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

Government of Wales Bill 2006: House of Lords Second Reading

Abstract
This paper provides a summary of the key issues arising in the debate on the Second Reading of the Government of Wales Bill [HL] 2006 which took place on 22 March 2006.

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Cynulliad Cenedlaethol Cymru
National Assembly for Wales

Government of Wales Bill 2006: Second Reading in the House of Lords

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Cynulliad Cenedlaethol Cymru
National Assembly for Wales

Executive Summary

The paper sums up the key issues that emerged during the Second Reading debate on the *Government of Wales Bill 2006* [HL] in the House of Lords on the 22 March 2006.

The key issues include:

- Framework powers
- Procedures for Orders in Council
- The powers of the Secretary of State
- Dual Candidacy
- Miscellaneous other issues such as the duty of Welsh Ministers towards the Welsh language and including the Voluntary Sector Partnership Council in the Bill.

The paper also makes reference to the recent Report of the House of Lords Constitution Committee on the Bill and the UK Government's response to it.

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1 Introduction

The *Government of Wales Bill 2006* received its Second Reading on March 22 2006.The Constitution Committee of the House of Lords published its Report on the Government of Wales Bill on 16 March which several peers referred to during the course of the debate.[1] The Government published its response to the Report on 30 March 2006.

2 Framework Powers

Opening the debate for the UK Government, Lord Evans of Temple Guiting restated the Government's rationale for introducing the Bill:

> Since 1999, the Assembly has been able to shape much subordinate legislation in a distinctive way so as to give effect to its own policies. However, it has remained dependent on the timetable and priorities for legislation in this Parliament in order to achieve anything which required either changes to primary legislation or new provision.
>
> Moreover, the approach to giving the Assembly legislative powers has been inconsistent. Some Bills have prescribed a great deal of detail and others have given the Assembly more discretion. Framework powers are not dependent on the passage of this Bill. Indeed, one such provision, Clause 17 of the NHS Redress Bill, has recently completed its passage though this House. However, in recognition of the breadth of framework powers, the Bill includes a provision to ensure that they are exercised not by Welsh Ministers but by the Assembly as a whole following separation.[2]

Some peers expressed disquiet about the emphasis on framework powers as a device for awarding the Assembly further powers. Lord Roberts of Conwy stated:

> Meanwhile, the Government continue to increase the powers of the Assembly to make subordinate legislation. The NHS Redress Bill, to which the Minister referred, is mentioned on page 5 of the Explanatory Notes as an example of a very broad framework provision; indeed, it attracted the critical attention of our Delegated Powers and Regulatory Reform Committee. There is no requirement in this Bill for such enabling framework provisions, unpopular as they are with legislators, to have general endorsement. They will have to be debated individually as and when they arrive, but I feel sure that debated they will be.[3]

Baroness Finlay of Llandaff, on the other hand, felt that the Government was moving away from the spirit of the commitment made in the White Paper regarding framework powers:

> The *Better Governance for Wales* White Paper clearly states that Her Majesty's Government's intention is to immediately, in primary legislation relating to Wales, delegate to the Assembly maximum discretion in making its own provisions using its secondary legislative powers. Recently, the Assembly Minister for Health and Social

[1] Constitution Committee, Eighth Report, *The Government of Wales Bill*, HL 142, 2005-2006.
[2] HL Debates 22 March 2006, c.263
[3] Ibid., c.271

> Services gave us an insight into his own experience of framework powers in a debate and discussion on the NHS Redress Bill, saying that,
>
> "some of the signals that we are getting from Westminster were that . . . in making the case for framework legislation, there had to be some immediacy in the sense that we would be likely to use that framework legislation sometime within the next couple of years in order to have a strong intellectual case for it".
>
> From Dr Gibbons' statement, it appears that the Assembly must continue to make a case for framework powers, rather than, as was promised last June, a policy for new Bills to frame legislative discretion in devolved areas.[4]

When the Secretary of State appeared before the Committee in February 2006, the Chair of the Constitution Committee of the House of Lords, Lord Holme, expressed an 'edginess' at the parallel between the *Legislative and Regulatory Reform Bill* and the Order in Council procedures of the *Government of Wales Bill*, in that both reduce the potential for legislative scrutiny by Parliament.[5] However, in its Report the Committee conceded that the two bills were distinct:

> The Government of Wales Bill, which makes extensive use of secondary legislative powers to achieve important constitutional ends, is introduced to the House against a backdrop of controversy about delegated powers provisions in other recent bills. The Company Law Reform Bill has sought to give Ministers "a Henry VIII power of enormous proportions" to make Orders for the purpose of reforming the law relating to companies. As we have pointed out elsewhere, the Legislative and Regulatory Reform Bill seeks to confer even broader powers to change the law by Order. Understandably, the Secretary of State expressed the hope that the Government of Wales Bill will be considered on its own merits with the interests of Wales in mind, and kept separate from concerns about delegating legislative powers on Ministers. **We accept that this should be so in that the delegation of law making powers to an elected body is indeed very different from delegating them to Ministers.[6]**

This was welcomed by Lord Evans on behalf of the Government.[7]

3 Procedures for Orders in Council

There was a considerable amount of discussion about the possible procedures for the Orders in Council and scope for proper scrutiny. Lord Roberts of Conwy stated:

> The novel procedure by which the Assembly secures and Parliament endorses such orders, bearing in mind that orders are ultimately unamendable, has yet to be satisfactorily defined and refined. There will be pre-legislative scrutiny of the proposed order in draft form and of some explanatory memorandum/documentation, but doubt and uncertainty persist about the precise procedure involved, and its scope and acceptability. I refer noble Lords to col. 168 of the *Official Report* of the other place on 28 February, if they wish to savour the confusion that still exists.[8]
>
> The Constitution Committee's eighth report also highlights the staggering complexity of this procedure and the uncertainty attached to it. The ultimate result is intended to be Assembly measures that will have the same force as Acts of Parliament.....My main point now is that it has been established in the other place that the process of

