



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

Government of Wales Act 2006

Abstract

The *Government of Wales Act 2006* received Royal Assent on 25 July 2006. This paper provides an overview of the key provisions in the Act; highlights notable changes from the original Bill and outlines what steps are underway to implement the Act in advance of the Assembly Elections on 3 May 2007.

August 2006



Government of Wales Act 2006

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Executive Summary

- ◆ The *Government of Wales Act 2006* received Royal Assent on 25 July 2006.
- ◆ The Act gives effect to proposals set out in the UK Government White Paper, *Better Governance for Wales*, which was published in June 2005.
- ◆ The Act will bring into effect the legal separation of the executive branch (Welsh Assembly Government) and the legislative/parliamentary branch (National Assembly for Wales) after the 2007 Assembly Elections and creates an Assembly Commission and a Welsh Consolidated Fund.
- ◆ It allows the Assembly to make Measures on matters where it has been empowered to do so by an Order in Council ("Legislative Competence Order). It also provides for the Assembly to assume primary legislative powers at a future date subject to a referendum.
- ◆ The Act prevents the existing practice of dual candidacy in Assembly Elections. In the 2007 Elections candidates must either stand in a constituency or on the regional list.
- ◆ The paper highlights key changes in the Act from the original Bill published in December 2005.
- ◆ The paper notes steps being taken by the UK Government and in the Assembly to implement the Act, such as the establishment of a Shadow Assembly Commission and the Standing Orders Committee and lists key dates.

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The Government of Wales Act 2006

1 Introduction

The *Government of Wales Act 2006*¹ ("the Act") received Royal Assent on 25 July 2006. This paper sets out the key provisions of the Act and highlights the notable amendments that were made to the Bill during its Parliamentary passage. The paper also outlines developments currently underway that are preparing for implementation of the Act in readiness for after the next Assembly elections in May 2007 when most of the Act's provisions will come into effect.

2 Background

2.1 The Government's Proposals

In its 2005 General Election manifesto, Labour pledged to legislate for a stronger Assembly with enhanced legislative powers and to end the corporate body status of the Assembly. It also contained a commitment to reform the Assembly's electoral system.² These proposals were set out in the UK Government White Paper, *Better Governance for Wales* in June 2005.³ The paper proposed a formal separation of the executive and legislative branches of the Assembly by ending its status as a corporate body and changing the nature of executive authority so that the First Minister and Ministers are appointed by the Monarch. It also proposed to legislate in order to prevent candidates standing in constituencies as well as on the regional list. It further undertook to increase the legislative powers of the Assembly in three stages by:

- ◆ Ensuring that primary legislation is drafted in a consistent way in relation to Wales and one that gives the Assembly maximum discretion in making its own provisions, so called 'framework powers'.
- ◆ Introducing primary legislation to put in place a procedure that will enable Parliament to give the Assembly powers to modify primary legislation or make new provisions on specific matters or within defined areas in currently devolved fields. This will involve Orders in Council being made at the Assembly's request and passed by Parliament using the affirmative procedure.⁴
- ◆ Introducing the possibility of the transfer of primary legislative powers over all currently devolved fields to the Assembly if approved by votes in both Houses of Parliament, the Assembly and in a Referendum.

In July 2005 the Assembly established the Better Governance for Wales White Paper Committee to consider the proposals set out for the proposed new structure and its

¹ *Government of Wales Act 2006* (Chapter 32)

http://www.opsi.gov.uk/acts/acts2006/ukpga_20060032_en.pdf

² The Welsh Labour Manifesto 2005, *Wales: Forward not Back*, pp.108-110

³ Wales Office, *Better Governance for Wales*, (Cm.6582), June 2005.

⁴ Delegated legislation, such as Orders in Council are subject to either negative or affirmative procedures in Parliament. The Orders in Council referred to in the Act cannot become law unless they are approved by both Houses and therefore subject to the affirmative procedure. More information can be seen in House of Commons Information Office, Factsheet L7, *Statutory Instruments*, March 2006. <http://www.parliament.uk/documents/upload/L07.pdf>

legislative powers.⁵ The Committee reported back to the Assembly in Plenary on 21 September 2005. It submitted its report to the UK Government in mid September.⁶

The White Paper was scrutinised by the House of Commons Welsh Affairs Committee in autumn 2005. It published its Report on 13 December 2005.⁷

The Bill received its Second Reading in the House of Commons on 11 January 2006 and completed its passage through the Commons on 27 February. It received its Second Reading in the House of Lords on 22 March and completed its passage in late July 2006.⁸ Some notable amendments were made to the Bill and these are discussed below.

