 12 July 2005
QQ469-511

Aelodau o'r Cynulliad yn bresennol: Dafydd Elis-Thomas, y Llywydd (Cadeirydd), Lorraine Barrett, Jocelyn Davies, Jane Hutt, David Melding, Carl Sargeant, Kirsty Williams.

Tystion: Ieuan Wyn Jones, Arweinydd yr Wrthblaid; Elin Jones, Aelod o'r Cynulliad.

Swyddogion yn bresennol: Paul Silk, Clerc y Cynulliad.

Gwasanaeth Pwyllgor: Siân Wilkins, Clerc.

Assembly Members in attendance: Dafydd Elis-Thomas, the Presiding Officer (Chair), Lorraine Barrett, Jocelyn Davies, Jane Hutt, David Melding, Carl Sargeant, Kirsty Williams.

Witnesses: Ieuan Wyn Jones, Leader of the Opposition; Elin Jones, Assembly Member.

Officials in attendance: Paul Silk, Clerk to the Assembly.

Committee Service: Siân Wilkins, Clerk.

*Dechreuodd y cyfarfod am 5.44 p.m.
The meeting began at 5.44 p.m.*

Cyflwyniad ac Ymddiheuriadau
Introduction and Apologies

Y Llywydd: Croeso i gyfarfod diweddaraf y pwyllgor ar drefn lywodraethu well i Gymru, a chroeso arbennig i arweinydd yr wrthblaid, Ieuan Wyn Jones.

The Presiding Officer: Welcome to the latest meeting of the committee on better governance for Wales, and a special welcome to the leader of the opposition, Ieuan Wyn Jones.

5.45 p.m.

Papur Gwyn—Trefn Lywodraethu Well i Gymru: Tystiolaeth
The Better Governance for Wales White Paper: Evidence

[469] **Y Llywydd:** Diolch yn fawr am y papur. Jocelyn?

[469] **The Presiding Officer:** Thank you very much for the paper. Jocelyn?

[470] **Jocelyn Davies:** Thank you for the paper, Ieuan. I do not know if you have been following everything that all the witnesses have said to us, but there seems to be some disagreement now between witnesses about what the stages or steps would be leading up to

the granting of an Order in Council. Can you give us your interpretation, from their manifesto pledges, of what would lead to the Assembly actually producing legislation?

The Leader of the Opposition (Ieuan Wyn Jones): I have worked on the principle that the first sign of the requirement for legislative changes would come through the manifesto of the party that formed the Government here in the National Assembly. I think that that manifesto would highlight the kind of legislative changes that the Government would want to introduce, and I have worked on the principle, which was contained in the Richard commission proposals, that the capacity of the Assembly to develop legislation in its present form would be in the nature of perhaps four to six measures a year. Now, on the assumption that that would be the case, one would have expected an incoming Government, after 2007, to want to introduce its major legislative changes early, presumably in the first two years after 2007 because the pattern is that you would want your big changes to go through in the first two years, and then, the closer you got to the election, the number of legislative Bills that you would want to introduce would fall away because, clearly, you would be building up for the next Assembly in 2011 plus.

As I see it, the procedure from the proposal being contained in a manifesto to the delivery of that through the Order in Council, needs to go through a number of stages. What is not clear in the White Paper is at what point the Assembly Government would need to draft its legislative proposals because, if one imagines that the Secretary of State might want to disagree with the proposal, as he can do under the White Paper proposals, it would be a bit of a waste of time for the Assembly Government to have drafted its plan in detail. So, my presumption is that the Assembly Government would want to present the Secretary of State with some kind of a measure that would not be fully drafted, but which would contain the legislative proposal, which the Secretary of State would then consider.

What is not clear to me, although it says that the Secretary of State would not wish to reject proposals for trivial reasons, is what other steps might be available to the Secretary of State if he is reluctant to give that consent. It seems to me—and I argue this in the paper—that the Secretary of State could say, ‘well, I am not satisfied yet that you are in a position to present this; why do you not consult for a period of six months?’; presumably, the Secretary of State could ask the Assembly Government to do that. There is the assumption then that, after the consultation, the Secretary of State might give an approval. That would then mean that one of two things, it seems to me, under the White Paper, could happen. Either it goes to a form of pre-legislative scrutiny through a joint committee of both Houses of Parliament, or, presumably, if it is a fairly minor piece of legislation, it could go directly to the Order in Council.

What I am not clear about, and what the White Paper is not clear about, is at what point the Assembly begins to work up its legislation. Is it at the point at which the Secretary of State gives his consent, or is it after the scrutiny by the joint committee of both houses? That is not clear to me. I fear that there are a number of hurdles there that would prevent the Assembly from carrying out its proposals if you had a reluctant Secretary of State, or a reluctant Government in Westminster, not prepared to allow you to legislate. Until we have greater detail about the way in which Westminster intends to handle that legislation, I fear that these proposals could lead to the Assembly either wasting a lot of time in drafting legislation that is not passed, or not being ready with legislation once the Secretary of State gives the go ahead.

5.50 p.m.

[471] **Jocelyn Davies:** If ideas or measures were contained in manifestos, then that could be considered a pretty good consultation. If you have won an election based on your manifesto,

it would be difficult for a Secretary of State to say, 'go away and think about this some more', or 'I do not approve of that'. If you had ideas that had not been contained in your manifesto you would be in more difficulty, but it would be difficult for the Secretary of State to refuse to put the request forward if it was in a manifesto.

On page 2, you mention that one of the drawbacks is the lack of clarity; you have made an issue of this. One of the justifications for the White Paper is the confusion that has resulted from the Government of Wales Act 1998. In your view, what is the likelihood of more difficulties arising from this White Paper's proposals?

Ieuan Wyn Jones: I will touch upon your first comment about the mandate of the Assembly Government. One of the things that I cannot find in the White Paper is any recognition of the value of the Assembly's mandate. That is a missing ingredient, because if the Assembly Government has been elected on certain proposals for legislation, it has secured the mandate of the people of Wales; yet, that is not recognised in the White Paper. The only thing that is recognised is that the Secretary of State would not refuse proposals for trivial reasons. However, one could imagine a situation arising where Governments of different political complexions would have big, philosophical differences over measures. It seems to me that, rather than going for the big constitutional arguments, which would paralyse the Assembly and Westminster, a Westminster Government would be tempted to use delay mechanisms. You could find that a legislative proposal would just disappear into the sand, rather than a big issue having been made of it.

On the lack of clarity, one could argue that once you begin to have legislation through Orders in Council, you begin to reduce the problems concerning the Assembly's powers. That is an argument, but I do not subscribe to it. My fear is that the lack of clarity on the Assembly's current powers could be worsened by these proposals, because the Assembly would have certain powers over secondary legislation and some powers over which it would have legislative proposals under Orders in Council. So, if a lawyer were to seek to find what the real powers of the Assembly were, there would be a number of different places where he or she would have to look. That complicates the issue. Unless we are careful, there is potential here for a real legislative nightmare.

[472] **Jocelyn Davies:** The other problem that has been pointed out to us is the ability of the Assembly to scrutinise properly, especially on executive action, under these proposals. Have you any views on that?

Ieuan Wyn Jones: Once the new powers would be in place, the Assembly would need to set up efficient scrutiny of proposed legislation as well as the scrutiny of Government Ministers and Government action. I have real concerns about the capacity of Assembly Members, not their intellectual capacity, but about the time that would be required for such effective scrutiny to take place. I base that on the fact that there are a number of Assembly Members who have to double up on committees as it is. The current Act is prescriptive in that it says that we must have subject committees that mirror Ministers' responsibilities. My proposal for trying to make that more effective is to have fewer committees. They would be legislative scrutiny committees, but they would not necessarily have to cover the narrow policy areas of current subject committees. If there were fewer committees, Assembly Members would have more time, within the remit of a committee, to spend on scrutiny.

There is a question of whether the Assembly needs more Members. Politically, that is a difficult argument to propose at present, so I assume that we have to work with a body of 60, and, under those circumstances, the number of committees would have to be reduced.

The only other point that I would make is that the current composition of the Assembly has not led to what I would describe as a collegiate approach to scrutiny. For whatever reason—I do not want to go over the history—it has adopted scrutiny on party lines, rather than a collegiate approach to scrutiny, which one would find, for example, in a select committee in the House of Commons. The removal of the Minister from the committee would enhance that sort of approach and would enable the committee to act as a committee, rather than as a group of individual party members.

[473] **David Melding:** You seem to be concerned that whatever role the Secretary of State plays, it should be a limited one in terms of the technical robustness of the request for competence to legislate in a certain area under an Order in Council. I presume that what you most fear is that there could be a veto on policy grounds. Is that something that you are genuinely concerned about?

Ieuan Wyn Jones: Yes, it is something that I am concerned about because, in order to see the robustness of the proposals, you have to consider what would happen if you had Governments of different political complexions. One can make the case for the current proposals working reasonably well if you have Governments of the same political persuasion in Cardiff and London, but once you begin to have different Governments, as will inevitably happen at some stage, you have to ask yourself, ‘What will a Secretary of State do when he is faced with a policy proposal with which he or his Government fundamentally disagree?’. It seems to me that, under those circumstances, the Secretary of State would either go for a big constitutional crisis, which would be to say ‘no’, giving his reasons in a letter that he would have to publish within 60 days, or he would find other ways of frustrating the will of the Assembly, which would be to look for the blocking or delay mechanisms that the proposals in the White Paper, I would not say encourage, but would make available to the Secretary of State. That is where my concern would be.

That is why I think that the current proposals would be unstable, if a mandate has been given to the Assembly Government to deliver, but you have a reluctant Secretary of State who might not wish to play ball. The proof of the pudding is in the eating, I fully understand that, because the Secretary of State might well have to say to himself, ‘It has the mandate, we are going to have to allow it to go through, even though we fundamentally disagree with it’. As I have indicated, there is always the role of pre-legislative scrutiny, although it is not clear to me under what circumstances that committee would arise. The Government is not suggesting that it would have to happen; it suggests that it would be desirable. I genuinely fear that what would happen is that the Assembly would find it frustrating to have a Secretary of State who was not prepared to act in the way that the Assembly would want.

[474] **David Melding:** Do you see any danger of a double-scrutiny process emerging, with a joint committee looking at the Order in Council before it goes for the affirmative vote? It could start to put all sorts of bells and whistles on the Order in Council. Is this a concern that you have when you raise this issue?

Ieuan Wyn Jones: There is a major concern about when the proposal becomes worked up, as it were. At what point does it become worked up? The White Paper is not clear about the precise moment at which it becomes worked up. There is a proposal that the thing would be scrutinised in detail by the joint committee to begin with, then it would be formed into an Order in Council, then it would come to the Assembly, then the Assembly would produce its piece of legislation, which it would also scrutinise. It seems to me that there is a whole procedure of scrutiny whereas, in reality, there must be the recognition that, if the Assembly has robust systems in place, scrutiny by the Assembly should be sufficient.

6.00 p.m.

[475] **David Melding:** If we adopt a more benign interpretation—I think that it is the one that the First Minister has offered us—and that this system would be a far lighter touch, the Order in Council would be the equivalent or analogous to the long title of a Bill, and, come the happy day when we have a Conservative Secretary of State, that would allow the Secretary of State to Pilate-like wash his hands of the policy developments in Wales and say, ‘That is now a matter for the Assembly. I do not have to defend this legislation at Westminster, so just get on and do it’. Assuming that all that happens, and that the system is proven to be one that can endure and survive the co-habitation required when you have different Governments in London and Cardiff, it is important that our structures are robust in terms of scrutiny. I am assuming that we have something rather similar to a Bill process, where there is a debate on the principle, then line-by-line scrutiny somewhere and then there is agreement or not on the amended version, and that goes back up to Westminster for formal acceptance. Is that how you would see it if it were a robust process?

How would you see the legislative process thus described operating in a bilingual way, which is obviously a requirement? It would be quite a challenge to produce English and Welsh-language law in this way, as it would be a big expansion of what happens at the moment, with consequent effects on how we structure the work in the Assembly and how we use the Welsh-language resources in terms of the expertise and translation services that we have.

Ieuan Wyn Jones: A gaf i ddelio â'r mater hwn mewn dwy ffordd? Gellid cymryd y safbwynt, fel y gwnaethoch chi, y byddai Llywodraeth Llundain—[*Torri ar draws.*]

Ieuan Wyn Jones: May I deal with this issue in two ways? One could take the view, as you did, that the London Government—[*Interruption.*]

[476] **Y Llywydd:** Mae angen newid offer cyfieithu David Melding. Iawn, diolch.

[476] **The Presiding Officer:** David Melding requires alternative translation equipment. Fine, thank you.

Ieuan Wyn Jones: Cyfeiriodd un o bwyntiau David Melding at y syniad y byddai'r Llywodraeth yn Llundain yn dweud, ‘Dyna ni, mae'r Cynulliad wedi cael y pwerau, mae wedi cael etholiad, dyma yw Mesurau'r Cynulliad, ac, felly, gwnawn hwyluso hynt y ddeddfwriaeth hon drwy'r Senedd er mwyn i'r Cynulliad symud ymlaen’. Dyna fyddwn yn gobeithio fyddai'n digwydd, ond mae ein profiad ni hyd yma yn dangos bod anesmwythyd mewn rhai adrannau yn Llundain o ran caniatáu yr elfen honno o ryddid a fyddai yn ei gwneud yn bosibl i'r Cynulliad fod yn fwy hyblyg yn y modd y mae'n defnyddio pwerau. Ni welais unrhyw enghraifft hyd yma o barodrwydd i gael cysondeb yn y modd y caiff Mesurau eu drafftio. Ni fu unrhyw rwystr i gam cyntaf y Papur Gwyn, sef cael deddfwriaeth fframwaith, ers 1999. Mae'r posibilrwydd hwnnw wedi bod yno hyd yr amser. Mae'r enghreifftiau o hynny'n digwydd yn San

Ieuan Wyn Jones: One of David Melding's points referred to the idea that the London Government would say, ‘There we are, the Assembly has received the powers, it has had an election, these are the Assembly's Bills, and, therefore, we will facilitate this legislation's progress through Parliament so that the Assembly can move forward’. That is what I would hope would happen, but our experience to date shows that there is uneasiness in some departments in London as regards allowing that degree of freedom that would enable the Assembly to be more flexible in the way it exercises powers. I have not seen an example to date of any willingness to draft Bills in a consistent manner. The framework legislation outlined in the White Paper's first phase has been available to us since 1999. That possibility has always been there. However, examples of that being taken up in Westminster have been limited—they are few and far between.