[4] Ibid., c.290-1
[5] For a full account see Members Research Service, *Progress of the Government of Wales Bill 2005-6*, Research Paper, March 2006, p.18.
[6] Op.cit, HL Constitution Committee, GoW Bill Report, March 2006, para.45.
[7] Op.cit., HC Debates, 22 March, 2006 c.264
[8] Ibid., c.270

> devolving primary legislative powers, by Order in Council, is open-ended and seemingly endless.[9]

Lord Rowlands, who had been a member of the Richard Commission wondered what form the Orders in Council would take:

> What will be the nature and content of the Orders in Council? Will we be presented with an Order in Council which is minimal in words, signifying a massive transfer of legislative competence over a wide area of policy? Indeed, if that were so, I would be a part of those people who would jib at the whole notion of doing so. We certainly will want to know what we are voting for. While I do not agree that there should be a draft measure, we have a right to expect clarification on the content, nature and scope of the Orders in Council.[10]

Lord Richard also speculated on how widely Orders in Council would be drafted:

> Nor is it at all clear what the Orders in Council will contain if they are to add a "matter"—that is the phrase used—to Schedule 5. That schedule is in broad terms and I would be grateful to know whether the Government anticipate that the Orders in Council will be equally broad. It is envisaged that the powers transferred to Cardiff would include the right to amend existing primary legislation. That is Henry VIII writ large, because the right would be to amend not only existing legislation, but legislation that has not yet been passed.[11]

Lord Howarth of Newport highlighted the lack of proper scrutiny under the status quo:

> we have encountered the problem of lack of time in the Westminster legislative programme for Welsh measures, and when there has been legislation, there has been insufficient scrutiny—in the House of Commons at any rate—in my experience. They have developed varieties of useful, pre-legislative scrutiny, but few Members of Parliament representing Welsh constituencies have been appointed to stand in committees on Bills that contain important clauses referring to Wales; and non-Welsh MPs have either been uninterested or have felt that they should not presume to intrude on issues that are devolved to Wales. We have had framework Bills—very possibly outflanking Parliament's original intention when devolution for Wales was established—but necessary to enable the Assembly to exercise the powers devolved to it.[12]

He continued:

> Critics of this Bill, who complain that it would diminish Parliament's powers of scrutiny, should take account of the failure of the House of Commons, all too often, to scrutinise the detail of legislation in relation to Wales in recent years, and the tolerance by Parliament of very large, permissive, legislative measures. The upshot is that policies agreed by the executives in Cardiff and Whitehall have been perfunctorily scrutinised before landing on the people of Wales. Some would say that the remedy for these difficulties is to move now to full primary legislative powers. I agree with the Government that it is unlikely that the people of Wales would vote for that transference now; and I also agree with the Government that they are right that the representatives of the people of Wales in the Assembly should determine the eventual timing of a referendum on this matter. In my judgment, the Assembly is not yet ready to assume full primary legislative powers. I speak with great respect, but I believe that the Assembly has further to go to gain the confidence and the affection of people in many parts of Wales. I also respectfully submit that it needs to re-orientate some of its focus

[9] Ibid., c.270
[10] Ibid., c.300
[11] Ibid., c..282
[12] Ibid., c. 303

> and efforts and to develop some of its procedural methods. Surprisingly little time has been spent by the Assembly in the period of its existence in scrutiny, and in taking the advantage that it might have done in of the enormous potential of its powers to enact secondary legislation. It is a small body, less than one-tenth of the size of the House of Commons. It sits for fewer weeks than either the House of Commons or the House of Lords, and there is no second chamber in Cardiff to assist in the process of scrutiny.

Lord Anderson of Swansea was concerned that the expertise would be in place to draft Orders in Council:

> On the technical resources available to the Assembly, I understand that the Government assume that there will be roughly six Orders in Council per year. That requires additional technical drafting experience at the Assembly. I would like an assurance from the Minister that that position has been addressed.[13]

Lord Elystan-Morgan and Lord Richard both defended the Bill as a pragmatic advance in progressing devolution in Wales. Lord Elystan-Morgan stated:

> Detractors of the Bill will say that it is a fudge. The noble Lord, Lord Roberts of Conwy, says that it borders on dishonesty. Others say that it is a shabby compromise. Of course it is a compromise. Practically every political act is a compromise, because politics is the art of the possible. Nearly all legislation is a compromise. The only clear example to the contrary that I can think of is the delivery of the 10 Commandments from Moses on Mount Sinai; there was no compromise in that. Be that as it may, a compromise by itself is nothing wicked if it serves a proper and honourable purpose, as I believe that this Bill does.[14]

Lord Richard stated:

> I listened to the noble Lord, Lord Roberts of Conwy, with very great interest. At the end of his speech, I was not sure whether he was in favour of greater legislative competence. He also attacked the Orders in Council procedure as if in some way or another it was hypocritical or not acceptable for the Government to use it. One of the things that I have learnt in 40 years in politics is the virtue of stealth. If the result of the operation of these powers is that greater legislative powers come down to the Assembly, whether they come stealthily or with banners flying and bands playing I mind not. The important thing is where the powers are, where they come from and to whom they go.[15]

3.1 Pre-legislative Scrutiny

For the UK Government, Lord Evans of Temple Guiting stated:

> The Welsh Affairs Committee in another place and the relevant Assembly committee may also be involved in pre-legislative scrutiny. It is the Government's hope that such scrutiny can be arranged in a concurrent and complementary way. The Constitution Committee has made some constructive proposals on this issue and I am sure that the House will wish to consider them most carefully. In this House, statutory instruments are also sometimes considered in Grand Committee, which allows any Member to contribute.[16]

[13] Ibid., c.311
[14] Ibid., c.278
[15] Ibid., c.281
[16] Ibid., c.265

Lord Baker expressed some scepticism about pre-legislative scrutiny and the willingness of the UK Government to amend its proposals.