The Assembly also set up its own Bill Committee to scrutinise the Bill in February 2006. Its final Report was considered by Plenary in March 2006.⁹

3 Key provisions in the Act

3.1 Separation

The original *Government of Wales Act 1998* established the National Assembly for Wales as a single corporate body, with secondary legislative powers and 60 Assembly Members. The new arrangements in the *Government of Wales Act 2006* create a formal legal separation between:

- ◆ the Legislative branch: the National Assembly for Wales, comprising the 60 Assembly Members, and
- ◆ the Executive branch: the Welsh Assembly Government, which will comprise the First Minister, Welsh Ministers, Deputy Welsh Ministers and the Counsel General.

The separation between legislature and executive will take effect once the First Minister has been appointed by the Monarch following the Assembly elections in May 2007.

Functions that were conferred on the Assembly under the existing devolution settlement will now mainly transfer to the Welsh Ministers upon separation, as will the bulk of any further functions transferred from Westminster. Most subordinate legislation will now be made by Welsh Ministers. This means that the structure and business of government in Wales will more closely resemble arrangements in Scotland and Westminster.

3.2 The National Assembly for Wales

From May 2007 the National Assembly for Wales Commission (“the Assembly Commission”) will be responsible for employing the staff supporting the new National

⁵ Better Governance for Wales White Paper Committee, *Report of the Better Governance for Wales White Paper*, LD3999, 13 September 2005.

⁶ <http://www.wales.gov.uk/keypubassembettergov/content/bgw-report.pdf>

⁷ RoP p47, 21 September 2005

⁸ <http://assembly/rop/ROP/Plenary%20Session/2005/September/rop050921fv7.pdf>

⁹ Welsh Affairs Committee, *Government White Paper, Better Governance for Wales Report*, 13 December 2005, HC551, 2005-2006.

<http://www.publications.parliament.uk/pa/cm200506/cmselect/cmwelaf/551/55102.htm>

⁸ Information on the original Bill and on the Bill's progress can be seen in MRS papers numbers 06/001, 06/003, 061010 and 06/024.

⁹ National Assembly for Wales, Government of Wales Bill Committee, Final Report, March 2006.

<http://www.wales.gov.uk/keypubassemgovofwalesbill/report-0306-e.pdf>

Assembly for Wales (Assembly Parliamentary Service staff) and for holding property, entering into contracts and providing support services on its behalf. A shadow Assembly Commission is already in existence.

The Act provides for the election of a Presiding Officer (PO) and a Deputy Presiding Officer (DPO) but modifies the requirement in the 1998 Act that the PO and DPO should not 'represent the same party' to require that they should not be from the same political group or both be members of political groups with an executive role. Therefore, if a coalition government were formed, at least one would need to be appointed from a political group in opposition.¹⁰ The Act also provides for a Clerk of the Assembly, thereby making the post statutory.

The Act strengthens the Assembly's powers to call people to appear before its committees or to provide documentation requested.

3.3 Welsh Assembly Government

From 2007, the First Minister will be nominated by the Assembly and appointed by the Monarch. He or she will then appoint the Welsh Ministers and the Deputy Welsh Ministers, with the approval of the Monarch.

The Act also creates a new post of Counsel General, who will be the Legal Adviser to the Welsh Assembly Government. The Counsel General is appointed by the Monarch, on the nomination of the First Minister. The First Minister's recommendation for Counsel General will need to be agreed by the National Assembly. The Counsel General may be, but does not have to be, an Assembly Member.

The Act permits a maximum of 12 Welsh Ministers, which includes Deputy Welsh Ministers but excludes the First Minister and the Counsel General.

Under the current arrangements in the 1998 Act, executive functions are conferred on the National Assembly for Wales and then separately delegated to the First Minister, other Cabinet Ministers and staff as appropriate. From May 2007, executive functions will be directly vested in the Welsh Ministers. It will still be possible for further transfers of executive functions from the UK Government to the Welsh Assembly Government to take place after May 2007. Such transfers will, under the *Government of Wales Act 2006*, be made directly to the Welsh Ministers (with their consent) by an Order in Council approved by Parliament or by Acts of Parliament.¹¹

The vast bulk of current Assembly civil servants will work for the Welsh Assembly Government.

3.4 Finance

The Act establishes a Welsh Consolidated Fund which, from April 2007 will hold the money voted by Parliament to Wales. The Assembly will be responsible for approving budget motions and supplementary budget motions proposed by the Welsh Ministers. The Auditor General for Wales will authorise payments out of the Welsh Consolidated Fund to the Welsh Ministers if the expenditure has been approved by the Assembly in this way. The expenditure of the Assembly Commission, the Auditor General for Wales and the Public Services Ombudsman for Wales will also come out of the Welsh Consolidated Fund.

¹⁰ *Government of Wales Act 2006* (Chapter 32) s.25(7)

¹¹ Welsh Assembly Government, Constitutional Affairs Unit Bulletin, July 2006.

3.5 *Dual candidacy*

The Act requires each candidate standing in an Assembly election from 2007 onwards to choose to stand either as a constituency representative or on a regional list. They can no longer stand as both.