Steffan yn gyfyngedig—nid oes nifer fawr ohonynt. Felly, ein profiad ni yw ei bod fel pe na bai nifer o adrannau yn Llundain yn sylweddoli yn union beth ddigwyddodd ar ôl datganoli. Mae profiad amser yn awgrymu y gallai hynny newid, ond mae wedi cymryd chwe blynedd hyd yn oed i gael cydnabyddiaeth yn y Papur Gwyn fod angen deddfwriaeth fframwaith. Felly, nid wyf yn hollol siwr y byddwn yn derbyn y syniad y byddai Llundain yn fwy parod oherwydd bod system newydd ar waith.

O ran y syniad o graffu, un o'r pethau a ddaw yn amlwg o'r Papur Gwyn yw y bydd patrwm gwaith Aelodau'r Cynulliad yn newid yn llwyr. Bydd chwyldro yn y ffordd yr ydym yn gweithio, a fydd yn golygu llawer mwy o gyfrifoldeb ar Aelodau unigol i graffu ar ddeddfwriaeth. Yn hytrach na'r craffu dwbl y cyfeiriwch ato, mae angen i'r Cynulliad adeiladu capasiti i graffu er mwyn inni allu hepgor y cam sydd yn cael ei arfaethu yn Llundain. Yr unig beth y byddai ei angen gan Lundain, hyd y gwelaf fi, yw caniatâd yr Ysgrifennydd Gwladol i'r ddeddfwriaeth a'r Gorchymyn yn y Cyfrin Gyngor, ac ni fyddai'n rhaid ichi gael yr elfen o graffu cyn deddfu o gwbl.

[477] **David Melding:** It seems to me that consideration of how the process might work through the medium of Welsh is crucial.

Ieuan Wyn Jones: Nid yw hynny'n cael ei drafod yn y Papur Gwyn o gwbl. Mae enghreifftiau, mewn nifer o wledydd eraill, o ddeddfwriaeth yn cael ei chyflwyno yn y ddwy iaith. Mae'r Cynulliad wedi magu profiad yn ei flynyddoedd cynnar o baratoi is-ddeddfwriaeth, ac mae hynny yn aml yn llawer mwy cymhleth na deddfwriaeth sylfaenol. Ni fyddwn yn pryderu'n fawr am gapasiti na gallu'r Cynulliad i sicrhau bod deddfwriaeth yn cael ei gwneud yn y ddwy iaith.

Fel cyfreithiwr, yr wyf yn ymwybodol nad oes achosion llys wedi bod ynglyn ag unrhyw wahaniaeth tybiedig rhwng y ddwy iaith, a hyd nes bod achosion llys o'r fath yn digwydd, ni fydd rhywun yn gwybod yn union pa broblemau a allai godi o ran cael

Therefore, our experience is that it is as though many departments in London realise exactly what has happened post devolution. The may change over time, but it has taken six years for the White Paper to even acknowledge that framework legislation is required. Therefore, I am not entirely certain that I would accept the idea that London would be more willing because a new system had been put in place.

In terms of the idea of scrutiny, one of the obvious consequences of the White Paper is that the work pattern of Assembly Members will change completely. There will be a revolution in the way in which we work, and it will mean much more responsibility on the shoulders of individual Members to scrutinise legislation. Rather than having the double scrutiny to which you refer, the Assembly needs to create its own capacity for scrutiny, so that we can do away with the step that is being proposed in London. All that would be needed from London, as far as I can see, would be the Secretary of State's permission for the legislation and the Order in Council and you would not need to have this element of pre-enactment scrutiny at all.

Ieuan Wyn Jones: That is not discussed in the White Paper at all. There are examples, in a number of other countries, of legislation being produced bilingually. The Assembly has gained experience in its early years of drafting subordinate legislation, and that is often more complex than primary legislation. I would not be too concerned about the Assembly's capacity or ability to ensure that legislation is produced bilingually.

As a solicitor, I know that there have been no court cases about any perceived difference between the two languages, and, until you start having such court cases, one will not know exactly what problems could arise in terms of having legislation in two languages.

deddfwriaeth mewn dwy iaith.

[478] **Y Llywydd:** Yr wyf yn siwr na fydd y barnwyr yn araf deg wrth ffeindio'r problemau.

The Presiding Officer: I am sure that the judges will not be slow in finding the problems.

[479] **David Melding:** I would be happy to leave the committee structures to someone else to talk about. I was going to move on to that, but Kirsty is indicating that she might explore it.

[480] **Kirsty Williams:** Please jump in if I do not cover the points that you were going to cover, David. Ieuan, you say that there will be a huge change in terms of how we work and that that will have a great impact on us, and the committees are one of the first places where that change will have to start. You mention in your paper and have spoken about reducing the number of committees as being one way of lightening the load when we only have a certain number of Assembly Members to play with, but you make no mention of the possibility of cutting the number of committee members. I do not know whether you have any views on whether considering the numbers of committee members could be a way of addressing some of those problems rather than cutting the numbers of committees.

Ieuan Wyn Jones: Y rheswm pam nad ydwyf yn argymhell cwtdogi ar nifer yr aelodau ar bwyllgor yw—a sylweddolaf nad oes gan bob grwp ddigon o Aelodau i gael mwy nag un aelod ar bwyllgor, ac mae hynny'n achosi pwysau ychwanegol—fod nifer o bleidiau yma â mwy nag un aelod ar bwyllgor, a'r argraff yr wyf wedi'i chael, o siarad ag Aelodau, yw eu bod yn teimlo bod cael mwy nag un aelod o grwp ar bwyllgor o gymorth sylweddol wrth iddynt wneud eu gwaith. O ran craffu, bydd yn sicr yn haws—nid wyf yn dweud ei bod yn amhosibl i'w gyflawni—i Aelodau rannu'r baich gyda'u cyd-Aelodau os oes mwy nag un aelod o grwp yn digwydd bod ar bwyllgor. O'r ddau ddewis—ac yr wyf yn derbyn yr hyn yr ydych yn ei ddweud am y ffaith bod dau dewis—byddwn i'n tueddu i ffafrio cael llai o bwyllgorau.

Ieuan Wyn Jones: The reason why I do not recommend reducing the number of committee members is—and I realise that not every group has the numbers to have more than one member on a committee, which brings with it additional pressure—that several of the parties here have more than one member on a committee, and the impression given to me, from talking with Members, is that they feel that having more than one group member on a committee is of huge assistance to them in carrying out their work. It will certainly be easier, from the point of view of scrutiny—I am not saying that it is impossible to do—for Members to share the burden with their fellow Members if more than one group member happens to be on a committee. Of the two options—and I accept what you say about there being two options—I would tend to favour having fewer committees.

O safbwynt personol—nid wyf wedi trafod y mater hwn gyda fy ngrwp—teimlaf fod achos cryf dros gyfuno meysydd polisi mewn pwyllgorau hefyd. Yr wyf yn bryderus iawn ynglyn â'r ffordd y mae'r Cynulliad yn seiliedig ar hen fodel Whitehall lle mae gennyh wahanol adrannau polisi wedi'u gosod mewn seilos. Mae yn union fel pe bai gennyh Whitehall bach yn y Cynulliad. Byddwn yn llawer hapusach pe gallem edrych ar ffordd wahanol o grwpio meysydd polisi a fyddai'n caniatáu ichi weithio yn

From a personal point of view—I have not discussed this matter with my group—I feel that there is also a strong case for combining policy areas in committees. I am concerned about the way in which the Assembly is based on the old Whitehall model where you have different policy areas placed in silos. It is exactly like having a miniature Whitehall in the Assembly. I would be much happier if we could look at a different way of grouping policy areas that would allow you to work more efficiently in a cross-cutting fashion

drawsbynciol yn llawer mwy effeithiol ac a fyddai'n caniatáu i weision sifil o wahanol adrannau weithio gyda phwyllgorau a chyda Gweinidogion o dan y drefn newydd, ond hefyd yn gwasanaethu pwyllgorau a fyddai'n gwneud gwaith y Llywodraeth yn fwy effeithiol. Byddwn am symud oddi wrth y syniad bod rhaid cael adran benodol ar gyfer addysg, iechyd a meysydd eraill. Byddai hynny o reidrwydd, yn fy marn i, yn arwain at well llywodraeth.

and which would allow civil servants from the various divisions to work with the committees, and with Ministers under the new arrangements, but also to serve the committees that would be carrying out the Government's work more effectively. I would want to move away from the idea that you have to have a specific division for education, health and other areas. That would of necessity, in my view, lead to better governance.

6.10 p.m.

[481] **Kirsty Williams:** If you cut down the number of committees and give them wider areas to consider, however you stack those areas, how could you ensure that those committees would be able to properly scrutinise what would be an even larger portfolio of issues? To take the Scottish example, you could have a committee that was responsible for economic development, transport and tourism through to Welsh culture, which would be a huge remit. How could you ensure that that committee gave due scrutiny to the work of a number of Ministers?

How could you get a balance between those committees that were solely dedicated to reacting to an Executive that kept putting legislation in front of them and others that were not? Again, as we heard in Scotland, the other committees were looked on jealously by some of their colleagues because they were the ones that had very little legislation to deal with and spent all their time on foreign trips, investigating policy areas and doing wonderful policy reviews and putting that into the part, whereas their colleagues were constantly bogged down, reacting to legislative pressures and unable to set their own agenda. How can we get that balance right in our committees?

Ieuan Wyn Jones: Certainly in the early years of the Assembly, the legislative programme would be as light as I have described. You must remember that, unlike the Assembly, the Scottish Parliament has responsibility for areas such as criminal justice, which produces more legislation probably than any other department. So, in the early years, at least, the legislative programme would not be as burdensome as you described. I think that the committees could cope with it. We must remember that although the committees might have more responsibility than for just one discreet policy area, they would not be legislating in each area at a given time. So, the committees might have responsibility over a broad area, but, at a given time, would only be scrutinising a piece of legislation in one policy area. So, there is no magic answer, but that would be my approach.

[482] **Kirsty Williams:** Do you think that it is inevitable that committees will have to meet more often and that the working week of the Assembly will have to expand to accommodate the need to meet more often, so that Thursday will definitely become an established working part of the week in this building? Indeed, Monday or Friday could become additional days when Members would be basing their work here in the National Assembly.

Furthermore, in their scrutiny role, how important is it for committees to have the right to call for all papers, persons and records that the committees would deem appropriate?

Ieuan Wyn Jones: On your first question on the Assembly's working week, I suspect that the working week would be a full three days. Perhaps proceedings could start a little later on

a Tuesday to allow Members the time to get here. However, once they arrived, they would be here until the end of Thursday, as a minimum. I cannot see how 60 Members would otherwise cope with the load that they would be expected to produce. I hope that that would not mean Friday working because, as someone with 18 years of elected experience, I would not want to lose the Friday connection with a constituency, particularly for Assembly Members who live far away from Cardiff. So, I would want to be able to get back to my constituency in time for an early start on a Friday.

However, our responsibility would be to be here for three full days, which calls into question some of our current practices, such as party group meetings. The Plaid Cymru group meets on a Tuesday morning. I am not sure what other groups do, but what would happen to those sorts of meetings? Could they be fitted in? In Westminster, groups meet later in the evening, which is not the tradition here. Various issues like that would have to be accommodated.

[483] **The Presiding Officer:** In the House of Lords, they meet at lunch time, which is much more civilised.

Ieuan Wyn Jones: You also made a point about the committee's powers, which we need to look at. I certainly think that it is important for the committee to be given the tools that it needs to do a proper job. I assume that you would have a legislative function that would be the scrutiny of legislation, but also the scrutiny of government action. I think that it is in the scrutiny of government action that the powers to request the information would be most needed.

[484] **Jane Hutt:** Thank you, Ieuan, and also for your written evidence. Having read between the lines, I detected some optimism I thought, at the mention of the novel approach, a simpler and quicker method of legislating, and possibly a more liberal approach. I welcome that because this is about trying to move forward and make the best opportunities of enhanced powers.

I was curious about your point towards the end of the paper in relation to your concern about Ministers acting as pre-devolution Secretaries of State in respect of subordinate legislation. It is for the Assembly as a whole to consider how we handle subordinate legislation. If we are moving towards enabling committees—as we have just discussed—to have more time, in terms of Orders in Council and to continue with some of their important policy development work, we will have to look at how we handle subordinate legislation. I would have thought that, as we move forward, clearly we would want to hear the views of the Assembly on the scrutiny of that and how it is handled. I am concerned that this suggestion that Ministers act as pre-devolution Secretaries of State is a little unfair or unrealistic in terms of what the Assembly would want to achieve.

Ieuan Wyn Jones: Gwneuthum y datganiad oherwydd dyna'r hyn y mae'r Papur Gwyn yn ei awgrymu sy'n digwydd. Nid wyf yn awgrymu ei fod yn rhywbeth a all fod o ganlyniad i'r ddeddfwriaeth newydd. Efallai fy mod wedi camdarllen y Papur Gwyn, ond hyd y gwelaf fi, pan fo'r Cynulliad yn hollti'r cyfrifoldeb rhwng y ddeddfwrfa a'r Llywodraeth, daw'r Gweinidogion yn Wenidogion y Goron yn hytrach na chael pwerau o dan y Cynulliad. Golyga hyn felly, o dan Ddeddfau newydd sy'n cael eu pasio

Ieuan Wyn Jones: I made that statement because that is what the White Paper suggests is happening. I am not suggesting that it is something that could arise as a consequence of the new legislation. Perhaps I have misread the White Paper but, as far as I can see, when the Assembly separates responsibility between the legislature and the Government, Ministers become Ministers of the Crown rather than being given their powers by the Assembly. This would therefore mean that, under new Acts passed

yn Llundain, fod y pwerau hynny'n cael eu trosglwyddo i Weinidogion yn hytrach nag i'r Cynulliad.

in London, those powers should be transferred to Ministers rather than to the Assembly itself.

Os deallaf hyn yn gywir, nid myfi sy'n dweud y gwnaiff Gweinidogion weithredu fel Ysgrifennydd Gwladol cyn datganoli. O dan yr hen drefn cyn datganoli, deuai Deddf newydd o Lundain yn trosglwyddo'r cyfrifoldeb i wneud deddfwriaeth eilradd i Ysgrifennydd Gwladol Cymru. Ar hyn o bryd, trosglwyddir y pwerau hynny i'r Cynulliad ac fe'u dirprwyir i'r Prif Weinidog yma. O dan y drefn newydd, a chan na fydd gennym gorff corfforaethol, bydd y Deddfau newydd yn Llundain sy'n trosglwyddo cyfrifoldeb i'r Cynulliad yn mynd at y Gweinidogion, nid y Cynulliad. Mae hyn yn golygu, felly, y byddwn yn union yr un sefyllfa â'r Gweinidog gynt.