> We learn that there will be pre-legislative scrutiny. I am in favour of pre-legislative scrutiny. I was a member of the Procedure Committee from 1975 to 1979 in the House of Commons, which recommended not only Select Committees but pre-legislative scrutiny. Such scrutiny, however, has not been a very satisfactory experiment. The noble Lord, Lord Crickhowell, will know that from his experience of the Ofcom Bill, which was given considerable pre-legislative scrutiny to improve it. The Government, however, simply dismissed all the Select Committee's proposals. I believe that they waded through them and did not accept a single one, so I hold no great belief that this means the great involvement of Westminster in examining the legislation. I do not think that that will happen, particularly when it can be done simply through a proposal rather than through detailed examination of the Bill. [17]

Lord Rowlands disagreed with Lord Baker:

> Since I came to this House, I—unlike the noble Lord, Lord Baker—have watched pre-legislative scrutiny work very effectively in the Welsh context. We have had a kind of legislative trinity—Lords, Commons and Assembly—working together to produce good Bills. The latest Bill, the transport Bill, created a new precedent where the Assembly committee and the Welsh Select Committees in the other place worked together, jointly, and produced a very effective Bill, to which the Minister has listened and has amended accordingly as a result. The noble Lord's dismissal of the pre-legislative scrutiny procedure is unfair in the Welsh context.[18]

Lord Richard highlighted the uncertainty about how any disagreements at the pre-legislative stage would be resolved:

> It is equally unclear what role the Westminster Parliament would play in considering requests from Cardiff. Scope for debate on Orders in Council is very limited; they are not capable of amendment. It is difficult to see at the moment how the formal Westminster legislative procedure would be adapted to meet the requirements of this new Order in Council suggestion. If reliance is to be placed on pre-legislative scrutiny, what would happen if there was disagreement at that stage of the process?[19]

Lord Howarth of Newport suggested a role for the Welsh Grand Committee in pre-legislative scrutiny and questioned how English MPs could have an input in regard to cross border issues.

> The load on the Welsh Affairs Select Committee is going to be considerable. Have the Government considered whether the Welsh Grand Committee might have a useful part to play, particularly in pre-legislative scrutiny? A committee consisting of every Welsh Member of Parliament, and which on the past pattern has not met very often, would seem to be available as a rather useful instrument for this work.
>
> How are the interests of England and the United Kingdom to be taken into account in pre-legislative scrutiny? In recent years we have seen that policies on one side of the border for the National Health Service or for student support, to take two examples, have important impacts on the other side.[20]

[17] Ibid., c.298
[18] Ibid., c.300
[19] Ibid., c.282
[20] Ibid., c.303

3.2 Role of the House of Lords

A number of peers questioned what role the House of Lords would have to play in the scrutiny of Orders in Council. Lord Rowlands stated:

> As a member of the Constitution Committee, I should bring the attention of the House to the concerns that the committee has that this House could be marginalised in the process. We are not likely, or have not yet got a procedure, to be part of any pre-legislative scrutiny of the kind that will probably happen between the Assembly and the Commons on these draft Orders in Council. The committee rightly suggests—it is for the House to decide—in what structure, manner and way we will be able to deal with those issues and, as it were, participate and not be marginalised.[21]

Lord Howarth asked:

> What, as other noble Lords have asked, is to be the role of the House of Lords? Are our procedures to be changed so that we vote on Orders in Council, or is our role simply to be advisory? What will be the processes for reconciliation if the two Houses of Parliament arrive at different views on a proposal for a new legislative competence in Wales?[22]

Lord Baker stated:

> Those of us who have been in politics for some time know perfectly well that the Order in Council is an extraordinary device. For a start, we do not vote on Orders in Council in this House, so this House, which has passed amendments and discussed all these Bills since 2000, will have no chance at all of voting on any of the detail of these proposals in the future.[23]

The House of Lords Constitution Committee considered the scrutiny role of the House of Lords in its Report and flagged up some suggestions for how it might be conducted.

> The provision of effective pre-legislative scrutiny in Parliament of requests for enhanced powers ...is clearly essential. We were concerned that in debates so far little has been said about what role the House of Lords might play at this stage. Informed estimates are that there are likely to be five or six legislative competence Orders coming before Parliament each year. It has often been assumed that the House of Commons Welsh Affairs Committee, perhaps working in conjunction with members of the Assembly, will have a monopoly over this important scrutiny work. The Secretary of State told us that the Government sees the House of Lords as having a "crucial role". The precise arrangements will, of course, be a matter for the House not the Government. It is however clear from the Secretary of State's remarks that the Government foresees limits on the role for the House of Lords in this particular context. The Government accepts that there would be scope for both Houses to conduct concurrent (but not consecutive) pre-legislative scrutiny of proposed legislative competence Orders but that it would "create quite a difficulty" if a process of scrutiny in the House of Lords were to reach a different view from that of the House of Commons Welsh Affairs Committee.
>
> In due course the House will need to consider how best to contribute to scrutiny of proposed legislative competence Orders. This work might be done by the Delegated Powers and Regulatory Reform Committee or by the Constitution Committee. In this context we may recall the recommendation made in 2000 by the Royal Commission under Lord Wakeham's chairmanship that the "reformed second chamber should be

[21] Ibid., c.301
[22] Ibid., c.303
[23] Ibid., c.297-8

so constructed that it could play a valuable role in relation to the nations and regions of the United Kingdom whatever pattern of devolution and decentralisation may emerge in future".