3.6 *Measures of the National Assembly for Wales*

After separation in May 2007, the Assembly will be able to seek legislative competence from the UK Parliament to make a new category of legislation, which will be called "Measures of the National Assembly for Wales" or "Mesurau Cynulliad Cenedlaethol Cymru" ("Assembly Measures"). Legislative competence may be sought through clauses in Westminster Bills or through the potentially more straightforward mechanism of an Order in Council.

Any Order in Council will require the formal laying of a draft of the Order in Council before the Assembly and both Houses of Parliament for approval. This means, in practice, that Cardiff and London will need to agree on the scope of the legislative competence sought.

The Standing Orders Committee of the National Assembly is considering procedures for dealing with Orders in Council and Measures in the Assembly. It may be that pre-legislative scrutiny of an Order in Council will be required in the Assembly and at Westminster. During the passage of the Bill through the House of Commons, the Parliamentary Under Secretary of State in the Wales Office, Nick Ainger MP stated:

I should say immediately that I do not think that it is right that the Government should prescribe in the Bill how such scrutiny must be conducted, but that is what amendment No. 187 suggests. That would not allow parliamentarians the proper discretion to determine the most appropriate arrangements.¹²

However, he also wrote to the Shadow Secretary of State for Wales, Cheryl Gillan MP outlining how the procedures might work. The letter is reproduced in **Annex 1** and examples of "Legislative Competence Orders" are reproduced in **Annex 2**.

The scope of the legislative competence to make Measures which is agreed in each Order in Council will be known as a "Matter" and will have to relate to one of the twenty fields of devolved government listed in Schedule 5 to the Act. The precise wording of the Matter, including any exceptions and reservations, would depend on what it was the Welsh Assembly Government wanted to achieve and in practice would need to be agreed with the UK Government.

Once the Assembly has been given the legislative competence to make Measures in relation to specified Matters, that competence remains with the Assembly indefinitely (unless removed by further Westminster legislation) and will be added to the Matters under the relevant devolved Field. It will then be up to the Welsh Assembly Government to develop draft Measures relating to the Matter and bring them before the National Assembly for Wales for consideration. The Assembly will scrutinise draft Assembly Measures. The method of scrutiny is being considered by the Standing Orders Committee, but the Act provides for each Measure to be subject to a debate and vote on

¹² HC Debates 24 January 2006, c.1329

its general principles; an amendments stage, and a final vote on whether it should be passed or rejected.

Once the Assembly has approved a draft Measure it will be enacted by being approved by the Monarch, without the need for any further Parliamentary approval. Over time, the Assembly's competence to make Measures in devolved fields of government will increase.

As well as the Welsh Assembly Government, Assembly committees and Assembly Members will be able to propose Orders in Council to add to the Assembly's legislative competence. They will also be able to propose draft Assembly Measures. The Standing Orders Committee is considering procedures for dealing with these.

Following Royal Assent, the First Minister, the Rt. Hon. Rhodri Morgan AM stated that:

All four parties in Wales can now start work on their manifestos for the 2007 elections, on the basis of seeking a mandate to bring in legislation using the new enhanced powers, just as happens in elections all over the Western world. It will make the election process in Wales far more exciting and the Third Assembly elected next year will be a more exciting place to serve in, with debates on whether we are going to legislate on a whole range of topics.¹³

3.7 Acts of the National Assembly for Wales

The *Government of Wales Act 2006* also contains provisions for the Assembly, at some point in the future, to have primary law making powers in devolved fields. These will be called "Acts of the National Assembly for Wales" or "Deddfau Cynulliad Cenedlaethol Cymru". These provisions can only be triggered by:

- ◆ two-thirds of all Assembly Members voting in favour of a referendum;
- ◆ then approval by UK Government and Parliament; and
- ◆ a "yes" vote in a referendum of the Welsh public.

The First Minister and Secretary of State for Wales predicted that, on this basis, the Act "will settle the constitutional debate for generations to come. It will be the last such Wales Bill." The Secretary of State added that:

For the first time ever, the Act puts primary powers for Wales on the statute book, ready and waiting to be activated once the people of Wales support such a change in a referendum. There won't be another Bill like it.¹⁴

4 Key Changes from the Bill

A detailed account of provisions of the original Bill published in December 2005 is provided in MRS Paper 06/001 *The Government of Wales Bill 2005-6*. Most provisions of the Bill remain substantially the same in the Act but the Government made some notable amendments which are discussed below.

4.1 Section 27 Assembly Commission

¹³ Welsh Assembly Government Press Release, *Government of Act heralds new dawn for devolution*, 26 July 2007.

¹⁴ Ibid.