If I have understood this correctly, it is not me who is saying that Ministers will act as pre-devolution Secretaries of States. Under the old system just before devolution, there would be new legislation from London which would transfer responsibility for making secondary legislation to the Secretary of State for Wales. At present, those powers are transferred to the Assembly and then delegated to the First Minister here. Under the new system, and because we have no corporate body, new legislation in London transferring responsibility to the Assembly will go to Ministers, not to the Assembly. This means that we will be in precisely the same situation as Ministers formerly.

Os dywedwch nad hynny yw bwriad y Llywodraeth, rhaid inni ailedrych ar y paragraff yn y Papur Gwyn.

If you are saying that that is not the Government's intention, we need to revisit this particular paragraph of the White Paper.

[485] **Jane Hutt:** If I understand it correctly, it is still the right and pre-requisite of the Assembly to judge whether to move to the affirmative or negative resolution route in terms of secondary legislation. We would want to hope that the Assembly, via its Ministers, would be able to have a key role to play in this, but perhaps judge that we would spend more of our time on the Orders in Council and policy development than we do at present on subordinate legislation. However, I am sure that that will emerge.

6.20 p.m.

Ieuan Wyn Jones: It is important for us to test this, because it is quite an important issue. As I understand it, because you will be abolishing the corporate body, the responsibility to act will be with Ministers appointed under the Crown. If there is new legislation in Westminster proposing new powers for the Assembly, the current position is that the corporate body assumes the powers, which are then delegated to the First Minister, so we decide what we do with those powers. As I understand it, once the corporate body disappears, the devolved powers go directly to the Minister, because there is no corporate body to assume them. Is that not the case?

[486] **Jane Hutt:** If we have a Legislation Committee to scrutinise how we handle legislation, I would have thought that that is where the body, although not a body corporate, will act. It is about scrutiny and priorities in terms of our time.

Ieuan Wyn Jones: I had assumed that the Minister would be entitled to make secondary legislation, under legislation devolved from Westminster, and that all the Assembly could do if the Minister proposed legislation was seek to annul it through the negative resolution.

[487] **The Presiding Officer:** Does it not depend on what we write in our Standing Orders and what is in the Bill?

Ieuan Wyn Jones: I accept that it depends on what is in the Bill, but once we have lost the corporate body status, who will assume the responsibility?

[488] **David Melding:** So what if all the secondary legislation does not emanate from us? We hardly do that now.

Ieuan Wyn Jones: I suppose that that is a point in practice. I understand your point, but all that I am saying—and not in a pejorative sense—is that the Ministers will be acting as the Secretary of State previously acted.

[489] **David Melding:** That just proves that the old argument that we could democratise secondary legislation was hooley.

Ieuan Wyn Jones: Absolutely.

[490] **Jocelyn Davies:** This is the point that Richard Rawlings made to us. He said that it was a dangerous point. If we say that it is okay for the Ministers in the Assembly to have the same rights as Ministers in Westminster, when the Parliament in Westminster will be scrutinising how the Ministers there use the powers that they have been given under their own Acts, we would be in the position where the Westminster Parliament gave our Ministers the discretion. How wide or narrow that is would be up to the Westminster Parliament, not us. It is an entirely different situation. Richard Rawlings warned us about this matter.

[491] **Carl Sargeant:** On a lighter, although important, point regarding ending the corporate body status, you mentioned the naming of the Assembly Government or the Welsh Executive. It has been brought up once or twice during these meetings. Although there will have to be some change to the structure because there will be two separate strands, do you really believe that the change of name will be useful or that it will deliver the difference that the people of Wales want in the Welsh Assembly Government? People, particularly in our neck of the woods, recognise the Welsh Assembly Government as the Welsh Assembly Government. How important is the change of name?

Ieuan Wyn Jones: Derbyniaf eich pwyt nad yw i'w weld mor bwysig â phwyntiau eraill a wnaed gennym, ond o ran y cyhoedd, dyna un o'r pwyntiau pwysicaf. Nid wyf yn meddwl, yn y pen draw, y bydd y dadleuon hyn ynghylch y strwythur gyfansoddiadol yn cael cymaint o effaith ar y cyhoedd; yr hyn sydd yn cael effaith ar y cyhoedd yw sut mae'r corff hwn yn gweithredu a sut mae'n effeithio ar eu bywydau bob dydd. Nid wyf yn deall yn iawn, os bwriad y Llywodraeth—fel y byddem oll yn cytuno oherwydd yr oeddem yn aelodau o'r pwyllgor a oedd yn trafod y materion hyn—oedd dweud 'Beth yw'r gwahaniaeth rhwng y Cynulliad a'r Llywodraeth?', pam y cynhwyswyd y gair 'Cynulliad' yn enw'r Llywodraeth, sy'n cymhlethu pethau hyd yn oed yn fwy.

Ieuan Wyn Jones: I accept your point that this does not seem to be as important as other points raised by us but, in terms of the public, it is one of the most important points. I do not think that, at the end of the day, these discussions on the constitutional structure will have much of an effect on the public; what will affect the public is how this body operates and how it impacts on their daily lives. What I do not quite understand is, if the Government's intention—as we would all agree because we were all members of the committee that discussed these matters—was to ask 'What is the difference between the Assembly and the Government?', why include the word 'Assembly' in the Government's name, as that makes matters even more complex.

Y pwynt yr wyf am ei wneud yw gofyn pam The point that I am making is why should we

na ddylid defnyddio term yn Saesneg fel 'Welsh Executive' i gyfateb i'r hyn sy'n digwydd yn yr Alban? Nid wyf yn deall yn iawn pam bod rhaid cynnwys y gair 'Assembly', pan ein bod yn ceisio cyfleu'r ffaith bod gwahaniaeth rhwng y ddau gorff. Yr wyf yn teimlo'n eithaf cryf am y pwynt hwn, a gwnaf y pwynt yn y papur. Yr wyf yn derbyn llythyrau o hyd sydd wedi'u cyfeirio at 'Ieuan Wyn Jones—Member of the Welsh Assembly Government', ac mae hyn gan gyrrff y byddwn yn disgwyl iddynt wybod y gwahaniaeth rhwng Llywodraeth Cynulliad Cymru a Chynulliad Cenedlaethol Cymru. Credaf ei bod hi'n bwysig iawn, o gychwyn cyntaf y drefn newydd, bod y gwahaniaeth yn glir, ond bod y canfyddiad ohono'n gliriach byth, a chredaf yn eithaf cryf y dylid newid enw'r Llywodraeth.

not use an English term such as 'Welsh Executive', which corresponds with what happens in Scotland? I do not quite understand the need to include the word 'Assembly' when we are trying to convey the fact that there is a difference between the two bodies. I feel quite strongly about that point, and I make that point in the paper. I receive letters all the time that are addressed to 'Ieuan Wyn Jones—Member of the Welsh Assembly Government', and these are from organisations that I would expect to know the difference between the Welsh Assembly Government and the National Assembly for Wales. I think that it is very important, from the very outset of this new system, that not only is the difference made clear, but that the perception of it is even clearer, and I feel quite strongly that the Government's name should be changed.

[492] **Lorraine Barrett:** We have learned a lot about Orders in Council, and I have said previously that I do not believe that many of us had heard of Orders in Council before. We have been discussing different ways in which they might work. What are your views on whether Orders in Council should be reserved to the Assembly Government? Could Assembly Members or committees initiate requests for Orders in Council? How would you see that working, and how could we restrict or control the numbers that might be put forward? Do you have any views on that?

Ieuan Wyn Jones: I do not think that the White Paper envisages that that should happen often, if at all. However, I think that it is a very important concept that the backbench Assembly Members should have the opportunity to legislate. On occasions, committees might want to do so, but I am more concerned, now that you have raised the issue, with the backbench member. As somebody who piloted a piece of private legislation through Westminster from beginning to end, I know that it is quite an achievement, of which, as an Assembly Member, you would be proud because you had initiated a piece of legislation that went through. For some reason, the procedure that we have adopted for secondary legislation is so horrendously complicated that I am not sure whether it is actually proved to be of all that much worth in practice. However, I would hope that it would be possible for Assembly Members to initiate it.

What happens in Westminster is that Members regularly propose legislation that gets nowhere, but it is an opportunity to highlight an issue. I am obviously someone who would like to see an Assembly Member occasionally succeed in getting legislation through. So, you can do that by a ballot, which would allow a Member to follow it through. I think that there is a great deal to be said for the persistence of Assembly Members in wanting to get things done. I saw it regularly at Westminster—unpopular causes were trumpeted by backbench members, which eventually became law because they were persistent enough and they won the argument in public. I would want Assembly Members to feel that they had a similar procedure to enable them to get things done, and that, against all the odds, if you like, they could succeed. I would like to see the White Paper and the Bill allowing that to happen.

[493] **David Melding:** I just want to follow up on this interesting idea that you have about

the number of committees. Nearly every witness has assumed that we would probably have more committees and that we would disaggregate. In fact, I have asked them what would happen to the Health and Social Services Committee, and most think that we would have to have two committees there. You have taken us in a very different direction and I just want to explore that.

Earlier, if I understood you correctly, you thought that the order of magnitude in terms of Orders in Council that would be going through the Assembly in any one year would fall between four and six. That strikes me as quite a lot, actually. We have seven Subject Committees at the moment, so if we have four or five, one of which is the Health and Social Services Committee, it seems to me to be quite possible, if we had six measures going through, that one would be in health and one would be in social care. That seems to me to be realistic, but, then, as far as general policy work is concerned, it is 'Good night, Vienna'. We just could not cope.

6.30 p.m.

Ieuan Wyn Jones: My reading of the situation is that policy development would suffer most under the new plan. That seems to me to be obvious, because when you think about the thrust of the new Assembly, I cannot see how you could possibly build policy development into the new system as well as the other things that you would want to do. Based on the Richard commission recommendations, proposals and evidence, I suspect and expect that the Assembly would not want to go into full legislative mode immediately. So I am assuming that, although the maximum would be six, in the early years, it may be as little as three. However, if you had three a year, it would be a substantial amount over a three-year period. I suspect that the final year would be pretty minimal, because everyone would be in election mode. That was certainly the procedure in Westminster; the amount of legislative proposals was light in the final year.

It is quite an interesting argument—and I am not saying that it is a majority view; I have to accept that, but it is the case that I am making—that while health and social services is an exception, as I say in my paper, and would probably need a dedicated committee, there are other policy areas where it is possible to amalgamate committees. This would force the Assembly to work in a different way. Rather than saying, 'This is education, where does that touch on culture, economic development or other things?' as happens now, there would be no need to ask the question. It would be possible to look at the matter under discussion in a much more cross-cutting fashion. I am anxious to explore the opportunity for the Assembly to be more innovative in its approach rather than forcing itself into a silo mentality, as it has done, unfortunately, in its first six years, in my view.

I see that I am not convincing you, Kirsty.

[494] **Kirsty Williams:** No, you are not, because long, long ago, we sat around the table in the National Assembly Advisory Group, and we had this very discussion. We spent many hours discussing this, and the real desire not to fall into a Whitehall way of doing things and silo mentalities. The reason that it turned out this way was because there was no satisfactory way to create the committees that Ieuan is calling for. You simply cannot have committees that are so large that they do not allow for proper scrutiny of a Minister. You cannot have subjects floating in and out.

The reality is that you either have one committee that encompasses absolutely everything, or create a silo—it is just that it is called something different. That is why I am not convinced. I spent many hours considering these very facts eight years ago and we took a lot of evidence

and no-one could come up with a structure that could achieve that effectively.

Ieuan Wyn Jones: Fe wnaif i ei roi mewn ffordd ychydig yn wahanol. Un o'r pethau a welais pan ddeuthum i'r Cynulliad yn gyntaf oedd y matrices o sut oedd y Swyddfa Gymreig yn gweithredu. Yr hyn a welais oedd Whitehall ar raddfa bach. Yr ydym yn genedl o 3 miliwn sydd yn gweithredu system sy'n ceisio llywodraethu 55 miliwn o bobl. Credaf fod ffordd symlach o weithio. Os oes arnoch angen adran arbennig ar gyfer pob un maes, mae'n debygol y byddwch yn dilyn y patrwm i lywodraethu cenedl enfawr. Dylem fod yn gallu gwneud pethau mewn dull llawer symlach, a bod dipyn bach yn fwy arloesol. Os ydych yn edrych ar faes addysg, mae effaith ar ddatblygu economaidd, iaith, diwylliant a meysydd eraill, ond nid oes modd i ni drafod, gan ein bod mewn adrannau gwahanol. Yn fy mhrofiad i, mae'n cymryd oes i gael pobl ar draws y seilos i gydweithio. Teimlaf y dylai cenedl fach weithio mewn ffordd llawer symlach.

[495] **Y Llywydd:** Mae'r dadansoddiad yn apelio yn fawr ataf. Mae gennym dyst arall sydd wedi aros am dipyn o amser, ond yr wyf am ofyn un cwestiwn i gloi.

A ydyw'n bosibl ein bod i gyd, gan eich cynnwys chi, Ieuan, yn gwneud gormod o'r posibilrwydd o wrthdaro os oes newid Llywodraeth neu newid gwleidyddol? Mae'r hyn a ddywedaf yn cael ei ragfarnu gan y ffaith fy mod, ers 1992, wedi bod yn treulio peth amser mewn Ty lle yr oedd y Blaid Lafur mewn lleiafrif o ran grwp tan yn ddiweddar, er ei bod mewn Llywodraeth yn y Ty arall, ac felly bu ymgais parhaus i sefydlu confensiynau am weithio. Yn ystod y misoedd nesaf, bydd adolygiad pellach o'r confensiynau sy'n gweithio rhwng dau Dy y Senedd.

Oni fyddwn yn wynebu sefyllfa nid annhebyg yn y fan hon, lle bydd un corff seneddol yn San Steffan, mewn dau Dy, fydd â phwerau deddfwriaethol, a bydd gennym ni rhai fan hyn? Onid yr hyn sy'n debygol o ddatblygu yw confensiynau a fydd yn cael eu hyrwyddo gan y ffaith y bydd pwyllgorau

Ieuan Wyn Jones: I will put it in a slightly different way. One of the things that I saw when I first came to the Assembly was the matrix of how Welsh Office worked. What I saw was Whitehall in miniature. We are a nation of 3 million, operating a system that attempts to govern 55 million people. I believe that there is a simpler way of working. If you decide that you need a specific department for each area, you are bound to follow the pattern for governing a massive nation. We should be able to do things in a much simpler way, and be somewhat more innovative. If you are looking at the field of education, there is an impact on economic development, language, culture and other areas, but we cannot discuss, because we are in different departments. It takes an age, in my experience, to get people to collaborate across the silos. I feel that a small nation should be able to work in a much simpler fashion.

[495] **The Presiding Officer:** That analysis appeals greatly to me. We have another witness who has been waiting for some time, but I will ask one question in conclusion.