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

The UK Government's response to this point was:

> The Government attaches great importance to Parliament having the opportunity to conduct pre-legislative scrutiny of any proposed Order in Council seeking to grant the Assembly legislative competence and believes that members of the House of Lords should be able to play an active part in such pre-legislative scrutiny. However, the manner in which this is done is a matter for the House itself to determine.
>
> The Government welcomes the reference to pre-legislative scrutiny in the Lords complementing rather than duplicating the scrutiny conducted by the House of Commons and the Assembly itself and would re-iterate the preference for concurrent scrutiny in the interests of enabling the Assembly to determine its legislative priorities in a timely way. The Government would welcome ongoing consideration of the form that pre-legislative scrutiny might take.[25]

4 Powers of the Secretary of State

A number of peers raised questions about the powers of the Secretary of State in the Bill. Lord Richard deemed it "a bit over-paternalistic" and added:

> There is a considerable lack of clarity on the way in which this interim stage will be managed and effected. It is by no means clear how the Assembly would formulate its requests, or to what extent that would be purely a function of the Assembly Government, which presumably would negotiate with the Secretary of State on what they consider appropriate. That illustrates one of the dangers still inherent in the proposals; the scope that the Secretary of State would have to reject a request by the Assembly is as yet unspecified in detail. Parliamentary procedure in relation to Orders in Council is fluid, to say the least. It could well mean that the Secretary of State would take the view that it would not be appropriate for the Assembly to be given the powers that it is asking for, particularly if the political affiliations of Cardiff and Westminster were different.[26]

[24] Op.cit, HL Constitution Committee, GoW Bill Report, March 2006, paras. 22-4.
[25] Wales Office, Government response to the Report by the House of Lords Select Committee on the Constitution, on the Government of Wales Bill, 30 March 2006,
[26] Op.cit., HL Debates, 22 March 2006, c..282

The former Secretary of State for Wales, Lord Crickhowell, said:

> Clauses 92 to 101 make it glaringly apparent that the exercise of power supposedly to be transferred to the Assembly will remain entirely at the discretion of the Secretary of State. Clause 94(7) allows the Secretary of State the right to refuse a draft order proposed by the Assembly. Ministers lay great emphasis on the effectiveness of pre-legislative scrutiny. But it is very hard to see how pre-legislative scrutiny can be effective in these circumstances. In any event, pre-legislative scrutiny should be an aid to consideration by both Houses and not a substitute for it.[27]

Lord Thomas of Gresford suggested that the only way the Secretary of State could be challenged would be by means of judicial review:

> I raised the matter of judicial review. The only way in which the Secretary of State's reasons could be challenged—and only on the basis that they were completely unacceptable—would be by way of going to the courts. I do not think that that is a suitable way of dealing with issues that would arise.
>
> I have already pointed out that no scrutiny is envisaged by Parliament of Assembly measures in themselves. Once the legislative competence has been given, Assembly measure after Assembly measure in that particular field can be brought forward. But then again, the Secretary of State may step in to block the Assembly's will be refusing to send the Assembly measure, once it has passed through the Assembly, for Royal Assent. On this occasion, all he has to do is to say he has reasonable grounds to believe it would have an adverse effect on any matter not specified in Part 1 of Schedule 5 and he gives his reasons for that. Again, presumably, that is challengeable only by judicial review, which is a highly unsatisfactory mechanism.[28]

5 Size of the Assembly

The Richard Commission Report stated that if the Assembly were to acquire primary legislative powers, an increase in the size of the Assembly would be required in order to facilitate the increased workload in terms of scrutiny. It recommended an increase to 80 members.[29] During the debate, Lord Richard himself noted that:

> It is also sensible to clarify the number of Ministers and Deputy Ministers who can form the Assembly Government. If the number of Ministers is eight and the number of deputies is four, then it would follow that, when Ministers are withdrawn from the subject committees, manning the committees adequately will become a problem. That was one reason why we concluded in the commission that with the growth in the legislative capacity of the Assembly the present membership of 60 would not be sufficient. I regret that the Government have rejected that recommendation.[30]

Lord Livsey of Talgarth and Lord Roberts of Llandudno also expressed concerns about the capacity of the Assembly to cope with new demands at its current size. Lord Livsey worried that the dice would be too heavily loaded on the Welsh Assembly Government's side:

> However, the Assembly is not able to engage directly in primary legislation, as we have heard, and, further, if the Assembly is to lose its executive functions, the balance of power will have moved decisively in favour of Ministers. That, combined with

[27] Ibid., c..284
[28] Ibid.
[29] Richard Commission on the Powers and Electoral Arrangements for the National Assembly for Wales, Report, 2004, ch.14, para.41.
[30] Ibid., c. 280

> 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. Even with the Orders in Council process contained in the Bill, more scrutiny will be required.[31]

Lord Roberts of Llandudno noted that of the existing 60 Members, two are officers of the Assembly: the Presiding Officer and the Deputy Presiding Officer and then "we have as many as 12 or even 14 Ministers who now with the new arrangement are not taking part in ordinary discussion. So we are left with just 45 or 46 Members of the Assembly who are able to take part in the legislative process and in scrutiny." He went on:

> As the Assembly's extended powers come into effect, I am sure that they will be far too few. Even on the Government side, if we take 12 people out of 28 or 29 one is left with very few to argue the Government's case on the Assembly Floor. I have been looking at the statistics in Wales. Of the 22 local authorities, only six have fewer than 46 members. They feel that they need more for adequate representation, legislative discussion and scrutiny..[32]

The Constitution Committee's Report raised questions about the Assembly's capacity to deal with new burdens of scrutiny. It stated:

> Part 3 of the bill will require a significant step-change by the Assembly. We share the concerns expressed by the House of Commons Welsh Affairs Committee about the strains that the new law-making powers may place on the ability of the Assembly to carry out effective scrutiny of proposed legislative competence Orders and the draft Assembly Measures that will follow. It will be important for the Assembly to keep the arrangements under review. We also believe that it is legitimate for Parliament to take an interest in the matter under the regime created by Part 3 of the bill, which creates shared responsibilities for law-making stopping short of full devolution of primary law-making powers.[33]

The Government responded:

> To ensure adequate scrutiny of proposed legislative competence orders and Assembly Measures there is considerable scope for the Assembly to adapt its working practices and spend less time on routine subordinate legislation. The Assembly's own Presiding Officer, Lord Dafydd Elis-Thomas, has suggested that the Assembly should increase the number of weeks it is in session from 33 to at least 40 weeks a year and Mondays and Thursday mornings should become part of the Assembly's working week. The Assembly will be acquiring legislative competence progressively through the mechanism created by Part 3 of the Bill, thus allowing its expertise to develop in the same way.
>
> Parliament of course remains sovereign. Parliament therefore has the right to monitor any aspect of the devolution settlement and to draw such conclusions as it sees appropriate. It is for the Committee to decide whether and how it might wish to undertake such monitoring.[34]