During the Report Stage in the House of Lords a Liberal Democrat amendment requiring that members of the Assembly Commission should be drawn from different groups was passed. This was accepted when the Bill returned to the Commons but the Government put down a re-drafted version of the amendment. Lord Evans of Temple Guiting stated:

We do not contest the principle that the Assembly Commission should be made up of members from different political groups.... [*The Amendment*] provides that standing orders should require that, as far as is reasonably practicable, no two members of the commission should be drawn from the same political group. This does not include the presiding officer who will chair the Assembly Commission.¹⁵

The Commission will, therefore, consist of the Presiding Officer and four other Assembly Members and standing orders must make provision, as far as is reasonably practicable, that none of the four Assembly Members belongs to the same political group.

4.2 Section 29: Composition of Committees

In the Bill, Clause 29 had required the use of the d'Hondt system to determine the composition of Assembly Committees. The Opposition had argued that the clause was too restrictive and would require the Assembly to have committees of at least ten members in order to comply.¹⁶ The Government agreed to amend the clause and S.29 of the Act now states that membership of each committee must reflect (so far as is reasonably practicable) the balance of the political groups to which Assembly members belong. If a proposal for the composition of a particular committee is not supported by two-thirds of the Assembly in a vote, then the d'Hondt formula will be used to determine the membership of that Committee.

The Secretary of State commented that:

The d'Hondt formula is now, instead of being up front, very much a fall-back option and on the backburner. It is there if needed, but we hope that it will not be needed.¹⁷

4.3 Section 30: Audit Committee

The only Committee that the Assembly is required to have under the Act is an Audit Committee. During the Bill's passage through the Lords the opposition argued that prescribing the title of the Committee as an "Audit Committee" was potentially misleading. Baroness Noakes stated:

I believe that the language used by Clause 30 is, quite simply, confusing. It is clear that the work that the committee will be required to do is very like that of the Public Accounts Committee in another place, but it is quite unlike the kinds of audit committee that exist either in the public or private sector. It is not an advisory body or one that is supportive of an accounting officer as envisaged in the Treasury's handbook. Indeed, its work is to grill accounting officers on the basis of the Auditor General's reports.¹⁸

The Government amended the Bill so that the Assembly can change the name of the Audit Committee. The Act states:

The committees of the Assembly must include one to be known as the Audit

¹⁵ HL Debates, 24 July 2006, c.1561

¹⁶ HC Debates, 27 February 2006, c.68-74

¹⁷ HC Debates, 18 July 2006, c.191.

¹⁸ HL Debates, 19 April 2006. c.1143

Committee or Pwyllgor Archwilio or by such other name as the Assembly may determine.¹⁹

4.4 Section 75: Business scheme

During the Committee stage in the House of Commons, the Government supported an amendment put down by Labour back bench MP Huw Irranca-Davies, placing a requirement for a Business Scheme to be agreed with the Welsh Assembly Government. Existing schemes for Local Government and the Voluntary Sector with the Assembly are required under the *Government of Wales Act 1998*. These will be required in the new Act but will be agreed with Welsh Ministers rather than the Assembly.²⁰ The 1998 Act only required consultation with Business²¹ so the new Act puts it on a par with the Voluntary Sector and Local Government. The partnership will involve both business and unions.²²

4.5 Section 78: The Welsh language

During the Second Reading Debate on the Bill in the House of Lords, Lord Prys-Davies raised concerns about the duty on Welsh Ministers, following separation, to give effect to the principle of equality.

Clause 35 imposes the duty only on the legislative branch. Nowhere in the Bill have I seen a duty on Ministers to give effect to the principle of the equality of the two languages. I am completely nonplussed by that omission. It is worrying. Is it an oversight on the part of the authors of the Bill?²³

He was also concerned that the Bill did not place a duty on the Executive to promote the Welsh language in the governance of Wales: "such a duty would be fully consistent with the duty imposed by the Bill on Ministers to promote or support local government and voluntary action."²⁴

During the Report Stage the Government introduced an amendment which inserted a new clause (78) into the Bill requiring Welsh Ministers to have a Welsh language strategy and a scheme. The Minister, Lord Evans of Temple Guiting, stated:

The concern expressed, in particular by my noble friend Lord Prys-Davies, was that the current good practice of the Welsh Assembly Government in respect of the Welsh language would not be safeguarded in the future. The Government therefore propose to put the current good practice on a statutory footing. The requirement to adopt a strategy setting out how the Welsh Ministers propose to promote and facilitate the use of the Welsh language corresponds to Iaith Pawb, the national action plan for a bilingual Wales.

The requirement will adopt a strategy to complement, as my noble friend Lord Prys-Davies himself argued in Committee, the function of promoting and facilitating the use of the Welsh language. This will continue to be a requirement of Welsh Ministers, whether they acquire statutory function of the Welsh Language Board or not, as a result of the WLB merger. The requirement to adopt a Welsh language scheme is

¹⁹ Op.cit., GoWA 2006, s.30.