Is it possible that all of us, including you, Ieuan, are making too much of the possibility of conflict if there is a change of Government or a political change? What I say is prejudiced, in a sense, by the fact that, since 1992, I have spent some time in a House in which the Labour Party was a minority group until recently, although it was in Government in the other House, and therefore there have been ongoing attempts to establish conventions on how to operate. During the next few months, there will be a further review of the conventions that operate between both Houses of Parliament.

Will we not face a similar situation here, where there will be one parliamentary body in Westminster, in two Houses, with legislative powers, and we will have some here also? Is it not likely that conventions will evolve, which will be promoted by the fact that there will be scrutiny committees

craffu yn y fan hon ac yn Llundain? Mae'n eithaf posibl y bydd rhai o'r pwyllgorau craffu yn Llundain yn ystyried ei bod yn rhan o'u gwaith i warchod pwerau'r Cynulliad o dan y Ddeddf. Mae'n eithaf posibl y gwelwn sefyllfa—a defnyddio'r gair Saesneg neu Ffrangeg, neu beth bynnag yw ei darddiad—mwy *robust* o ran y berthynas rhwng y Cynulliad a San Steffan ac na fydd yr Ysgrifennydd Gwladol yn ddim byd ond y person sy'n cario'r papurau wedi eu lapio mewn rhuban ac sy'n eu cyflwyno, er enghraifft, fel neges gan y Frenhines ac yn y blaen.

Ieuan Wyn Jones: Yn naturiol, hoffwn gredu mai hynny fydd y sefyllfa. Ar ddiwedd y dydd, nid oes gennyf lawer o broblem gyda'r strwythurau, er fy mod yn gweld bod posibilrwydd y gallai'r Llywodraeth rhoi rhwystrau ar y ffordd, pe bai am rwystro'r Cynulliad. Nid problem strwythurol yw hon, ond problem wleidyddol. Gwleidyddiaeth y mater sy'n agored i gael ei dehongli.

Y perygl yr wyf yn ei weld yw pe bai Llywodraeth y Deyrnas Gyfunol yn gweld problemau yn y ffordd yr oedd y Cynulliad yn deddfu, na fyddai o angenrheidrwydd yn edrych am y ddadl gyfansoddiadol fawr, ond am ffyrdd o wneud i'r Cynulliad aros, pe bai'n anhapus ynglyn â rhyw syniad yr oedd Llywodraeth y Cynulliad am ei weithredu. Gall Llywodraeth y Deyrnas Gyfunol ddweud, 'Mae'n rhaid i chi ymgynghori am chwe mis', ac yna, ar ôl yr ymgynghoriad, ddweud, 'Cawn broses graffu cyn y broses ddeddfu yn y ddau Dy yn Llundain'. Wedyn, cyn ichi droi, byddai blwyddyn wedi mynd heibio cyn dechrau ar y broses a byddem yn ail flwyddyn y Cynulliad, yna'r drydedd flwyddyn, ac efallai na fyddem ond wedi cael dau fesur drwyddo. Dyna lle yr wyf i'n gweld y potensial am drafferth yn codi.

Ni fyddai Llywodraeth y Deyrnas Gyfunol eisiau edrych am y ffrae fawr gyfansoddiadol, i greu gwrthdaro; byddai'n defnyddio'r system i rwystro Deddfau rhag pasio'n gyflym. Dyna'r potensial, a mae'r Papur Gwyn yn rhoi bob rhwydd hynt i'r Llywodraeth wneud hynny, pe bai'n dewis gwneud hynny. Ar y llaw arall, pe bai'r

here and in London? It is quite possible that some of the scrutiny committees in London will consider it part of their work to protect the Assembly's powers under the Act. It is quite possible that we will find ourselves in a more robust situation with regard to the relationship between the Assembly and Westminster, and the Secretary of State will be nothing more than the person who carries the papers wrapped in a ribbon and who presents them, for example, as a message from the Queen and so on.

Ieuan Wyn Jones: Naturally, I would like to believe that that will be the case. Ultimately, I do not have much problem with the structures, although I do see the possibility that the Government could use blocking mechanisms, if it wanted to hinder the Assembly. That is not a structural problem, but a political one. It is the politics of the matter that are open to interpretation.

The danger that I see is that if the United Kingdom Government perceived a problem with the way that the Assembly was legislating, it would not necessarily look for a great constitutional row, but for ways of making the Assembly wait, if it was not happy about some idea that the Assembly Government wanted to implement. The United Kingdom Government could say, 'You must consult for six months,' and then, after the consultation, say, 'We will have pre-legislative scrutiny in both houses in London'. Then, before you turn round, a year would have passed before the process is even started, we would be in the second year of the Assembly, then the third, and we may have only got two measures through. That is where I see the potential for problems arising.

The United Kingdom Government would not want to look for a great constitutional row, which would lead to a clash; it would use the system to prevent Acts from being passed swiftly. There is potential for that, and the White Paper gives the Government every opportunity to do that, if it chooses to do so. On the other hand, if the Government was to

Llywodraeth yn gweithredu yn ffordd yr ydych wedi awgrymu, yn naturiol, byddai hynny yn gam mawr ymlaen.

operate in the way that you suggested, naturally, that would be a massive leap forward.

[496] **Y Llywydd:** Amser a ddengys. Diolch yn fawr, Ieuan.

[496] **The Presiding Officer:** Time will tell. Thank you, Ieuan.

Yr wyf yn awr yn galw'r tyst olaf, Elin Jones. Elin, mae'n ddrwg gennyf fod huodledd arweinydd y grwp wedi golygu y bu'n rhaid i chi aros. Diolch yn fawr am eich llythyr a'ch papur. A ydych am ddweud unrhyw beth pellach ynglyn â'r papur, neu a chawn fynd yn syth at gwestiynau?

I now call the final witness, Elin Jones. Elin, I apologise that the eloquence of the leader of the group has meant that you have had to wait. Thank you for your letter and your paper. Do you have any further comments on your paper, or can we move straight to questions?

Elin Jones: Nid oes gennyf unrhyw beth i'w ychwanegu at gynnwys y papur, felly, o ran amser, yr wyf yn hapus i fynd yn syth at gwestiynau.

Elin Jones: I do not have anything to add to the content of the paper, therefore, given the time, I am happy to move straight to questions.

[497] **Y Llywydd:** Jocelyn?

[497] **The Presiding Officer:** Jocelyn?

[498] **Jocelyn Davies:** I do not have any questions, because I agree with Elin 100 per cent.

[499] **David Melding:** I wonder whether I may be rude and say that your proposal in terms of the Welsh language is well made and discrete and understandable, and the Government will hear it, but I am more concerned about how this institution will work in a bilingual fashion when we have important legislation to pass under Orders in Council, legal concepts are being argued in committee and there is the need for technical and legal advice in the Welsh language. That may have to lead to a change in our working methods. Is that your view, or do you, as Ieuan said earlier, I think, think that it will not be as great a challenge as some of us fear?

6.40 p.m.

Elin Jones: Mae hynny yn mynd ymhell y tu hwnt i'r hyn yr oeddwn wedi bwriadu ei gyflwyno, sy'n benodol ar faes polisi yr iaith Gymraeg; mae'n ymwneud fwy â gweithredu mewn sefydliad dwyieithog. Mae angen sicrhau bod y capasiti a'r profiad digonol ar gael i allu deddfu drwy gyfrwng y Gymraeg a'r Saesneg. Mae'r hyn a ddywedwyd eisoes yn y sesiwn yn bwysig o ran nodi bod manau eraill mewn gwledydd eraill sydd â phrofiad helaeth yn y maes hwn—nid oes profiad o hyn yn San Steffan, wrth gwrs. Mae'n bwysig bod y Cynulliad yn manteisio ar bob cyfle i elwa o'r profiad hwnnw.

Elin Jones: That goes way beyond what I had intended to present, which is specifically on the policy area of the Welsh language; it is more to do with working in a bilingual institution. We need to ensure that we have sufficient capacity and experience to legislate through the medium of English and Welsh. What has already been said in this session is important in terms of noting that there are other places in other countries with extensive experience in this area—there is no experience of this in Westminster, of course. It is important that the Assembly takes advantage of every opportunity to learn from that experience.

[500] **David Melding:** Now that I have been rude, I will ask some questions about the paper

[501] **The Presiding Officer:** I did not think you were being particularly rude.

[502] **David Melding:** Do you think that the Order in Council procedure would allow an entire policy area to be given to the Assembly, or is what you are suggesting, in effect, that there will be Orders in Council for most things, but the Assembly will pass Acts in relation to the Welsh language? That is stage three even before stage two is implemented.

Elin Jones: Yr wyf wedi cyflwyno'r papur i'r pwyllgor oherwydd fy mod yn siomedig iawn fod y Papur Gwyn yn gwahardd, o dan adran 3.18, yr hawl i greu Gorchymyn yn y Cyfrin Gyngor ar faes polisi cyfan. Cyn cyhoeddi'r Papur Gwyn, meddyliais y byddai'n bosibl defnyddio Gorchymyn yn y Cyfrin Gyngor i drosglwyddo pwerau deddfwriaethol ar yr iaith Gymraeg i'r Cynulliad. Pan ddarllenais y Papur Gwyn a gweld bod gwaharddiad penodol ar drosglwyddo meysydd cyfan, yr oeddwn yn siomedig bod y cyfle yn cael ei golli. Teimlaf yn gryf fod y Papur Gwyn yn bwriadu ymestyn pwerau deddfwriaethol y Cynulliad, ac yn ysbryd y Papur Gwyn, felly, mae'n bwysig ein bod yn ystyried a yw'n briodol taw'r Cynulliad sy'n deddfu ar yr iaith Gymraeg. Credaf y dylai'r Cynulliad ddeddfu ar yr iaith Gymraeg, ac, felly, dylid cydnabod yr egwyddor honno yn y ddeddfwriaeth a fydd yn dilyn y Papur Gwyn, a chaniatáu i Orchymyn yn y Cyfrin Gyngor rhywbryd yn y dyfodol drosglwyddo maes cyfan yr iaith Gymraeg i'r Cynulliad Cenedlaethol. Yn dilyn hynny, byddai'n fater i'r Cynulliad Cenedlaethol greu mesurau deddfwriaethol o fewn maes penodol yr iaith Gymraeg, yn ôl yr ewyllys gwleidyddol ar y pryd.

Elin Jones: I have presented a paper to the committee because I am very disappointed that the White Paper prohibits, under section 3.18, the right to create an Order in Council on an entire policy area. Before the White Paper was published, I had thought that it would be possible to use an Order in Council to transfer the power to legislate on the Welsh language to the Assembly. When I read the White Paper and saw that there was a specific prohibition on transferring whole policy areas, I was disappointed that this opportunity was being lost. I feel strongly that the White Paper seeks to extend the legislative powers of the Assembly, and in the spirit of the White Paper, therefore, it is important that we consider whether it is appropriate that the Assembly legislates on the Welsh language. I believe that the Assembly should legislate on the Welsh language, and, therefore, that principle should be recognised in the legislation that will follow the White Paper, and an Order in Council to transfer the entire policy area of the Welsh language to the National Assembly should be permitted at some time in the future. Following that, it would be for the National Assembly to create legislative measures within the specific area of the Welsh language, according to the political will of the day.

[503] **Carl Sargeant:** Thank you for your paper, Elin. We have had witnesses with many different opinions: some understanding what primary powers are, and some saying that there is some part of primary powers and secondary powers—it is all very wishy-washy, and it is the same principle, Orders in Council. If we recognise that, with regard to the White Paper and its proposals, there will be some rough edges, do you accept that the Welsh language aspect—I know that it detracts from your paper, but if you can follow where I am going—will also have some rough edges? There are also elements such as S4C, which is currently governed by the UK administration. How do you see that interacting and coming in? One of the issues with S4C is funding. How do we fund it and ring-fence the money within Wales? Do you see that as being a big problem?

Elin Jones: Yr wyf yn derbyn bod meysydd sy'n gor-gyffwrdd, ond nid yw darlledu yn faes a ddatganolwyd hyd yn hyn ac nid oes

Elin Jones: I accept that there are areas that overlap, but broadcasting has not been devolved to date and there is no clear

bwriad amlwg i wneud hynny—er fy mod yn eistedd ar Bwyllgor Diwylliant, y Gymraeg a Chwaraeon a drafododd ddarlledu am gyfnod hir yn ystod y flwyddyn ddiwethaf. Hyd nes y datganolir darlledu—os bydd hynny'n digwydd ar unrhyw bwynt—ni chredaf y byddai'n bosibl i fesurau o dan bwr Gorchymyn yn y Cyfrin Gyngor ar yr iaith Gymraeg ymwneud ag S4C o gwbl. Credaf mai ystyried darlledu fel maes y dylid ei wneud ac nid ystyried S4C fel un cyfrwng o fewn y maes darlledu. Ni chredaf fod gwrthdaro amlwg rhwng yr hyn yr wyf yn ei gyflwyno yma ac unrhyw beth a fyddai'n ymwneud ag amharu ar feysydd nad ydynt wedi'u datganoli ar hyn o bryd.

intention to do that—although I sit on a Culture, Welsh Language and Sport Committee that discussed broadcasting for a long time last year. Until broadcasting is devolved—if that happens at any point—I do not believe that it would be possible for measures under Orders in Council on the Welsh language to appertain to S4C at all. I believe that broadcasting should be considered as a field rather than have S4C considered as one medium within the broadcast field. I do not believe that there is an evident conflict between what I am presenting here and anything that would touch upon areas that are non-devolved at present.

Kirsty Williams: I take the point. I am with Jocelyn.

[504] **Y Llywydd:** Yr ydych wedi codi pwnc diddorol iawn nad yw'r Papur Gwyn wedi'i ystyried. Mae cynsail rhyfedd yn adran 32 Deddf Llywodraeth Cymru 1998. Os wyf yn cofio'n iawn, cafodd cymal ei gynnwys oherwydd ansicrwydd deddfwriaethol ynglyn ag a oedd rhywfaint o wariant yr hen Swyddfa Gymreig ar yr iaith Gymraeg wedi'i awdurdodi yn gyfreithiol. Dyfeisiwyd y term:

[504] **The Presiding Officer:** You have raised a very interesting point that the White Paper has not considered. Section 32 of the Government of Wales Act 1998 contains a strange precedent. If I remember rightly, a clause was included because there was some legislative uncertainty about whether some of the former Welsh Office's spending on the Welsh language was legally authorised. They devised this term,

'The Assembly may do anything it considers appropriate to support'.

Mae rhestr o bethau, ac yn eu plith, mae,

There is a list of things, one of which is,

'[c] the Welsh language...'.