6 Dual Candidacy

Lord Evans of Temple Guiting reasserted the Government's arguments for ending dual candidacy. Namely that dual candidacy is confusing for the electorate and that the

[31] Ibid., c. 274
[32] Ibid., c..288
[33] Op.cit, HL Constitution Committee, GoW Bill Report, March 2006, para. 26
[34] Op.cit., Wales Office, Government response HL Constitution Committee Report on the GoW Bill, 30 March 2006.

targeting of constituencies by regional members undermines the very purpose of regional representation. "The role of regional members is to represent all the people in their region, rather than targeting the bulk of their work and resources on roughly one eighth of it."[35]

The House of Lords Constitution Committee Report on the *Government of Wales Bill* stated:

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

Lord Evans referred to this:

> The Government are grateful to the Constitution Committee for its recognition that the proposal to ban dual candidacy is a manifesto commitment. We also note the committee's recommendation that the Government should set out clearly what alternative approaches were considered and why these options were rejected in favour of the dual candidacy ban.
>
> The Government agree that it is important for the House to be informed on this point, and we therefore intend to address this recommendation in detail in our response to the committee's report.[36]

The Government's detailed response on dual candidacy can be seen in **Annex 1.**

A couple of peers made reference to another Bill, the *Scottish Parliament (Candidates) Bill [HL]* which is before the Lords. This Bill was introduced by a Labour peer, Lord Foulkes of Cumnock and seeks to end dual candidacy for elections to the Scottish Parliament.[37] The Government are not supporting the Bill and Lord Evans of Temple Guiting explained why:

> The question is whether the provision will require candidates for the Welsh Assembly to stand in either constituency seats or for regional lists. Everybody is claiming that this ought to be the basis of the electoral system in Scotland. The Government do not accept the automatic assumption that electoral systems for the different devolved administrations need to be wholly identical. To the extent that such systems are part of the devolution settlement, there is already what the constitutional experts would call "asymmetry" between the various settlements. It is perfectly reasonable to argue, therefore, that there may well be variations in the electoral systems tailored to suit the particular requirements of the different devolved administrations. Indeed, we see a pertinent example in the introduction of a new voting system for local government in Scotland, which would not necessarily attract support for replication in the rest of the country. Devolution means that differences emerge that stand on their own merits.[38]

[35] Ibid., c..263
[36] Ibid., c..264
[37] The debate on the Second Reading of the *Scottish Elections (Candidates) Bill [HL*] can be seen here: HL Debates, 3 March 2006, c.487. http://www.publications.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds06/text/60303-11.htm#topichd_1
[38] Ibid., c.503

Lord Steel of Aikwood, who was the Presiding Officer of the Scottish Parliament until May 2003 took the opportunity to clarify his own position on the issue of dual candidacy, having been quoted by the Government as supporting its proposals.

> I noticed that the Government in the other place have circulated, in support of the argument the noble Lord has just been advancing, a list of quotations, which includes two from me. I simply make it clear that these were taken out of context and that the quotations I gave were in the context of our going for the single transferable vote and multi-member seats and not for the solution that is in the Bill. It is a bit of a sleight of hand that I should be quoted in aid of a provision which I do not agree with and, indeed, had the noble Lord, Lord Foulkes, been pressing for this to be happening in Scotland, the result would have been, in the first Scottish Parliament election, that the Conservative Party, all of whose constituency candidates had to be elected through the list, would have had no seats at all. That is not a system I would have recommended.[39]

Lord Roberts of Conwy noted the different stance the UK Government was adopting with regard to Wales and Scotland.

> We now know that the Government agree with Arbuthnott for Scotland, but not for Wales. Replying to the debate on the Bill of the noble Lord, Lord Foulkes of Cumnock, to ban dual candidacy at Scottish parliamentary elections, the noble Lord, Lord Evans of Temple Guiting, said that,
>
> "there is no prospect of government support for reopening the Scotland Act for this or any other purpose".—[*Official Report*, 3/3/06; col. 504.]
>
> He went on to discourage his noble friend from proceeding further with his Bill. I am bound to say that there is a whiff of inconsistency here. Why should a principle be valid in Scotland but not in Wales?[40]

Lord Roberts of Llandudno referred to the vote that had taken place in the Assembly earlier in the day. An amendment to remove dual candidacy was tied and therefore fell on the casting vote of the Presiding Officer. Lord Roberts stated that this meant that the Government "have no mandate for this change".[41]

Baroness Gale suggested that perhaps a distinct role should be considered for list members:

> In the run-up to the elections in 1999, no party spelt out the role of the list Member. It was new to us all. It was only when the election campaign started that I began to wonder what we would do with the list Members. I think that that was the first time many of us asked what a list Member would do. I know that, as far as the Labour Party and other parties were concerned, the list Members were the same as constituency Members, because there was no particular role for them. I know that the Bill does not address this matter. Perhaps all parties should think about it. Perhaps we should have thought about the exact role of the regional list Members in the past, but none of us did.[42]

[39] Op.cit. HL Debates 22 March 2006, c. 263
[40] Ibid., c. 271
[41] Ibid., c..289
[42] Ibid., c.313

7 Miscellaneous

7.1 Clause 29

Baroness Finlay of Llandaff questioned the Minister about the reasoning for Clause 29 given that the *Better Governance for Wales* White Paper "promised a more wide-ranging reform affording greater flexibility for the Assembly to decide the constitution of its committees." She noted that "Clause 29 is considerably more prescriptive and complex than both the 1998 Act and the White Paper, requiring the allocation of seats on committees to be calculated using the d'Hondt formula". She concluded:

> The Secretary of State for Wales has acknowledged that the d'Hondt formula becomes distorted when applied to smaller committees of six or fewer members. So, to apply the d'Hondt formula restricts the Assembly's flexibility to set up smaller committees when it needs to do the job that we will be asking it to do. If the Government insist on the d'Hondt formula, the call for more AMs becomes an imperative to ensure balance and allow minority representation on committees.[43]

Lord Henley also signalled his intention to table constructive amendments to Clause 29 on the composition of committees during the committee stage.[44]

The House of Lords Constitution Committee Report commented that "it may be thought that clause 29 is an inappropriate incursion into matters that should be left for the Assembly to determine for itself."[45]

For the Government, Lord Davies of Oldham spoke in support of Clause 29:

> The noble Lord will recognise that Select Committees in the other place were always faced with the problems of adequate representation. Part of the issue for the responsible Assembly is that if, on one committee, the rub of the green was against a particular party in an unfair way, the whole legislature, looking at the total picture, compensated elsewhere.
>
> The other place constructs its Select Committees according to such principles all the time. The d'Hondt principle can give us clear guidance on formulae, but to apply those formulae utterly arbitrarily could conceivably produce unfairness. We would expect a responsible assembly that was created on democratic lines and eager that its committees should be representative of itself to take the same approach to these issues. There is no way that small committees can solve this issue in any other way.[46]

7.2 Tracking Subordinate Legislation

Baroness Finlay of Llandaff also drew attention to the need to keep a register of subordinate legislation for tracking purposes. She noted that this mechanism had been called for and supported by Law Society in Wales and the BMA in Wales. She outlined the reason why the register was desirable:

> The Government have increasingly given clearer information—I am grateful—for the tracking of primary legislation as it affects Wales. I hope that the improved tables and explanatory notes will continue and will become routine practice in drafting all explanatory notes. We need to track all legislation, particularly as it increasingly

[43] Ibid.; c.290
[44] Ibid., c.322
[45] Op.cit., HL Constitution Committee, GoW Bill Report, March 2006, para.18.
[46] Op.cit., HL Debates, 22 March 2006, c.327

> diverges from regulation affecting England. Solicitors and other professionals in Wales, such as healthcare professionals, need to know all the details and to be able to access them rapidly—hence the call for a register.[47]

7.3 Statutory Voluntary Sector Partnership Council

Lord Davies of Coity signalled his intention to table an amendment for the Government to consider including the requirement for the establishment of Voluntary Sector Partnership Council in the Bill.[48]

7.4 Duty of Welsh Ministers for the Welsh Language

Lord Prys-Davies raised a number of concerns about the status of the Welsh language, in particular, following separation, the duty on Welsh Ministers to give effect to the principle of equality.

> Section 47 of the Government of Wales Act 1998 imposes on the Assembly as a corporate body with executive and legislative functions a duty to give effect in the conduct of its business to the principle of equality of the English and Welsh languages—the principle enshrined in Section 5(2) of the Welsh Language Act 1993. Although the present law obviously separates the executive and legislative branches of the Assembly, the duty in Section 47 to treat the two languages on a basis of equality should, I submit, continue to apply in parallel to both the executive and legislative branches of the Assembly.
>
> However, 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?[49]

He was also concerned that the Bill does 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."

8 Next Stage

The Bill began its Committee Stage in the Committee of the Whole House on 19th April 2006. A programme motion was passed on 29 March 2006.

> **Government of Wales Bill**
>
> **Lord Davies of Oldham:** My Lords, I beg to move the Motion standing in the name of my noble friend Lord Evans of Temple Guiting on the Order Paper.
>
> Moved, That it be an instruction to the Committee of the Whole House to which the Government of Wales Bill has been committed that they consider the Bill in the following order:
>
> Clauses 1 and 2, Schedule 1, Clauses 3 to 27, Schedule 2, Clauses 28 to 58, Schedule 3, Clauses 59 to 87, Schedule 4, Clauses 88 to 93, Schedule 5, Clauses 94 to 102, Schedule 6, Clauses 103 to 107, Schedule 7, Clauses 108 to 144, Schedule 8, Clauses 145 to 148, Schedule 9, Clauses 149 to 159, Schedule 10, Clauses 160 and

[47] Op.cit., HL Debates, 22 March 2006, c.290
[48] Ibid., c.294
[49] Ibid.

161, Schedule 11, Clause 162, Schedule 12, Clauses 163 to 165.—(*Lord Davies of Oldham*.)

On Question, Motion agreed to. [50]

Amendments to the Bill tabled in the House of Lords can be seen here:
http://www.publications.parliament.uk/pa/ld200506/ldbills/081/amend/ldam081.htm

[50] HL Debates, 29 March 2006, c.778

Annex 1: Government response to the Report by the House of Lords Select Committee on the Constitution, on the Government of Wales Bill: *Alternatives to the proposal to ban dual candidacy*

1. In its report on the Government of Wales Bill, the Constitution Committee noted "that the Government's commitment to introducing a bar on dual candidacy was contained in the Labour Party's General Election manifesto in 2005" and expressed a hope "that the Government will take care to explain to the House what other options have been considered (for example replacing the regional lists with a single national list across the whole of Wales) and why they have been rejected"[51].

2. This Annex discusses the alternative options that were available to the Government and explains why the ban on dual candidacy was deemed most suitable.

Additional Member System (AMS)

3. Members of the National Assembly for Wales are elected using the Additional Member System (AMS). 40 Assembly Members are elected from Assembly constituencies which are coterminous with the parliamentary constituencies in Wales. A further 20 Members are elected from five electoral regions, four from each region.

4. The Government of Wales Act 1998 established AMS as the electoral system for the Assembly because the Government believed that AMS had a number of important advantages over alternative electoral systems. In particular, it builds on the tradition of strong, single-member constituency representation under First Past The Post (FPTP) with which the electorate is already familiar. At the same time, it provides a degree of proportionality through regional lists, which ensures that the outcome of the election more fairly reflects the will of the voters.