²⁰ *Government of Wales Act 1998* (Chapter 38) ss.113.114.

²¹ Ibid., s.115.

²² HL Debates, 22 March 2006., c.156-160

²³ Ibid.

²⁴ Ibid.

explicitly linked to the principle of equality between English and Welsh. This mirrors the Welsh Assembly Government's current practice.²⁵

5 Implementing the Act

The main provisions of the Act are due to come into force following the Assembly Elections in May 2007, when the Third Assembly is in place. However, considerable work is required before that date. Summing up on the Bill in the House of Commons, the Secretary of State said:

The key immovable deadline that we face is the Assembly elections next May. Considerable consequential work is needed following Royal Assent and before the *purdah* period before the elections. That includes elections and disqualification orders, which need to be made in good time to set out clearly the basis on which all parties and candidates need to organise themselves and to allow adequate time for proper consultation with the Electoral Commission. The Bill includes a power for the Assembly to promote participation in and awareness of the elections—meeting an Electoral Commission recommendation. Clearly, there has got to be sufficient time for that.²⁶

He went on :

Schedule 7 outlines the Assembly's ability to make primary legislation if there were to be a successful referendum. A key commitment is to fine tune that and to bring forward an amendment order to ensure that it is complete and accurate before the elections next May so that everybody is clear what the new footing is on which the Assembly will start. A considerable number of further orders are required—about 14—many of which are fundamental to the separation and include provisions for financing and staffing arrangements. They are critical when it comes to delivering the policy in the Bill and have to be completed in good time before the next elections.²⁷

The Wales Office is preparing the necessary Orders which are expected to be published in the autumn.²⁸

Some preparation is already underway within the Assembly. A Shadow Assembly Commission has been set up and a Standing Orders Committee is drafting new standing orders. A list of key dates can be seen in **Annex 3**.

5.1 *The Shadow Assembly Commission*

The National Assembly for Wales Commission will be established in May 2007 under s.27 of the *Government of Wales Act 2006*. It will be the corporate body responsible for ensuring that the National Assembly is provided with the property, staff and services that it will require.

In order to prepare for the creation of the Commission, a Shadow Assembly Commission was established by a vote in Plenary on 17th May 2006. It will plan for the matters within the responsibility of the future Assembly Commission. It will cease to exist on 2 May 2007.

The Members of the Shadow Assembly Commission are:

²⁵ HL Debates, 27 June 2006, c.1179.

²⁶ HC Debates, 18 July 2006, c.193

²⁷ Ibid.

²⁸ Information from Wales Office.

Dafydd Elis-Thomas AM	(Chair) Presiding Officer
Lorraine Barrett AM	Labour
Peter Black AM	Welsh Liberal Democrats
William Graham AM	Conservative
Elin Jones AM	Plaid Cymru

The National Assembly agreed that the Shadow Assembly Commission can meet in private. Standing Order 18C states that minutes will be published within six weeks of a meeting.²⁹ The Shadow Assembly Commission is supported by a small team of staff seconded from the Welsh Assembly Government.

The Shadow Assembly Commission publishes regular bulletins about its work and publishes the minutes of its proceedings. Issues that the Shadow Assembly Commission has to date considered include:

- ◆ The Assembly Commission's 2007/8 budget, in consultation with the House Committee.
- ◆ The Clerk will become a statutory post under the Act and Principal Accounting Officer for the Commission, a de facto Chief Executive Officer. The Commission has, therefore, defined the role of the Clerk in order to prepare for drawing up a detailed job description and person specification
- ◆ The Shadow Commission has agreed to conduct a survey of Members, their research assistants and internal support service providers in order to assess views of the current services supplied by the Assembly Parliamentary Service. This review is currently underway and results will be considered by the Shadow Commission in September and October.

5.2 The Committee on Standing Orders

Paragraph 20 of Schedule 11 to the Act sets out how the new Standing Orders are to be made. They must be made by the Secretary of State by 31st March 2007 but this formal procedure allows for the current Assembly itself to draft the Standing Orders of the new body. In making the Standing Orders, the Secretary of State must give effect to proposals submitted to him by the Assembly (as currently established) no later than 28th February 2007, provided that those proposals have been approved by a two-thirds voting majority in the Assembly. As a minimum, the Standing Orders have to include the mandatory provisions required by the Act. Both the Standing Orders made by the Secretary of State, and the Assembly's proposals as to what provisions they should include, must be made in both English and Welsh.

The Standing Orders Committee of the National Assembly for Wales was also set up following a vote in Plenary on the 17 May 2006. Its Terms of Reference are to :

- ◆ Make every effort to recommend new standing orders, which are capable of securing a two thirds majority approval by plenary;

²⁹ Minutes of Shadow Commission, 8 June 2006, SC (1) 01 06
<http://www.wales.gov.uk/keypubassemshadowcomm/0106-minutes-e.htm>

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



Cynulliad National
Cenedlaethol Assembly for
Cymru Wales

- ◆ Prepare a report, which shall set out proposed new standing orders for consideration by plenary.