Yr ydym yn sôn am awdurdodi gwario cyhoeddus drwy Ddeddf, ond ni allaf weld rheswm pam na ellid dyfeisio Gorchymyn yn y Cyfrin Gyngor. Gall Gorchymyn yn y Cyfrin Gyngor fod yn unrhyw beth o ran y ffordd y mae wedi'i baratoi. Clywsom hynny mewn tystiolaeth ddoe. Ni allaf weld pam nad oes modd rhoi cymal i mewn nad yw'n annhebyg i'r hyn sydd gennym yn y ddeddfwriaeth tân eisoes, yn dweud y gall y Cynulliad wneud unrhyw beth yn y maes deddfwriaethol i hyrwyddo'r iaith Gymraeg. Ni allaf weld nad yw hynny'n bosibl, er bod hyn yn dweud nad yw 'ardaloedd polisi' yn golygu yr holl faes sydd yn atodlen 2 o Ddeddf Llywodraeth Cymru 1998. Mae'r hyn yr ydych yn gofyn amdano yn bosibl drwy'r

We are talking about authorising public spending through an Act, but I cannot see any reason why we cannot devise an Order in Council. An Order in Council can be anything in terms of how it is prepared. We heard that in evidence yesterday. I cannot see why we are not able to include a clause that is not dissimilar to the one that we have in the fire legislation at present, which says that anything can be done in the legislative field to promote the Welsh language. I cannot see why that is impossible, even though this says that 'policy areas' does not mean everything in schedule 2 of the Government of Wales Act 1998. What you are asking for is possible through this system, as long as it is used creatively.

system hon ond iddi gael ei defnyddio yn greadigol.

Elin Jones: Mae ysbryd yr hyn yr wyf yn ei gynnig wedi cael ei gydnabod yn Neddf Llywodraeth Cymru 1998 ond nid oes pŵer yn y cymal hwnnw i greu deddfwriaeth i weithredu mewn unrhyw ffordd. Felly, mae dwy ffordd o weithredu'r egwyddor hon o ddeddfu. Un yw bod cymal mwy penodol o ddeddfwriaeth yn cael ei roi yn y Mesur a fydd yn dilyn y Papur Gwyn, fel yr wyf yn credu i chi gyfeirio ato. Yr ail yw newid, yn y Mesur a fydd yn dilyn y Papur Gwyn, gymal 3.18 yn y Papur Gwyn i gydnabod bod eithriad ar yr iaith Gymraeg ac fe ellid, drwy Orchymyn yn y Cyfrin Gyngor, drosglwyddo pwerau deddfwriaethol ar yr iaith Gymraeg i'r Cynulliad Cenedlaethol.

[505] **Y Llywydd:** Mae ffordd arall, sef cael dau Orchymyn yn y Cyfrin Gyngor. Yr wyf yn cael fy nghynghori o'r chwith y byddai hynny'n bosibl. Gellid ei wneud drwy gael dau Orchymyn yn cydweddu â'i gilydd.

Elin Jones: Pam mae angen dau Orchymyn yn y Cyfrin Gyngor? Oni fyddai'n haws newid y Mesur i ganiatáu i hyn gael ei wneud drwy un Gorchymyn yn y Cyfrin Gyngor? Yr ydym wedi clywed eisoes yn y sesiwn dystiolaeth faint o Orchymynion yn y Cyfrin Gyngor posibl fydd o fewn blwyddyn neu o fewn sesiwn Cynulliad, ac mae'n hynny'n debygol o fod yn weddol isel. Felly, os gellid cymryd y cyfle yn awr i wneud hyn drwy un trosglwyddiad grym o San Steffan i'r Cynulliad, gan gydnabod yr hawl mai dyma'r man priodol i ddeddfu ar y Gymraeg, yna dylid gwneud hynny—os yw pawb yn gytún ar yr egwyddor—yn y ffordd fwyaf effeithiol posibl.

6.50 p.m.

[506] **Y Llywydd:** Gallai'r Senedd yn San Steffan benderfynu o dan gymal 3.18 ei bod yn briodol i'r iaith Gymraeg yng Nghymru fod yn ardal bolisi mor eang ag sy'n bosibl. Mae achosion lle byddai'n ddymunol i hyrwyddo'r iaith Gymraeg tu allan i Gymru.

Elin Jones: The spirit of what I am proposing has been acknowledged in the Government of Wales Act 1998 but there is no power in that clause to create operational legislation in any way. So, there are two ways of implementing this principle of legislating. One is for a more specific clause of legislation to be included in the Bill that will follow the White Paper, as I think you were referring to. The second is to change, in the Bill that will follow this White Paper, clause 3.18 in the White Paper to acknowledge that the Welsh language is an exception and that, therefore, through an Order in Council, legislative powers over the Welsh language could be transferred to the National Assembly.

[505] **The Presiding Officer:** There is another way, namely having two Orders in Council. I am being advised from my left that that would be possible. It could be done by having two Orders in Council running side by side.

Elin Jones: Why are two Orders in Council needed? Would it not be simpler to change the Bill to allow this to be done through one Order in Council? We have already heard in the evidence session how many possible Orders in Council there could be within a year or within an Assembly session, and that is likely to be relatively few. Therefore, if the opportunity could be taken now to do this through one transfer of power from Westminster to the Assembly, thereby acknowledging the right that this is the appropriate place in which to legislate on the Welsh language, then we should do so—if everyone agrees on the principle—in the most effective way possible.

[506] **The Presiding Officer:** Under clause 3.18, the Westminster Parliament could decide that it would be appropriate for the Welsh language in Wales to be as broad a policy area as possible. There are cases where it would be desirable to promote the

Welsh language outside of Wales.

Elin Jones: Os yw pawb yn cytuno gyda'r egwyddor yr wyf yn ei chyflwyno, sef mai dyma'r man priodol i ddeddfu ar yr iaith Gymraeg, yna ni ddylai'r Mesur sy'n dilyn y Papur Gwyn wahardd hynny, fel mae'r Papur Gwyn yn ei argymhell, neu'n sicr fel mae cymal 3.18 yn ei argymhell. Dylai'r Mesur alluogi i hynny ddigwydd yn y dull mwyaf effeithiol posibl. Gallai hwnnw fod yn gymal penodol yn y Mesur sy'n dilyn y Papur Gwyn hwn.

Elin Jones: If everyone agrees on the principle that I have presented, namely that this is the appropriate place in which to legislate on the Welsh language, then the Bill that will follow this White Paper should not preclude that from happening, as the White Paper advises, or certainly as clause 3.18 suggests. The Bill should enable that to happen in the most effective way possible. That could be a specific clause in the Bill that will follow this White Paper.

[507] **David Melding:** While I have great sympathy for the case that you make, they will not allow an Order in Council to cover a whole field because, if that happens, you cannot pretend that it is not primary legislation. If the creature keeps quacking, people will start to call it a duck. That is the position that we are in, is it not?

Elin Jones: Guilty. However, the point that I wanted to make in my paper was that this specific field of the Welsh language is uniquely of interest to Wales, as a legislative matter, and is, therefore, an exceptional case; I am making an exceptional case here. I do not want to get embroiled in the whole debate about primary legislation versus Orders in Council.

[508] **David Melding:** You would say that—

Elin Jones: No; I think that it could be specific on this issue. That is the case that I make.

[509] **Jocelyn Davies:** Chair, you just read section 32 of the Government of Wales Act 1998, which states that the National Assembly for Wales can do anything in relation to the Welsh language, which allows us to spend money. However, if that section had stated 'do anything by Order'—and we already know, from Carl's contribution, that there is no difference between primary and secondary legislation in reality—then we would be in that position now, where we could have done anything with secondary legislation in relation to the Welsh language. There are only two words missing from the current legislation.

[510] **The Presiding Officer:** Yes. These are the enabling clauses or, if you like, the Lambert clauses, which enable Order-making powers to be used widely. However, we do not have those.

6.53 p.m.

Cofnodion y Cyfarfod Diwethaf Minutes of the Previous Meeting

[511] **Y Llywydd:** Cyn cau'r sesiwn gyhoeddus, hoffwn gadarnhau'r cofnodion. A wnewch nodi eich bod yn cytuno arnynt? Diolch.

[511] **The Presiding Officer:** Before closing the public session, I would like to ratify the minutes. Will you show your agreement? Thank you.

Cynigaf ein bod yn awr yn cau'r sesiwn gyhoeddus ac yn trafod paratoi'r adroddiad ymhellach. Gwelaf eich bod yn cytuno.

I propose that we bring the public session to an end and further discuss preparing the report. I see that you agree. We will meet

Byddwn yn cyfarfod mewn sesiwn gyhoeddus eto ar 21 Gorffennaf pan fyddwn yn derbyn tystiolaeth gan yr Arglwydd Morgan ac eraill. Diolch yn fawr; dyna ddiwedd y sesiwn gyhoeddus.

again in public session on 21 July when we will receive evidence from Lord Morgan and others. Thank you very much; that concludes the public session.

*Cadarnhawyd cofnodion y cyfarfod blaenorol.
The minutes of the previous meeting were ratified.*

*Daeth rhan gyhoeddus y cyfarfod i ben am 6.54 p.m.
The public part of the meeting ended at 6.54 p.m.*

**Cynulliad Cenedlaethol Cymru
Y Pwyllgor ar y Papur Gwyn—Trefn Lywodraethu Well i Gymru**

**The National Assembly for Wales
The Committee on the Better Governance for Wales White Paper**

**Dydd Iau, 21 Gorffennaf 2005
Thursday, 21 July 2005
QQ512-563**

Aelodau o'r Cynulliad yn bresennol: Dafydd Elis-Thomas, y Llywydd (Cadeirydd), Jocelyn Davies, Jane Hutt, David Melding, Carl Sargeant, Kirsty Williams.

Eraill yn bresennol: Ben Cottam, Busnes Cymru; yr Athro a'r Arglwydd Morgan; David Rosser, Busnes Cymru.

Swyddogion yn bresennol: Paul Silk, Clerc y Cynulliad.

Gwasanaeth Pwyllgor: Siân Wilkins, Clerc.

Assembly Members in attendance: Dafydd Elis-Thomas, the Presiding Officer (Chair), Jocelyn Davies, Jane Hutt, David Melding, Carl Sargeant, Kirsty Williams.

Others in attendance: Ben Cottam, Business Wales; Professor Lord Morgan; David Rosser, Business Wales.

Officials in attendance: Paul Silk, Clerk to the Assembly.

Committee Service: Siân Wilkins, Clerk.

*Dechreuodd y cyfarfod am 2.30 p.m.
The meeting began at 2.30 p.m.*

**Papur Gwyn—Trefn Lywodraethu Well i Gymru: Tystiolaeth
The Better Governance for Wales White Paper: Evidence**

[512] **Y Llywydd:** Croeso i'n tyst diweddaraf, yr Arglwydd Morgan o Aberdyfi. Mae'n rhoi pleser mawr imi ddweud y teitl ac i groesawu'r gwrthrych. Diolch yn fawr ichi am ddod ac am eich tystiolaeth ysgrifenedig.

[512] **The Presiding Officer:** I welcome our latest witness, Lord Morgan of Aberdyfi. It gives me great pleasure to say the title and to welcome its object. Thank you for coming and for your written evidence.

[513] **Jane Hutt:** Welcome, Professor Morgan. I am very pleased that you have given us written evidence and that you have joined us today. I found your written evidence very helpful in terms of helping us to take forward our aspiration and in terms of contesting, I am sure on many points, the aspirations of the White Paper, which is what we would like to explore with you.

I am very interested in your written evidence. You say that the two purposes of devolution are to ensure that we can develop all-Wales policies suited to the needs of the people of Wales and to be able to deliver them through executive action, and to ensure that we can

develop public policy, which might mean a divergence, and to develop that on a UK basis, which may go beyond devolution to a regional dimension. I would hope that the steps that the UK Government is taking in the White Paper would move us on one step further to achieve that, through the greater use of framework legislation and through the Order in Council route. I would say that we have perhaps already started to achieve this all-Wales purpose in terms of policy, delivery, legislative action and divergence, on occasion, from UK Government policy here in Wales. Could you respond to that? Do you feel that this will give us the opportunity? You said that the Orders in Council route may be helpful but that it is not good enough, but we feel that that may be the next step in terms of the maturing process of devolution. Could you comment on those points?

Yr Athro a'r Arglwydd Morgan: Diolch yn fawr i chi i gyd am fy ngwahodd i yma.
Professor Lord Morgan: Thank you all very much for inviting me here.

I think that there are many helpful proposals in the White Paper, and I indicated, in my letter, points that I particularly agree with. Yes, the Order in Council route could be helpful; I think that it could also be the reverse. A great deal depends on how, particularly, the Secretary of State responds and, for that matter, how parliamentarians in Westminster respond and, if there is a negative outcome from the attempt to use Orders in Council—let us say the Assembly expresses a wish that is not acknowledged or supported in Westminster—things could go backward. I think that it is a step forward, Jane, without question, but it is just one step and we need many, many more. It seems to me that the essential point about prime responsibility resting with the Assembly rather than the Assembly's being a kind of client, almost, of Westminster and Whitehall, is not addressed. There are many important aspects of the problem, which are, frankly, not argued at all; they are simply asserted, and no evidence is quoted. So, it seems to me that we need to go a major step further and that the basic conceptual point that responsibility should lie with the Assembly, except in clearly devolved areas, and, furthermore, that there is a logic even in the way you are already going, which implies that the Assembly would take on further powers, is simply not grasped.

On the whole, while I welcome some features, I found the White Paper disappointing and, I am almost tempted to say, predictably disappointing when, as a historian, I look at the history of Wales over the last 150 years. We have been taking a number of small steps for mankind and we need some giant steps.

[514] **Jane Hutt:** That is why we have the benefit of your presence here. It is about having that historical perspective, which is extremely helpful to us. However, even in our brief history, post-1999, we can demonstrate that, through having Wales-only Bills, we have had some divergence of policy. I engaged with that when I was Minister for Health and Social Services, with right and pertinent scrutiny from you, as a keen working peer, testing a particular development in health policy that was substantially different from the English direction. For example, we kept our community health councils and we are not having foundation hospitals, and that was our divergence of policy. We are developing policies through education such as the early years foundation phase. That, again, is a divergence in policy, which is meeting Welsh needs.

To take this point further, in terms of why you feel we could have been bolder because we have the opportunity for a referendum and I am sure that you welcome the fact that that is in the White Paper in terms of primary powers—

Professor Lord Morgan: I am not too keen on the referendum; I would not anticipate my views on that.

[515] **Jane Hutt:** No, but the opportunity to gain primary powers is in the White Paper.

Professor Lord Morgan: Yes, the opportunity is there.