5. The Government continues to believe that AMS represents the best way of balancing the competing goals of the electoral system.

Experience of AMS in the first two Assembly elections

6. The Government believes that AMS, by combining both a strong constituency link and an element of proportionality, has served the people of Wales well. However, in light of experience of the operation of AMS in the first two Assembly elections, the Government proposes to modify AMS by preventing candidates from standing simultaneously in a constituency and on the regional list.

7. This change is intended to correct a number of unforeseen and undesirable anomalies in the operation of AMS which arose in the 1999 and 2003 Assembly elections.

8. As the *Better Governance for Wales* White Paper described, the "outcome of the Assembly election in the Clwyd West constituency in 2003 illustrates the problem the Government is seeking to address. Five candidates stood for election in that constituency, four of whom ultimately became Assembly Members (one as the successful constituency candidate, and three more as additional members elected from their respective parties' regional lists)".[52]

[51] Eighth report, Constitution Committee, March 2006.
[52] *Better Governance for Wales* White Paper, June 2005.

9. However, this is not the only such occurrence. Of the 20 Assembly Members elected via the regional lists in the 2003 election, 18 stood unsuccessfully as constituency candidates in the same election. Furthermore, 15 of the 20 list members elected in 2003 maintain offices in constituencies where they were previously defeated.

10. The Government believes that the role of list Assembly Members is to serve the whole of the region for which they were elected. We do not believe it is legitimate for list members to target the bulk of their work and resources on only one constituency within that region.

11. Furthermore, the Government believes that for defeated constituency candidates to be elected to the Assembly via the regional list, even though they have been rejected by the voters of that constituency, undermines democratic accountability and voter choice.

12. The Government believes that the proposed ban on dual candidacy will correct these anomalies in the electoral system in Wales. Firstly, by removing the safety net of dual candidacy, it will make it harder for regional members to use their position to target particular constituencies. Secondly, it will restore the right of the voters to reject a particular constituency candidate.

13. The Government believes that the proposed ban on dual candidacy will improve the operation of AMS in Wales while retaining both a clear constituency link and an element of proportionality to ensure fair representation for all parties.

Alternative approaches

14. Since the publication of the *Better Governance for Wales* White Paper in June 2005, a number of commentators have suggested that the Government's objectives with regard to the ban on dual candidacy could be achieved by alternative means. However, the Government does not believe that any of the alternatives that have so far been proposed would satisfactorily resolve the problems that we have identified.

Code of conduct on the relationship between regional and constituency members

15. One proposal that is often put forward to address the problems with the current system of AMS is to establish a protocol or code of conduct regulating the activities of regional and list AMs and seeking to clarify their respective role.

16. This approach was adopted in Scotland, on a cross-party basis, after the establishment of the Scottish Parliament in 1999. Annex 5 of the Code of Conduct for Members of the Scottish Parliament sets out clear guidance from the Presiding Officer of the Parliament. The guidance states that "MSPs should not misrepresent the basis on which they are elected or the area they serve"[53] and provides pro forma advice on how MSPs are to describe themselves in public.

17. This guidance is intended to address potential tensions between regional and constituency members where, for example, regional members inaccurately describe themselves as the "local" member for a particular constituency.

18. The National Assembly for Wales has not taken this step. As a recent Economic and Social Research Council (ESRC) paper noted, the "Welsh Assembly has not introduced any written guidance, and simply operates under statements of the presiding officer that all members are equal. Criticism of the inadequacy of current arrangements is even stronger than in Scotland."[54]

19. As the ESRC paper notes, criticism of the lack of guidance in Wales has been widespread, "with 66.7% [of Assembly Members] disagreeing or strongly disagreeing that guidance was adequate" according to the ESRC's own research[55].

20. The Government agrees that the lack of clear guidance on the relationship between regional and constituency AMs has exacerbated the problems with the current electoral system. Clause 36(6) of the Government of Wales Bill therefore requires the standing orders of the Assembly, either directly or through a Scottish-style code of conduct or protocol, to include provision about the different roles and responsibilities of regional and constituency members.

21. In particular, the Bill seeks to ensure that Assembly Members describe themselves accurately and do not misrepresent the basis of their electoral mandate.

22. The Government hopes that this provision will help clarify the roles of regional and constituency members and that it will ease some of the problems that have arisen during the first two terms of the Assembly's existence.

23. However, concerns have been expressed about whether this regulatory approach would prove wholly effective – particularly in light of the greater tensions that have been experienced in Wales.

24. So while the Government believes that the introduction of guidance in the Assembly is an important first step towards resolving the current difficulties, we do not believe that, on its own, the introduction of such guidance represents an adequate safeguard against the serious problems that we have experienced in Wales. We therefore propose to proceed with the requirement for such guidance to be established only in

[53] http://www.scottish.parliament.uk/msp/conduct/coc-an5.pdf
[54] *Local Representation in a Devolved Scotland and Wales: Guidance for Constituency and Regional Members*, ESRC Devolution Programme, 2003
[55] ibid

conjunction with the proposed ban on dual candidacy, rather than as an alternative approach.

National list

25. A further alternative approach that has been proposed is for the five regional lists to be abolished and to be replaced with a single national list. Indeed, Dr Richard Wyn Jones, a prominent critic of the Government's proposed ban on dual candidacy, put precisely this suggestion to the Welsh Affairs Committee during his evidence on the White Paper. Dr Wyn Jones stated that "a lot of these problems arise because these are regional lists, which implies a degree of territorial representation, and many of these issues I suggest would be removed from play if we moved to a national list system which would clarify the representation issue"[56].

26. The Government considered this suggestion very carefully during the development of the proposals in the White Paper. However, we are not convinced that the introduction of a national list would do anything to restrict the incentive for regional members to focus their work and resources on particular target constituencies. Indeed, as one opposition member of the Welsh Affairs Committee pointed out, it would arguably "compound or magnify the problem…as if you gave them a national shooting licence rather than just a local one"[57].