The Committee is to report on or before 31 January 2007 and will cease to exist on the 1 March 2007.

Jenny Randerson AM (Chair)	Welsh Liberal Democrats
Jane Hutt AM (Minister)	Labour
Jocelyn Davies AM	Plaid Cymru
Lisa Francis AM	Welsh Conservatives
Ann Jones AM	Labour
Val Lloyd AM	Labour
Gwenda Thomas AM	Labour

The Committee is supported by staff from APS and is expected to approve a draft of Standing Orders to go before Plenary in November/ December 2006.

Annex 1: Pre-legislative Scrutiny

LETTER FROM NICK AINGER, MP PARLIAMENTARY UNDER-SECRETARY OF STATE FOR WALES TO CHERYL GILLAN, MP SHADOW SECRETARY OF STATE FOR WALES

GOVERNMENT OF WALES BILL: PART 3

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

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

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

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

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

In the light of any comments received on the scope of the proposed Order in Council—which could be in the shape of a Committee report, as is currently the case for draft Bills submitted for pre-legislative scrutiny—the Secretary of State would liaise with the Welsh Assembly Government to finalise the draft Order in Council. The agreed draft would then be laid before the Assembly for debate and approval; if approved, the First Minister would then send it to the Secretary of State who would lay it before both Houses of Parliament



for debate, inviting their approval. Clearly at that stage, both the Assembly and Parliament must approve the same text.

Although it is anticipated that that would be the usual process, the Assembly could decide to approve a proposed draft Order in Council without its having undergone any pre-legislative scrutiny in Parliament. In that case the Secretary of State could either refuse to lay the draft Order before Parliament, or alternatively, could ask for pre-legislative scrutiny to be undertaken. If the Secretary of State refused to lay the draft order, that refusal would have to be communicated, with reasons, within 60 days (not including periods of dissolution or prorogation, or adjournments of both houses for more than 4 days). If the Secretary of State asked for scrutiny to be undertaken, and following that, no amendments were made to the draft, the same draft could be laid before Parliament inviting approval. If the 60 days were insufficient for Parliamentary scrutiny, then the Secretary of State also has discretion to refuse to lay the draft Order in Council within that period but could lay it unamended when the Parliamentary scrutiny is completed. Alternatively, if amendments were proposed as a result of Parliamentary scrutiny, an amended draft Order in Council would then first have to be approved by the Assembly before it could be laid before both Houses of Parliament.

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

17 January 2006

Annex 2: Examples of “Legislative Competence Orders”

ILLUSTRATIVE EXAMPLES OF PROPOSED ORDERS AND EXPLANATORY MEMORANDA

Example A:

Swyddfa Cymru

Wales Office

[Date]

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

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

[signed Secretary of State]

200- No ---

CONSTITUTIONAL LAW DEVOLUTION, WALES

The National Assembly for Wales (Legislative Competence) (Highways and Transport)
Order 2008

Made9th January 2008

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

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

Present,

The Queen's Most Excellent Majesty in Council

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

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

Citation and commencement

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

Enhancement of legislative competence

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

"Matter 10.1

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

Matter 10.2

Provision in relation to -

- (a) Arrangements for the discharge of local authority transport functions;
- (b) The creation of, and conferral of functions on, bodies to discharge local authority transport functions; and
- (c) Financial support for such bodies by levy or precept or by payments made (whether directly or indirectly) from the Welsh Consolidated Fund."

Clerk of the Privy Council

EXPLANATORY NOTE

(This Note is not part of the Order)

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

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

**MEMORANDUM FROM THE WELSH ASSEMBLY GOVERNMENT
CONSTITUTIONAL LAW: DEVOLUTION, WALES**

Proposal for a Legislative Competence Order in the field of Highways and Transport

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

Introduction

1. The Government of Wales Act 2006 ("the 2006 Act") empowers Her Majesty, by Order in Council, to confer continuing competence on the National Assembly for Wales ("the Assembly") to legislate by Assembly Measure on specified matters. Assembly Measures may make any provision which could be made by Act of Parliament (and therefore can modify existing legislation and make new provision), in accordance with the competence conferred by the Order in Council but subject to the provisions of the 2006 Act.
2. The attached document is a proposed Order in Council. It sets out a matter which it is proposed to add to the legislative competence of the Assembly. In order to do so, an Order in Council will need to be made by Her Majesty following approval of a draft of the Order by the Assembly and by both Houses of Parliament.
3. This memorandum has been prepared by the Welsh Assembly Government. It explains the background to and context of the proposed Order in Council.