[516] **Jane Hutt:** Also, to follow through the point on the Secretary of State and where the Assembly lies in terms of pre-eminence and what we want to do, it is clearly about when it would be appropriate for us, the Assembly, to approach the Secretary of State and say, ‘This is appropriate for us; we want this Order in Council’. It is not necessarily appropriate for a Secretary of State to say that something is inappropriate; it is for us to say that. We need to test that out through this route.

Professor Lord Morgan: It is not only appropriate, but essential for the Assembly to raise these matters. I am worried about the response and whether there will be a response. My starting point is that of the House of Lords Constitution Committee report on devolution, in which I had some part, which effectively said that there should not be a Secretary of State. That is not a comment on any particular individual. No doubt, if, for example, John Redwood were our Secretary of State, the point might be made with greater clarity, so to speak, than it is now. The Secretary of State is there, possibly as a conduit, possibly as a barrier. It depends on the Secretary of State whether or not there will be Orders in Council, but he has to give reasons. We are assured in the White Paper that his reasons will not be trivial; I do not share that confidence, as a historian, at least. Many foolish things have been done over the years.

Basically, I do not think that these matters should rest on the decision of a Secretary of State. I think that it is indicative of the very ambivalent nature of the Secretary of State, as a potential obstacle, which, as Mr Murphy once told me, is about presenting but not representing the views of the Assembly. That is a very honest view and, I think, a totally unsatisfactory one. However, it also reflects something much deeper, which is that it all depends on *laissez-faire*, shall we say—how things will go and how the Parliament will respond. It depends on informal structures and convention. I have always been a believer in a written constitution. Devolution strengthened the case emphatically.

There are things in the present settlement that most certainly should be written down. These include, for example, the so-called concordat between Whitehall and Cardiff. This is not generally accessible. It seems to me that the way that an Order in Council works, assuming that matters will not be trivial and that Parliament will respond, is precisely the kind of slow-moving, conventional process that is a drag on the wheel. I have never been a conservative with a big or a small ‘c’, as you know, but informality is an argument in favour of conservatism—of having major changes but of ensuring that they operate in a cautious and limited way. Hitherto, I do not feel that the constitutional settlement for Wales has been fully enacted, and I would like it to be.

I greatly admire what the Assembly has done and the opportunities that you have taken, but the basic step forward has not been made. Sorry to go on a bit, but we heard a great deal of evidence in the House of Lords Constitution Committee, including a great deal of academic and civil service evidence on how unsatisfactory the Welsh legislative process was, and the anomalies are still there.

2.40 p.m.

You rightly mentioned your very interesting health Bill. That should not have come before Parliament. I saw no reason why a measure in relation to Welsh priorities, from the elected Assembly—elected by the people of Wales—was considered by the totally unelected House of Lords. I think that I may have made that point then. It came before the Lords, and the

Lords had no view on the matter. Ironically, it occurred just before a Bill on fox hunting, which meant that Tory peers flooded into the Chamber; several of them voted against your particular Bill, which did not get through by very many votes, for this utterly absurd and adventitious reason. It seems that if not only Orders in Council, but everything within the devolved sphere—primary and secondary—came within the orbit of those appointed or elected to carry them through, then this confusion would not occur. We received evidence from Professor Patchett and Professor Rawlings, which no-one contradicted; it was a clear academic diagnosis of what was wrong with the whole legislative process. Ivor Richard's report demonstrated that with great clarity. I hope, following your committee report, that perhaps the Government will look again at this, in my opinion, rather timid document.

[517] **Jocelyn Davies:** I know that you say in your submission that you are not a nationalist, but you are certainly a Richard man rather than an Orders in Council man.

Professor Lord Morgan: Indeed.

[518] **Jocelyn Davies:** Do you think that Orders in Council provide an appropriate tool or model for the governance of a country? They are based on the royal prerogative and rely on goodwill, which has been described to us, in evidence here, as unstable.

Professor Lord Morgan: One of the problems, Miss Davies, as you can imagine, is that the extent, or even the existence, of goodwill is a matter of guesswork, is it not? At the moment, the process has benefited from having people in all of the assemblies who are members of the same party. One can imagine the confusion, and indeed the conflict, that would arise if that were not so. I would have thought that Orders in Council would be ad hoc and would depend on the particular viewpoint of a particular official. They would always be open to Members of Parliament—and we are probably, in this case, talking about Labour Members of Parliament—who could block them and be obstructive. My colleague, Lord Gwilym Prys-Davies, raised a very important point in, I think, a written question to the relevant Minister in the Lords: where is the dispute resolution mechanism? What happens if the Assembly takes one view and the Secretary of State takes another, and the Secretary of State says that his reasons are not trivial though the Assembly may believe that they are? Where do we go from here? That is not even approached or raised, let alone answered. On the whole, therefore, my answer to your question would be no, I do not think that they do.

[519] **Jocelyn Davies:** This White Paper will form, not the second Government of Wales Act, but an amendment to the Government of Wales Act 1998. From the evidence that we have heard so far, some people have felt that it could, in itself, be the end of a journey, and that we would live very happily in this Orders in Council phase, while others have suggested that it is just a way to cross the road—that it will last five minutes and will become so unworkable that we will then have to go for another Government of Wales Act, which would, I suppose, be the Bill that contains the referendum and the proper Parliament. What is your view on those two options? Would the second phase be something that we could endure for a long time, or would it very swiftly lead to a third Government of Wales Bill?

Professor Lord Morgan: Either scenario is possible; however, considering the way that devolution has already gained momentum in the six years since the Assembly was established, a scenario of conflict is more likely, simply because the Assembly would be pushing for more and the authorities in Whitehall would be trying to maintain the status quo. It does not add up to devolution; it does not add up to the legislative initiative residing primarily in Cardiff. Every aspect of devolution is hedged by Whitehall control; the Treasury arrangements, including the Barnett formula, are determined by Treasury priorities. We have already discussed the role of the Secretary of State. We have the very strange situation in

which you might well have a block of Welsh matters dealt with in a Bill, as we have had in relation to health, or we might have Welsh measures dotted like currants in a bun all over the place. It is a very messy procedure; I think that the Richard commission called it a hybrid form of legislation, which is putting it politely.

[520] **David Melding:** Lord Morgan, you have clearly indicated to us that you take Occam's razor to this, by establishing the classic British parliamentary model of locating executive and legislative functions in the same institution. Do you feel that the intention of Orders in Council is to establish primary powers without the need for the promised referendum?

Professor Lord Morgan: No, not on paper. Looking at intentions is a difficult game, as they are not overtly stated. I am in favour of the greatest possible clarity in the arrangement, which is why I am so keen that this is so in devolution, as in a good many other matters, ranging from civil liberties to royal prerogative, which is far beyond our purview this afternoon. I am in favour of having them written down; written constitutions have a way of not being frozen in time, not set in stone for all time. If you consider the United States or France, you will see all sorts of examples why that is not so. However, it would lay down clear fundamental principles. At the moment, the principle of where legislative initiative is located is not set down; it is not even asked in this paper. Many parts of this paper's logic is extremely weak. If it was an undergraduate's essay, you would mark it with a B double minus and say 'have another go next week'. It is disappointing since it is put together by able people, with whom I am in agreement on other issues. So, I think that it is very unsatisfactory.

[521] **David Melding:** I will ask you to make a leap of the imagination and accept that this system, by custom or practice, becomes quite durable, and survives a change of administration in Westminster; how would you see the scrutiny side of this working in the Assembly? If that worked well, would you be reassured, or would you remain fundamentally concerned that the scrutiny needed for any legislative activity devolved by these mechanisms to the Assembly may not be robust?

Professor Lord Morgan: There are proposals about scrutiny, as you know, Mr Melding—particularly in the first part—and they would certainly improve matters. To me, the question is not the process of scrutiny but what is scrutinised and whence it comes. Essentially, it would come directly or indirectly from Westminster. That is a perfectly tenable point of view, but I am sure that that was not what was intended, and not what the Welsh people were asked to vote on in 1997. The question is, therefore, avoided.

[522] **David Melding:** I understand that the power of initiative may rest in Westminster, and that Westminster may prevaricate or delay. I assume, however, that the Government, possibly committees, or even backbenchers, could request that the Assembly deals with legislative activity in a particular field via an Order in Council. In the House of Lords, the responsible Minister speaking to the statement said that the Government saw the Orders in Council likely to emerge, as the long title of a Bill, not as the whole detail. So, the scrutinising function would come to the Assembly, would it not, because the Executive would have drawn up its proposals, and would go through them line by line in examination? Would that not be robust?

Professor Lord Morgan: As a scrutinising process, that depends on where it comes from. It depends what agenda they are scrutinising. You can, of course, have over-scrutiny. Some examples of measures taken to almost excessive detail were quoted in the evidence of the Richard commission. There should be a brisker process for what is conceived to be Wales-only legislation. One important point made by the Richard commission report which, off the top of my head as it were—I do not remember it coming up here—is that it assumes that there will be use of more Sewel motions. In other words, the Assembly would be freed up, and measures that could be dealt with by the Assembly would be handled by Westminster, and there would, of course, be plenty of work for Welsh MPs to do in that particular

connection.

2.50 p.m.

Therefore, I think that you could have a balance there. However, scrutiny is important, but scrutiny is not enough. If we take the first part of the report, which states that there should be a Welsh Executive that looks like a Government, which I think is probably generally agreed now, then the assumption is that it would have, as it were, a statement of priorities, a legislative programme and, within the guidelines of the devolution settlement—which are constantly being tested, of course—that should go through, and it really would not. I think that the outcome would probably be a rather fragmented process, and the, so to speak, bits that did not work would be the ones that would cause the ill will.

[523] **David Melding:** Finally, in response to a question from Jane Hutt, you said that the Orders in Council procedure is perhaps a step in the right direction, but many steps need to be taken. From that, can I at least infer that you do not think that this type of procedure, with all its ambiguity and possible flaws, would put back the case for primary legislation—that it would not damage that in the long term? Or, do you fear that, if this becomes a dog's breakfast, then the whole legislative potential of the Assembly will be downgraded?

Professor Lord Morgan: I do not think that it will damage it in the long term, because I regard the case for primary legislation as absolutely irresistible—it has happened to every other legislative power in the world. I suppose that you might say that, given that the Assembly has only been in being for six years, you have advanced quite rapidly in that time. I think that I take the Richard commission's point at the beginning of the report, when it says that the fact that we have got so far indicates what a very sensible and sound idea devolution is.

People find all sorts of parameters that they had not anticipated before; each of the previous ones has proved limited. The Orders in Council may make some progress; it could be argued, as I say, that, if you have a quite different view taken in Westminster, the Orders in Council could be enormously harmful, and could slow up matters. My feeling is that the main political parties have taken it on board. I believe that you are a Conservative, are you not? Your party seems to me to have advanced admirably in its thinking on these matters, and realised the potential for it. As a historian, it always seemed to me that the Conservatives absolutely should support devolution, because, since 1868, it has been the party of born losers, so to speak, whereas now you have a real and creative role, which, frankly, you have hardly ever had in nearly 200 years. So, that is welcome.

Therefore, things do advance. They advance, and I referred to the Conservative Party, very importantly, on a consensual front. Devolution is a community advancing, and not a particular political party. Although I am a Labour peer, I am not a partisan person in these matters at all—I certainly hope not.

[524] **David Melding:** I will ensure that your remarks are passed on to my colleagues.

Professor Lord Morgan: Thank you.

[525] **The Presiding Officer:** There are no further questions about the Welsh Conservatives, are there?

[526] **Kirsty Williams:** Lord Morgan, my colleague, David, suggested, and you did not disagree, that the Order in Council could take the form of nothing more than the equivalent of

a long title of a Bill—indeed, that was the idea advanced by your colleagues in the House of Lords. However, this committee has also received evidence that that would not be an acceptable way to proceed, and that the Orders in Council would have to be far more detailed if they were to be passed by the House of Commons and the House of Lords. What would your opinion be of your colleagues' expectations of what an Order in Council would look like? Is it something as simple as the long title of a Bill, or would they require almost a worked up Bill to be presented before they would consider it?

Professor Lord Morgan: It is difficult; the House of Lords is not a very obvious collective unit, even on the Labour benches—my father's house contains many mansions, as they say. However, I think that the House of Lords would probably be very happy to take the simplest possible view of what an Order in Council is.

The expectation is that legislation, or any enactments, relating to Wales are part of a devolution process on which the decision has been taken. The normal procedure is that we get through Welsh legislation quite rapidly. A large number of my colleagues and the people who normally take an interest in these matters are Labour and Liberal Democrat peers—and, indeed, the Plaid Cymru peer, should he be there. The expectation is that these are matters that should have only the most peripheral role anyway. In a way, that is not so much the problem. Wales-only Bills are seen as a natural outgrowth of devolution. It is more of a problem when Wales measures, or measures that might be Wales measures, become entangled in an England and Wales Bill, where the boundaries are not clear.

It is in that connection, if I recall, that I mentioned in my letter the Children Act 2004. I thought that it was potentially a very disturbing affair. That Act should have had separate legislation in Wales. It had separate legislation for Wales earlier in the process, in which I took part, in 2000-01. That was clearly an England and Wales Bill that began with a separate Wales rubric. The English rubric superseded and swamped the Welsh rubric, with the extraordinary result that a Welsh children's commissioner could potentially be overridden by the English children's commissioner, who had reduced powers and a completely different philosophical rubric, which is not geared to the United Nations convention on human rights. I hope that that never happens again. We were defeated—quite narrowly, in single figures—by the Government on that. Such things should not come to the House of Lords. It is not the role of the House of Lords to consider legislation for Wales, particularly as the House of Lords, contrary to my opinion of what it should be, is not elected. That makes it even more appropriate for you, as you are elected.

[527] **Kirsty Williams:** One example of a potential Order in Council that has been given to the committee is on the issue of the welfare of children. To what extent would it be appropriate for Parliament, including committees of the House of Lords, to lay down restrictions—as some have suggested might happen—on the nature of legislation that could be made under Orders in Council?

Professor Lord Morgan: It would be nice if Parliament, rather than the Government, did so. The Government has a standpoint that, according to the White Paper, is rather narrow. It would be far better if we had a new or supplementary Government of Wales Act that set out these things in written form to make it quite clear. We do not stop with the written form; we can go on from that, but it would give us an essential, clear starting point of what a Wales Bill is and what would be appropriate for a devolved matter. The children's measure pushes into Home Office matters, which are not devolved. However, in so many instances they actually are. That could be set down clearly. I am all in favour of clarity in these matters.

[528] **Kirsty Williams:** I am too, but perhaps you could give us clarity on what might

constitute an appropriate legislative workload and timescales. I am concerned that we could have a very go-getting administration in Cardiff that wanted to make the most of the opportunities, limited though they may be under this system, and that really wanted to get things done and push for the Orders in Council, but that it could take two or three years at a time to secure that. I am not optimistic that anything that the committee or anyone else might say will change the Government's mind about the sort of settlement that we may have on the amendment to the Government of Wales Act 1998. What is a realistic timescale, and how many legislative opportunities do you think that we could look to enjoy in a four-year term of the Assembly?