27. Furthermore, the Government believes that the current regional lists provide an important element of regional representation, which is a particularly important issue in north Wales.

28. In view of the doubts as to whether a national list would resolve the difficulties with the electoral system, and in light of the importance of regional representation, particularly in north Wales, the Government rejected the proposal to establish a single national list.

De-coupling the allocation of list seats from constituency results

29. During the Commons consideration of the Government of Wales Bill, some members argued that the method of allocating regional list seats treats some parties unfairly, because the operation of the systems means that they do not win any top-up seats on the list despite achieving a high proportion of the vote on the second ballot.

30. Advocates of such a change argue that this reinforces tensions between constituency and regional members, and that it would be fairer for list seats to be allocated from a national list, in direct proportion to the vote each party receives on the second ballot, without taking account of constituency results.

31. Such a reform would arguably bring Wales in to line with many other Mixed Member (MM) electoral systems around the world – for example, Italy, Japan and Hungary. Indeed, academic studies of MM systems indicate that the great majority of MM systems around the world are so-called Mixed Member Majoritarian (MMM) along these lines[58]. Mixed Member Proportional (MMP) systems of the type currently operating in Wales are the exception rather than the rule.

32. However, as the Parliamentary Under Secretary made clear during the debate on the Bill, the Government does not believe that such a change would be acceptable. The

[56] Dr Richard Wyn Jones (University of Aberystwyth), oral evidence to the Welsh Affairs Committee, 18 October 2005.
[57] Hywel Williams MP, 18 October 2005.
[58] Shugart, M & Wattenberg, M. (2001) Mixed Member Electoral Systems, Oxford: OUP

Government believes that any move to de-couple the allocation of list seats from constituency results would worsen rather than improve relations between list and constituency members. It would also be particularly unfair to parties that perform poorly in the constituency section, because it would make the electoral system significantly less proportional. The purpose of the top-up list is to provide a degree of proportionality, and the Government does not intend to change that.

Single vote

33. One of the more radical proposals that has been put forward to reform AMS is the abolition of the second vote – a system sometimes referred to as the "single vote". Under the single vote system, the regional top-up list would be retained, but instead of each party's entitlement being calculated on the basis of a separate second ballot, it would be calculated by aggregating the total number of votes received by each party's constituency candidates.

34. Proponents of the single vote argue that it would simplify the choice for voters at Assembly elections and that it would help clarify the role of regional and constituency Assembly Members by distinguishing more clearly between those who received a mandate principally as individual candidates and those who received a mandate principally as representatives of their respective parties.

35. However, the single vote system raises a number of difficulties that cannot readily be resolved – particularly in relation to smaller parties and independents. In order to maximise the chances of winning a list seat, parties would have to field candidates in all the constituencies within a given region. Smaller parties might struggle to find both a sufficient number of candidates and sufficient resources to achieve this. For independent candidates, it would be impossible.

36. For these reasons, the Government rejected the idea of abolishing the second vote under AMS and replacing it with a single vote system.

Single Transferable Vote (STV)

37. In its report on the powers and electoral arrangements of the Assembly, the Richard Commission recommended that "if the number of Assembly Members is to increase…on balance, the STV system of election is the best alternative to the present system"[59].

38. It should be noted that the Commission's recommendation of a change in the electoral system was linked to its recommendation that the membership of the Assembly should be increased. As Lord Richard explained to the Welsh Affairs Select Committee during its inquiry on the *Better Governance for Wales* White Paper, "the basis of our argument on the electoral system was the size of the Assembly. In other words, we said - and I have said it quite often since - that if the Assembly can run itself on 60 then problems with the electoral system tend to be withdrawn, tend to be slightly subsumed."[60]

39. The Government believes that the current size of the Assembly is sufficient to deal with the additional powers that are proposed in the Government of Wales Bill, and that any additional workload can be met by changing the working practices of the Assembly – for example, by meeting more frequently in plenary and through a better

[59] Richard Commission, Chapter 12, p239.
[60] Rt Hon Lord Richard QC, evidence to the Welsh Affairs Select Committee, 25 October 2005.

prioritisation of the Assembly's legislative workload. We therefore do not see a case for an increase in the number of Assembly Members.

40. Furthermore, the Government does not believe that there is currently a consensus in favour of moving towards STV and away from the current AMS electoral system, which was approved by the people of Wales in the 1997 referendum.

41. STV has recognised drawbacks. In particular, STV weakens the single-member constituency link that exists under both FPTP and AMS. STV would also require the creation of much larger constituencies – two to three times the size of the Assembly's current electoral divisions. Indeed, one amendment tabled to the Government of Wales Bill would have created an STV constituency coterminous with the current Mid and West Wales region.

42. This would pose particular difficulties in rural areas, because it raises the possibility that a single, sparsely populated constituency might cover a third or more of the total land area of Wales. It would be very difficult for Assembly Members elected to serve such a constituency to represent it adequately.

43. There are also serious doubts about whether the introduction of STV would solve the kind of tensions that have been experienced under AMS. As Dr Jonathan Bradbury and Dr Meg Russell argued research they conducted on behalf of the Arbuthnott Commission "the more radical alternative of abandoning AMS seems unlikely to solve the perceived problems with the current system. In particular a move to STV…would almost certainly also greatly increase competition over local work. If a proportional system is to be maintained…AMS thus remains the least problematic option"[61].

Conclusion

44. The Government believes that AMS, by combining both a strong constituency link and an element of proportionality, has served the people of Wales well.

45. However, in light of experience of the operation of AMS in the first two Assembly elections, the Government believes that it is necessary to correct a number of unforeseen and undesirable anomalies that have arisen. The Government concluded that the most effective remedy would be to prevent candidates from standing simultaneously on the regional list and in a constituency. In conjunction with this approach, the Government also supports the introduction of clearer guidance on the relationship between regional and constituency members.

[61] Dr Jonathan Bradbury (University of Wales, Swansea) and Dr Meg Russell (UCL Constitution Unit), *Local Work of Scottish MPs and MSPs*, May 2005