Scope

4. The matter set out in the proposed Order in Council would confer on the Assembly the competence to make statutory provision concerning plans and strategies relating to transport facilities and services and in relation to arrangements for the discharge of local authority transport functions in Wales.
5. Under the provisions of the 2006 Act, a matter can only be brought within the legislative competence of the Assembly if it relates to a field set out in Part 1 of Schedule 5 to the 2006 Act. The fields correspond broadly with the executive competence of the Welsh Assembly Government; the intention behind this provision is that the Assembly should acquire legislative competence only in fields in which the Welsh Assembly Government has executive functions.
6. The Welsh Assembly Government is the trunk road authority for Wales and has powers through primary and secondary legislation to promote public transport.^[68] Local authorities are the local transport authorities with the main statutory duty to promote transport in Wales. The Transport Act 2000 placed a statutory duty on local authorities to draw up, for the first time, an integrated transport strategy for their area. The strategies were set out in local transport plans. The Welsh Assembly Government influences local authority developments through partnership working, guidance and the provision of funding.
7. In addition to pursuing transport strategies at a local level, since 1996, groups of local authorities have come together, on a voluntary basis, to form consortia to facilitate joint working on transport matters. There are currently four transport consortia in Wales following some recent movements and mergers, covering South East Wales (SEWTA); South West Wales (SWWITCH); Mid Wales (TraCC); and North Wales (TAITH). The

consortia have drawn up regional public transport strategies. These are not statutory documents but act as a focus for planning public transport on a regional basis.

8. The main limits to the current arrangements are:

- THERE IS NO EXPRESS STATUTORY DUTY ON THE WELSH MINISTERS TO PROMOTE INTEGRATED TRANSPORT IN WALES AND IN PARTICULAR TO PREPARE AND PUBLISH A NATIONAL TRANSPORT STRATEGY. THIS MEANS THAT THERE IS UNCERTAINTY AS TO THE WELSH ASSEMBLY GOVERNMENT'S ROLE IN RELATION TO TRANSPORT AND AS TO THE ABILITY OF WELSH MINISTERS TO USE THEIR GENERAL STATUTORY POWERS (FOR EXAMPLE THE GENERAL STATUTORY AUTHORITY TO INCUR EXPENDITURE IN CONNECTION WITH THEIR FUNCTIONS) IN THIS FIELD.
- THERE IS NO STATUTORY MECHANISM FOR ENSURING THAT TRANSPORT PLANNING AND DELIVERY AT THE LOCAL LEVEL IS CONSISTENT WITH THE NATIONAL TRANSPORT STRATEGY AND TAKES ADEQUATE ACCOUNT OF REGIONAL ISSUES. THE WELSH ASSEMBLY GOVERNMENT IS HANDICAPPED, THEREFORE, IN TAKING FORWARD ITS STRATEGY.
- There is no statutory provision which would enable the Welsh Assembly Government to ensure that local authorities work together to address regional transport issues. Regional working is based on voluntary arrangements with varying degrees of commitment from local transport authorities towards co-ordinating transport provision.
- There is no strong link between the current local transport plan and the transport funding that local authorities receive from the Assembly. This contrasts with the position in England where much of local transport spending is based on bids contained in local transport plans.
- Local authorities are hampered by being too small to attract specialist staff to plan and implement significant transport projects.

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

Background

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

11. In July 2007, the Minister for Environment, in the Welsh Assembly Government's response to the report, said:

"I intend to seek powers along the lines of the Greater London Authority Act 1999 whereby the Mayor and Authority can develop and implement policies for the promotion and encouragement of safe, integrated, efficient and economic transport facilities... I will seek to incorporate further powers to enable joint authorities to be established.... I shall put in hand the preparation of a request to enable the necessary provision to be made by Assembly Measure. "

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

Effect of other provisions in the 2006 Act

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

Geographical limits of any Assembly Measure

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

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

Minister of the Crown functions

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

Conclusion

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

June 2007

Example B:

Swyddfa Cymru

Wales Office

[Date]

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

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

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

[signed Secretary of State]

200- No ---
**CONSTITUTIONAL LAW
DEVOLUTION, WALES**

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

Made1st December 2007

Coming into force..... 1st February 2008

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

Present,

The Queen's Most Excellent Majesty in Council

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

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

Citation and commencement

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

Enhancement of legislative competence

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

"Matter 14.1

The creation of, and conferral of functions on, an office or body for and in connection with investigating complaints about relevant public sector persons, social landlords and members and co-opted members of local authorities, remedies where such complaints are upheld and the abolition of offices or bodies with similar functions; and for this purpose a person is a relevant public sector person if the person has functions of a public nature exercisable in relation to Wales or a part of Wales all or some of which are in a field listed in this Part of this Schedule and either-

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

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

Clerk of the Privy Council

EXPLANATORY NOTE

(This Note is not part of the Order)