3.00 p.m.

Professor Lord Morgan: Possibly not many, but more than you are getting at the moment. Your esteemed First Minister, who is a very old friend of mine, pointed out that Wales legislation had shown a 500 per cent improvement. That is the difference between five and one, so that is not a great advance over the period of time. Again, it is a fairly small step for us all. I would have thought that it was a matter of a few weeks at the most, really; I do not see why these Orders in Council should take any time at all, but I think that they are bound to, given the institutional complexities.

So, I do not view them with enthusiasm. I suspect that the most positive aspect of this White Paper—though I know that we have not talked about other bits of it—would be encouraging the use of secondary and delegated legislation and taking more opportunities there, but Orders in Council are ad hoc. You just need one stumbling block, I think, and the whole thing will fall apart. It is not the way to go forward at all; it is another aspect of governing by convention rather than by written contract.

[529] **The Presiding Officer:** Carl Sargeant is next, then Jane Hutt, and I might ask one or two questions to wind up.

[530] **Carl Sargeant:** Lord Morgan, good afternoon to you. My personal view is that devolution is a rolled-out process, but we will get to that—and I accept some of your comments in your paper—and, for today, if we can accept that Orders in Council may be part of the process that we will be entering into post 2007, do you believe that Orders in Council should primarily be made only by the Assembly Government, or should it be opened up so that all Members of the Assembly, or even committees, could put an Order in Council forward?

Professor Lord Morgan: I am reluctant to offer a view on what ought to happen in your Assembly. I will not offer a view on that, if you forgive me. I have thoughts on it, but I might be discourteous if I gave them.

[531] **Carl Sargeant:** Okay.

[532] **David Melding:** Others have offered. [*Laughter.*]

[533] **Carl Sargeant:** Accepting that, on the basis that—

Professor Lord Morgan: One point that I had in mind was that we are moving more towards a Government and parliamentary situation in the Assembly. I think that that would presuppose putting the main initiatives with the Executive after the proper process of discussion, but I would not wish to intrude.

[534] **Carl Sargeant:** Thank you for that response. On the basis that you suggested to my colleague, Kirsty Williams that we may get a few Orders in Council through each year, it could, potentially, be open to everyone in the Assembly to raise Orders in Council. It could be about just firing Orders in Council into Westminster and so on. Therefore, the pre-legislative scrutiny would be particularly important before the Order leaves the Assembly. Do you have any views on that?

Professor Lord Morgan: I think that it would. I think that that happens now, and I think that it could be eased, frankly, by one aspect that we have not hitherto mentioned, namely having a bigger Assembly. It is already a very big workload for 60 people, of whom 50 or so are not Ministers, so they have to work extremely hard. No, that would be fine.

I think that what I am worried about with all this business of Orders in Council is not what happens here, but what would happen in Westminster. I think that it is likely to be protracted. It is clear from the language and tone of the White Paper that these steps are not to be taken lightly, and they will be considered with great care, and perhaps by the Welsh committee in the Commons, and individual gatherings of Welsh MPs. These are just a whole series of obstacles, which slow up the process enormously.

As Ms Williams suggested, there might well be a very pro-active Government in Wales that is just seeking to be frustrated. I guess—as I am sure that we all do—that I contrast in my mind the Assembly and the Scottish Parliament, where these issues do not appear to exist, because, if I may say so, public esteem for the Scottish Parliament is much higher—not because the Members are any better than you, but because they have a much clearer pro-active role, and it is so obviously their policy. I do not think that Orders in Council would play particularly well with the Welsh voters or attract an enormous amount of interest.

Mr Hain would probably be benevolent and well-meaning, but in relation to who might follow him, one does not know. However, the tendency of the Government generally, and I speak as, broadly, a supporter of the Government, is to propose initiatives. Many of these came from Lord Irvine's wonderful period, whom I would assess as being the greatest Lord Chancellor this country has ever had—he was much better than Cardinal Wolsey to whom he was once compared. Since then, things have not been followed up. The Department for Constitutional Affairs has been very disappointing, and anything that follows Mr Hain might be a let-down. So, it is not very good news.

[535] **Jane Hutt:** I wish to just briefly follow that up, Ken. We obviously have to take your forewarnings. I am interested in the fact that we have talked a lot about Orders in Council as a means to an end. All of this is a means to the end of delivering better policies that fit the needs of the people of Wales. When Rhodri Morgan came here to give evidence, he talked about the principle behind the White Paper being powers for a purpose rather than powers for their own sake. We also have to recognise the commitment of the UK Government to more framework legislation; we know that we have opportunities with regard to the public health Bill and smoking in public places. Do you agree that that will also be an important route, that commitment to more framework legislation in this stepped process?

Professor Lord Morgan: Absolutely, yes, but I would like it as an addition and not as a substitute for the powers of the Assembly, but it will help.

[536] **Jane Hutt:** I suppose that it goes back to the Government's indication in the White Paper of a commitment to making this work, which I am obviously optimistic about, and you are quite rightly scrutinising. However, you have also mentioned the Scottish situation, but there are areas that are reserved and, interestingly, that came up in relation to the non-

devolved issues relating to our children's commissioner and the Scottish children's commissioner. They were reserved by the legislative process through the Children Act 2004.

I suppose that my question is whether you feel, looking at it as a powers-for-a-purpose project in the devolution process, that it is robust enough to allow us to deliver the policies that emanate from the Executive, which are backed by the Assembly and that then go forward for action in Westminster.

Professor Lord Morgan: On the whole, I think that my answer is 'no', Jane. I do not think that it is at all robust enough. Even Ivor Richard, whose proposal was very radical, proposed a transfer by 2011. I do not know what the timetable would be in achieving these particular purposes under this proposal.

You desperately need to make people see the point of devolution to generate enthusiasm for it. You also need to use one of the well-worn clichés of New Labour—you need 'joined-up government'. I do not see how you are going to have joined-up government in Wales if powers are dispersed and if legislation is hybrid in this particular way. It seems to me that the whole initiative is weakened. As for whether the outcome in due course is an independent Wales or not, I do not think that it would be, and would not support that. However, it would be a Wales that felt, at this level, that it was in command of its destiny.

If we had a federal system in the United Kingdom—I do not know whether I would particularly support that—things would be absolutely clear. One could say with some degree of clarity, and almost spell out the timetable, when things would change. On the whole, this is a kind of long-grass solution, and I would like the grass to be avoided and certainly cut.

[537] **The Presiding Officer:** I was not going to ask you this, Lord Morgan, but I am now tempted to do so. In the long march to devolution, if I can use that expression, which you have very elegantly charted since the middle of the nineteenth century, where do you put this document?

3.10 p.m.

Professor Lord Morgan: I would put it with a long list of documents that show timidity about change; they do not really grasp it. I wanted to say this in my letter. It is argued, or we are told, that there is not a consensus on this matter, but, as a matter of fact, if you looked at the evidence from our admirable institute in Aberystwyth, of which I had the privilege of being vice-chancellor, you would see a good deal to show that the overwhelming view of the people of Wales is that they want the Assembly to have many more powers, and to have them quickly. However, the point is not discussed.

The record of Wales goes back to the fact that it was a conquered country; it was not an independent state as Scotland was. It does not have the concept of statehood and citizenship that Scotland has, and things are slow to change. There was a dramatic period of change, which owed a great deal to the presence of the admirable Lord Irvine, between 1997 and 1999. That was a unique period of dynamic movement, not only in Wales, but in the history of the people of this country. That period, as you know, included the enactment of the Human Rights Act 1998 and other wonderful pieces of legislation. I think that this White Paper is well in line with what Wales has had to put up with for 150 years.

[538] **The Presiding Officer:** I do not think that I can follow that.

Diolch yn fawr am eich presenoldeb.

Thank you for your attendance.

Yr Athro a'r Arglwydd Morgan: Diolch yn fawr. Yr oedd yn hyfryd iawn.

Professor Lord Morgan: Thank you very much. It was wonderful.

[539] **The Presiding Officer:** It is my pleasure now to welcome representatives of Business Wales. I would like to thank David Rosser and Ben Cottam for their presence and for their joint paper. Mr Melding, do you feel able to start the proceedings?

[540] **David Melding:** I will start with a good Tory question on value for money and what we will get as a return. You seem very sceptical about some of the suggestions, particularly formalising the roles of the Deputy Ministers and, presumably, increasing the size of the Executive who will all get busy and generate lots of red tape. Is that a fair summary?

Mr Rosser: On the issue of Deputy Ministers, we possibly strayed into constitutional issues. Scrutiny will clearly be desperately important in the new system, and it should not be a job just for opposition parties. On value for money, the Assembly is clearly not flush with funds at the moment and we would not wish to see a great diversion of funds from the delivery of services to administration. We have seen recent examples of change management in the Assembly, where the costs of change have possibly not been identified at the outset. We just wish to avoid seeing a repeat of that situation.

[541] **David Melding:** In terms of the civil service and the support staff that we would have, most of us believe that the costs would be considerable. I am not saying that the Government shares that view, but if more policy is to be determined, certainly on the legislative side, we will need more legal draftsmen and more policy experts and, for the legislative side to scrutinise effectively, the committees will need more technical support. This will come at quite a cost. Do you object in principle to that or are you warning us that people would expect good value for money from that investment?

Mr Rosser: Business Wales has not formed any particular view on the transfer of further powers to the Assembly and whether that, in principle, would be a good or a bad thing. If the Assembly adopts and receives further powers, we have a distinct preference for good legislation as opposed to poorly thought out and poorly crafted legislation. We have no problem with employing resources to ensure that the Assembly is able to pass good-quality legislation. I think that it is then the job of the Assembly to demonstrate value for money and that the legislation that it is passing will make a real difference, to the benefit of the people of Wales.

[542] **David Melding:** Let us assume that the legislative side of our work increases, and that the mechanism that is proposed is, more or less, Orders in Council, but also greater scope for delegated legislation. Are you confident that the business community will be able to co-operate in this process and have a role, or are you concerned that in what is proposed it is not quite clear yet as to how you would influence that process?

Mr Rosser: We listened with some awe to the previous speaker and the dialogue across the table.

[543] **David Melding:** I do not want to take you down that road again.

Mr Rosser: I claim no constitutional expertise.

[544] **The Presiding Officer:** We all listened in awe to Kenneth Morgan.

Mr Rosser: I am not at all clear in my mind, from having read the proposals, as to how the new system will work. I wait with interest to see what will happen. As to your question on whether the business community can get fully and properly involved, it is incredibly fragmented, which is the first problem. The real issue is whether the business community feels able to get fully and properly involved in the current system. A number of our comments in the paper were around trying to strengthen the ability of the business community to engage formally with the Assembly and to ensure that, where we make the effort and put the resources in to engage, we feel as though we are having a real say in the process and that our views are taken on board.

Mr Cottam: As we have outlined in the paper, there is an opportunity within any change to the Assembly's structure and powers to enhance the role of business in consulting not only with the Assembly as a legislature, but also with the Government with regard to policy making. The business community would inevitably rise to the challenge, as it is in its interests to do so, and would want to interact in whatever way it could to make sure that whatever policy making and legislation comes from the Assembly, it is properly responsive to the needs of the business community in Wales and keeps the business community at least on the footing that it enjoys at the moment, if not on a more competitive footing with its counterparts outside Wales.

[545] **David Melding:** I have a couple of other issues, to which I will perhaps come back.

[546] **The Presiding Officer:** Okay.

[547] **Jocelyn Davies:** Thank you for your paper. Paragraphs 19 and 20 talk about the requirement to set up a scheme for consultation, and you think that there should be a statutory requirement to establish the business partnership council. How will you justify to me that Westminster should create statutory requirement for the Assembly to set up that partnership council instead of our deciding for ourselves and putting it in our Standing Orders? Why should it be a statutory requirement?

Mr Cottam: Obviously, such a scheme exists currently with the public and voluntary sectors, and, broadly, we would like to see the private sector treated in a similar way and have a similar opportunity to have a broad plan of work, if you like, and reflect on that work on an annual basis. However, we feel that we have an arrangement at the moment which, although it does give business the opportunity to input into the Assembly's thoughts and processes, is a rather informal process, and, given what is outlined in the White Paper, if that were to be taken forward, the process would need to be properly formalised.

[548] **Jocelyn Davies:** But does it require a statutory basis, or could Standing Orders accommodate that?

Mr Cottam: I do not see any reason, from my experience, why Standing Orders could not accommodate that.

[549] **Jocelyn Davies:** Thanks. In paragraph 29, you mention the existing split of powers between the National Assembly and the UK Parliament, and you quite rightly say that it is not clear, because of the way in which the devolution settlement was created, there is a danger that that situation might not be clarified by these new proposals. Why do you feel that these proposals will further complicate things? Is it because we could have our powers from several sources, and some will reside with the Assembly and some with the Government?

3.20 p.m.

Mr Cottam: That is certainly what lies behind it. I do not think that you can expect the business community to get down and understand the nitty-gritty of the legislative process. There was certainly concern around the Business Wales table that whatever comes from any reform, as proposed in the White Paper, there needs to be clarity as to what comes from where, and I think that that is a reflective comment.

[550] **Jocelyn Davies:** A simpler situation would be your preference, obviously.

Mr Rosser: Clarity would be our preference. Much of the discussion in the first half of your meeting highlighted where it may not happen.

[551] **David Melding:** May I just clarify something?

[552] **The Presiding Officer:** Indeed.

[553] **David Melding:** The way in which the Government, and potentially the Assembly, relates to you could be in Standing Orders, as you say, or by statute, but presumably you want to be treated the same as the voluntary sector and the local government sector. Was that the point?

Mr Cottam: Certainly.

[554] **David Melding:** So it would be the same system for all.

[555] **Jocelyn Davies:** And something formal rather than informal.

Mr Cottam: Yes.

[556] **The Presiding Officer:** Further to that, would your general opposition to proliferation of bureaucracy and unnecessary and unbusiness-like meetings—I am playing devil's advocate here—not point to more direct relations to Government, rather than going through the rigmarole of these statutory councils, which meet because they have an agenda and have to meet?

Mr Rosser: I am not sure that we accept that it has to be bureaucratic—that is your interpretation. We would be very happy to sit down and look at a simple way of ensuring that we have a strong dialogue with the Assembly and clear working arrangements in a way that would bring speed and consistency to both our sides.

[557] **Jane Hutt:** Thank you for your paper, David and Ben. I know that you sat in on Professor Morgan's evidence, and you say in paragraph 24 that you see that we must have legislation passed where there is a definite need, and not passed merely to demonstrate that the National Assembly for Wales can legislate. It goes back to the point I made about powers for a purpose, in other words, we legislate because we want to do something in terms of policy, and not for the sake of it. So, I presume that you are into a more timid or gradual approach towards devolution—you may wish to comment on that. Clearly, business has much to contribute, for example, in relation to sustainable development, the social economy and the macro and micro economics of Wales. We need to understand from you how you feel that business can be more clearly mainstreamed into what we do in Government, as well as in the legislature. Perhaps you could comment on those points.

Mr Rosser: I am not sure that it is a timid approach to devolution—there are some strongly

held principles at different levels of different business people as to where devolution should get to and at what stage. As I said, Business Wales as an organisation has not formed a view on where devolution should get us to and to what timescale. The Confederation of Business and Industry has—its view is that, broadly, the current devolution settlement, albeit that we could clarify the powers, is probably the right place to be at the moment. I think that it is largely based on the fact that the business community, possibly of all the stakeholder communities in Wales, is probably the most affected by what happens outside Wales. The border really is not terribly meaningful for business in the way that it can be meaningful for many other stakeholder groups. The vast majority of businesses in Wales either trade outside Wales or are subject to competition from outside Wales. So, a different operating environment for its own sake is something which really impacts on business to a great extent.

If it is a company that is outside Wales, we have to face the fact that Wales, whether we like it or not, has a terribly small market: it is 5 per cent of the UK market and less than 1 per cent of Europe's market. If we make Wales a very different place in which to operate, requiring businesses to do things very differently in order to operate here, some businesses will decide that the size of the market does not warrant that. Other businesses already located within Wales may find that the need to invest in understanding and complying with the different legislative environment has a real impact on their ability to operate outside Wales. So, there is a meaningful reason why businesses are, to use your words, more timid; I would say that businesses are more cautious, or would prefer a much more gradualist approach to devolution. It is based on that.

As to how we engage with the Assembly, part of our concern is that, while we have had a dialogue with the Assembly and the Assembly Government, most business organisations have been less than convinced that the needs of the business community have been fully taken on board in the wide spectrum of Assembly policy making, even, sometimes, in areas such as economic development, which are aimed at the business community. That is why we would like to see a formal relationship between the business community and the Assembly Government, based on a clearly stated scheme of how we will relate to each other, how the Assembly will operate for the benefit of the business community, and promote it, and an accounting to that scheme on a periodic basis. As Ben says, most of the business organisations and a number of our individual members, as companies, have put an awful lot of effort into that engagement with the Assembly over the past five or six years and would be prepared to continue to do so. However, the appetite to do that varies according to the difference that they think that it will make and the degree to which their views are understood and taken on board in Assembly policy making. We are flexible about the exact method and the bureaucratic nature or otherwise of the meetings and so on, but we would welcome having that formally laid out.

[558] **The Presiding Officer:** You mentioned the separation of powers between the Government and the legislature and the clarity that that might introduce, but, at the same time, you expressed concern about an increase in running costs for legislative and scrutinising activity. Do you have a steer to help us to close that issue, as it were, and to take us through the conundrum? If we are to properly represent different interests, whether they are to do with environmental policy or they are those of business or the countryside—and I notice that the National Farmers Union is among your members—or to have them represented to us as Assembly Members, we need the ability to scrutinise and to deliver scrutiny, which means measuring outcomes—not just imagining policy but looking at its outturn. That is perhaps not done very well by any legislature in the UK at present. Can you suggest any ways to guide through some of that, because you have obviously thought about this?

Mr Cottam: What is proposed, as I mentioned earlier, provides an opportunity for business to get more involved. In terms of representing interests, it is important that we take the opportunity to ensure that interests are represented as early as possible in any legislative proposals or policy making. At the moment, there is concern among the membership of Business Wales that, although consultation is widespread and welcome, our views tend to be entertained quite late in the day, and that means that they can only have a minimal impact on what comes from the consultation. There is an opportunity now to ensure that the Assembly and the Assembly Government invite the views of the business community as early as possible to ensure that the views are properly represented and fed in.

[559] **The Presiding Officer:** By that, I take it that you are saying that you would welcome pre-legislative scrutiny so that proposals are properly thrashed out before they reach the consultation stage.

3.30 p.m.

Mr Cottam: I certainly agree with that.

Mr Rosser: Your point about the contradiction between costs and better scrutiny comes down to Mr Melding's point about value for money. We would not make simplistic comments about the sheer number of civil servants and criticise on that basis, but it puts more pressure on the Assembly to clearly demonstrate that its employment levels and way of organising its work is efficient and is delivering. As an example, many of my members will comment on the propensity of the Assembly to multiply everything by 22 so that we can do things according to local authority boundaries. That is one example perhaps of where our members see form taking precedence over substance. So, that puts the pressure on the Assembly to demonstrate value for money.

[560] **The Presiding Officer:** However, if we were to try to look for a sharper committee structure—although that may not necessarily be in our report—whereby we are seen to be delivering in the way that the Audit Committee delivers, having the very substantial resources of the Wales Audit Office, and being able to ask questions, in a select committee mode, of Government and Ministers and to do an assessment of programmes, including, as I mentioned earlier, of their out-turn, impact and effect, and if we could demonstrate that we were delivering value for money there, then that would interest your members.

Mr Rosser: Undoubtedly. I think that you will find that, as now, many people will not differentiate between the Assembly and the Assembly Government. I suspect that that may continue to be the case post changes and post the split. People will still ask, 'Why do we have all these people doing this?', when it adds no value in their perception. It is an issue for both sides in future—for the Assembly and the Assembly Government—to demonstrate value for money and efficiency.

[561] **Carl Sargeant:** I have a brief question. Your paper and evidence is pretty consistent with the business industry as it would normally present itself, in terms of value for money and early consultation, which I appreciate. I also accept the danger posed by dual legislators and the pressures that that would put on businesses across England and Wales. This is slightly unfair, but I will say it anyway, that I saw your body language in response to an earlier comment by Professor Morgan on gaining more powers for the people of Wales. He said that it was evident that the people of Wales were quite keen to have more powers. Is that the view of the business industry? What are your thoughts on that?

Mr Cottam: Speaking as a representative of the Federation of Small Businesses rather than

of Business Wales, if I may, I do not find that reflected among the membership of the Federation of Small Businesses and we have some 8,000 members in Wales. So, that is quite a high number. I have to say that we have not conducted extensive work into this, but the views that come my way do not reflect that.

Mr Rosser: As I said, the Confederation of British Industry has a formal policy on this issue, namely that it is not appropriate at this stage to see increased powers going to the Assembly. My body language might have reflected the fact that we are all in favour of evidence-based policy making and we keep quoting evidence without seeing it, so I would be interested to see it. I understand that there is a phrase going around at the moment which is 'policy-based evidence making'; we would not want to see too much of that.

[562] **David Melding:** There is a lot of that.

[563] **The Presiding Officer:** Some of us also have an interest in philosophically based policy making, where you work from first principles, but we will not go into that this afternoon.

We are very grateful to you. If you have any further ideas, particularly on what is the value for money of democracy and democratic scrutiny and what that delivers, we would be happy to hear those. It is something that will be occupying our minds as we try to move forwards without incurring too much cost. Diolch yn fawr.

*Daeth y cyfarfod i ben am 3.35 p.m.
The meeting ended at 3.35 p.m.*

Better Governance for Wales White Paper Committee

Minutes BGW2 10-05(mins)

Meeting date: Thursday 1 September 2005

Meeting time: 2.00 to 4.30pm

Meeting venue: Committee Room 1, National Assembly for Wales

Assembly Members in Attendance

Assembly Member	Constituency
Lorraine Barrett	Cardiff South and Penarth
Jocelyn Davies	South Wales East
Lord Elis-Thomas (<i>Chair</i>)	Meirionnydd Nant Conwy
Jane Hutt	Vale of Glamorgan
David Melding	South Wales Central
Carl Sargeant	Alyn and Deeside
Kirsty Williams	Brecon and Radnorshire

Committee Service

Paul Silk	Clerk to the Assembly and to the Committee
Sian Wilkins	Committee Clerk

Item 1: Introduction, Apologies, Substitutions and Declarations of Interest.

Item 2: Better Governance for Wales White Paper

2.1 The Committee considered the draft report

2.2 Paragraphs 1-15 were agreed

2.3 Paragraph 16: Amendment proposed by Kirsty Williams

line 17 - Delete all after “ by legislation.” and add

“ we however recommend that the maximum number of Ministers and Deputy Ministers should be regulated by the Assembly’s Standing Orders.”

Following discussion the amendment was voted on as follows:

For: Kirsty Williams, Jocelyn Davies (2)

Against: Lorraine Barrett, Jane Hutt, David Melding, Carl Sargeant (4)

The amendment was not agreed and the paragraph was agreed as drafted.

2.4 **Paragraph 17: Amendment proposed by David Melding**

Delete the final sentence of para 17 and replace with

“We recognise the WAG’s need for a Counsel General but reject the suggestion that the office holder may be a member of the WAG, unless he or she is an AM. Government ministers must be accountable to the legislature which, in regular British practice, requires ministers to be drawn from the Legislature.”

Following discussion the amendment was voted on as follows:

For: David Melding, Jocelyn Davies (2)

Against: Lorraine Barrett, Jane Hutt, Carl Sargeant (3)

Abstention: Kirsty Williams (1)

The amendment was not agreed and the paragraph was agreed as drafted.

2.5 Paragraphs 18-19 were agreed

2.6 **Paragraph 20: Amendment proposed by Kirsty Williams**

Line 24 – Delete all after “its title itself.”

Following discussion the amendment was voted on as follows:

For: Kirsty Williams, Jocelyn Davies (2)

Against: Lorraine Barrett, Jane Hutt, Carl Sargeant, (3)

Abstention: David Melding (1)

The amendment was not agreed and the paragraph was agreed as drafted.

2.7 Paragraphs 21-47 were agreed

2.8 **Paragraph 48: Amendment proposed by David Melding**

Delete all of para 48 from the third sentence (which begins “The Scottish formulation...”) and replace with

“We recommend that the current provisions regarding party balance remain unchanged and protected in statute.”

Following discussion the amendment was voted on as follows:

For: David Melding, Jocelyn Davies (2)

Against: Lorraine Barrett, Jane Hutt, Carl Sargeant, (3)

Abstention: Kirsty Williams (1)

The amendment was not agreed and the paragraph was agreed as drafted.

2.9 Paragraphs 49-69 were agreed

2.10 **Paragraph 70: Amendment proposed by David Melding**

- (i) Delete all paras from 70 through to and including 101 and replace with new para 70

"We believe, after extended consideration of the evidence presented to this committee, that the Orders in Council proposals amount to concealed primary legislative powers. While we say nothing about the desirability or otherwise of primary powers, we believe that it is disingenuous to pretend that this development of the Assembly's powers does not amount to a change in the principle and scope of Welsh devolution. Such a change requires the endorsement of the people of Wales in a referendum. We therefore call for a referendum on the principle of the Assembly receiving primary law making powers."

Following discussion the amendment was voted on as follows:

For: David Melding, Jocelyn Davies (2)

Against: Lorraine Barrett, Jane Hutt, Carl Sargeant, Kirsty Williams (4)

The amendment was not agreed and the paragraph was agreed as drafted.

2.11 Paragraphs 71-75 were agreed

2.12 **Paragraph 76: Amendment proposed by Lorraine Barrett, Jane Hutt and Carl Sargeant**

Final sentence – after “that” delete “special provision be made” and replace with

“consideration be given to special provision”

Following discussion the amendment was voted on as follows:

For: Lorraine Barrett, Jane Hutt, David Melding, Carl Sargeant, (4)

Against: Jocelyn Davies, Kirsty Williams (2)

The amendment was agreed and the paragraph was agreed as amended.

2.13 Paragraphs 77-89 were agreed

2.14 after Paragraph 90: Amendment proposed by David Melding

Add new para 91 and renumber subsequent paras accordingly,

"We recommend that the Government sets out the criteria under which the Secretary of State may decline the Assembly's request for an Order in Council. We further recommend that refusal on the grounds of policy be explicitly excluded from such criteria under which the Secretary of State may decline a request for an Order in Council."

Following discussion the amendment was voted on as follows:

For: Jocelyn Davies, David Melding, Kirsty Williams (3)

Against: Lorraine Barrett, Jane Hutt, Carl Sargeant, (3)

The Chair exercised his casting vote in accordance with the Presiding Officer's Guidelines on 'Motions and the disposal of Business in Committees' to reject the amendment.

2.15 Paragraphs 91- 98 were agreed

2.16 Paragraph 99: Amendment proposed by Kirsty Williams

line 5 – Delete all after Presiding Officer and add

“ The formal agreement of Assembly measures should be on a parity with the formal agreement of Parliamentary Bills.”

Following discussion the amendment was voted on as follows:

For: Jocelyn Davies, Kirsty Williams (2)

Against: Lorraine Barrett, Jane Hutt, David Melding, Carl Sargeant (4)

The amendment was not agreed and the paragraph was agreed as drafted.

2.17 Paragraphs 100-112 were agreed.

2.18 Paragraph 113: Amendment proposed by Kirsty Williams

The paragraph was drafted as follows:

The Secretary of State for Wales must, under section 31 of the 1998 Act, consult with the Assembly about the United Kingdom Government's legislative programme. Part of this consultation must include participating in proceedings at least annually. Under section 76 of the 1998 Act, the Secretary of State may attend any Plenary proceedings, and is entitled to receive certain documents. There are no such provisions in the Scotland Act, and they would certainly be provisions which would be inappropriate at Stage 3. However, as the balance between Westminster and Cardiff is readjusted, it might be sensible for these provisions to be repealed in the forthcoming Wales Bill. This does not mean that there would be any fewer contacts between the Wales Office and the Welsh Assembly Government, and we would hope that the Secretary of State and other United Kingdom Ministers would be willing from time to time to give evidence to Assembly committees. **We recommend that the Secretary of State's obligation to consult the Assembly on the United Kingdom Government's legislative programme be removed, and the right to attend Plenary proceedings be repealed also.**

Proposed amendment: delete all

Following discussion the amendment was voted on as follows:

For: Lorraine Barrett, Jocelyn Davies, Jane Hutt, Carl Sargeant, Kirsty Williams, (5)

Against: David Melding (1)

The amendment was agreed and the paragraph was deleted.

2.19 Paragraphs 114 –143 (now paragraphs 113 to 142) and the Annex were agreed.

2.20 It was agreed that the Report should be published on 13 September 2005.

2.21 Concluding the meeting the Chair said he wished to place on record the Committee's gratitude to all the officials who had supported the Committee in its work.

**Committee Service
September 2005**