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

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

CONSTITUTIONAL LAW: DEVOLUTION, WALES

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

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

Introduction

1. The Government of Wales Act 2006 ("the 2006 Act") empowers Her Majesty, by Order in Council, to confer continuing competence on the National Assembly for Wales ("the Assembly") to legislate by Assembly Measure on specified matters. Assembly Measures may make any provision which could be made by Act of Parliament (and therefore can modify existing legislation and make new provision), in accordance with the competence conferred by the Order in Council but subject to the provisions of the 2006 Act.
2. The attached document is a proposed Order in Council. It sets out a matter which it is proposed to add to the legislative competence of the Assembly. In order to do so, an Order in Council will need to be made by Her Majesty following approval of a draft of the Order by the Assembly and by both Houses of Parliament.
3. This memorandum has been prepared by the Welsh Assembly Government. It explains the background to and context of the proposed Order in Council.

Scope

4. The matter set out in the proposed Order in Council would confer on the Assembly the competence to legislate to reorganise the arrangements for the provision of public sector Ombudsman's services in Wales. These services are currently provided via the offices of the Commission for Local Administration in Wales, the Welsh Administration Ombudsman, the Health Services Commissioner for Wales and the Social Housing Ombudsman for Wales.
5. Under the provisions of the 2006 Act, a matter can only be brought within the legislative competence of the Assembly if it relates to a field set out in Part 1 of Schedule 5 to the 2006 Act. The fields correspond broadly with the executive competence of the Welsh Assembly Government; the White Paper "Better Governance for Wales" explains that the policy intention behind this provision is that the Assembly should acquire legislative competence only in fields in which the Welsh Assembly Government has executive functions.
6. Executive responsibility for matters concerning the Welsh Administration Ombudsman, the Health Services Commissioner for Wales and the Commission for Local Administration in Wales lies with the Welsh Assembly Government. The related funding in all cases comes from the Welsh Consolidated Fund.
7. The legislation governing the offices of the existing Ombudsmen's services (the Welsh Administration Ombudsman, the Health Services Commissioner for Wales and the Commission for Local Administration in Wales) is contained respectively in the Government of Wales Act 1998; the Health Service Commissioners Act 1993; the Local Government Acts 1974 and 2000; and the Housing Act 1996. The existing legislative competence of the Assembly would not allow it to modify or repeal provisions in those Acts, nor to make new provision creating any new ombudsman's office for Wales. The Order in Council, if made in terms of the draft before the Committee, would enable the Assembly to take such legislative action.

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

Background

9. This request for legislative competence derives from a manifesto commitment made at the Assembly general election in May 2007.

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

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

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

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

Effect of other provisions in the 2006 Act

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

Geographical limits of any Assembly Measure

15. If an Order in Council were made in substantially the form proposed, the Assembly would by Measure be able to reform the provision of public sector ombudsman's services in Wales, even though the Local Government Acts 1974 and the Health Service Commissioners Act 1993, which provide the authority for the existing arrangements also



make provision concerning Ombudsman's services in England. Section 93 of the 2006 Act provides that no Assembly Measure will be law if it applies otherwise than in relation to Wales or confers, imposes, modifies or removes functions exercisable otherwise than in relation to Wales (or gives power to do so). There are limited exceptions for certain kinds of ancillary provision, for example provision appropriate to make the provisions of the Measure effective, provision enabling the provisions of the Measure to be enforced and to make consequential amendments to other legislation. Such provision is likely to be necessary, for example, to ensure that any new Ombudsman's service for Wales could share information as necessary with counterparts in other parts of the UK; to ensure that courts throughout England and Wales could enforce any remedies ordered by an Ombudsman (if such remedies are provided for in a Measure); and to amend references in other legislation to any existing offices which an Assembly Measure had abolished.

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

Minister of the Crown functions

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

Conclusion

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

June 2007

68 These include:

The Ministry of Transport Act 1919, which enables financial support - either revenue or capital - to be given to any form of land or water transport, although with Parliamentary approval required for payments over £1 million;

The Transport Act 1968, which allows financial support for capital expenditure on public transport schemes; The Local Government Finance Act 1988, which allows financial support for capital expenditure by local authorities on highways and public transport schemes; The Transport Act 2000, which enables grants to be paid to bus operators as well as to local authorities for passenger transport services and facilities.

Annex 3: Key Dates

2006

September onwards	Orders for implementation of provisions in the Act published.
November	Standing Orders Committee to agree a final draft set of Standing Orders
December	Standing Orders Committee to table a draft set of Standing Orders for debate in plenary.

2007

January	Standing Orders to be approved by Plenary (if not already done so in December).
28 February	Assembly proposals for Standing Orders must be presented to Secretary of State.
31 March	Secretary of State must make Standing Orders.
2 April	Assembly funds moved into Welsh Consolidated Fund
3 May	Assembly elections to be held on basis of new proposals