



WALES OFFICE

▼ BETTER GOVERNANCE FOR WALES





Better Governance for Wales

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By Command of Her Majesty**

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Better Governance for Wales

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Better Governance for Wales

Ministerial Foreword

By the Secretary of State
for Wales,



The Rt Hon Peter Hain MP

I am proud to have been one of those who fought hardest for devolution. It has proved a success for Wales and for the rest of the United Kingdom. By establishing the Assembly, following the endorsement of a referendum, the Government has moved the process of decision-making closer to the people.

And, six years on, we in Wales can clearly demonstrate the benefits: record employment, rising standards in education, and ground-breaking initiatives, such as a Children's Commissioner, free bus travel for the elderly and disabled, and the piloting of a Welsh Bacallaureate.

With equal numbers of male and female members, and pioneering commitments to open government, sustainable development and equal opportunities, the Assembly has been a progressive institution, which has rapidly established itself as part of our political landscape, and attracted interest from around the world.

The Assembly has given Wales a stronger, more democratically accountable voice in Britain and in Europe. And the partnership with the UK Government has worked well, with Wales Office Ministers representing Wales' interests at the Cabinet table, across Whitehall and in Parliament, and no fewer than six Wales-only Bills coming before Parliament since devolution in 1999.

Devolution has strengthened the United Kingdom, not weakened it, as opponents once claimed. Indeed Nationalism has waned in Wales since the Assembly was established. Independence is now seen as eccentric whereas it could have gained momentum in a backlash against 'London rule' in the 1980s and 1990s without the prospect of devolution reform from 1997.

However, much has changed, both in Wales and the wider world since Parliament debated the Government of Wales Bill seven years ago. As a result of the Government's prudent economic management and sustained levels of public investment, the budget of the National Assembly has expanded greatly from some £8 billion in 1999 to over £12 billion in 2005-06 and is planned to rise to £13.5 billion in 2007-08. The responsibilities of the Assembly have also increased. In the past year alone, Westminster has transferred a number of important new responsibilities, in animal health, the fire service, student support and children's services. So devolution has not stood still, it has evolved.

After the experience of six years of the Assembly in operation, and two full sets of elections, it is appropriate now to review and improve the working of the Assembly. This is not to make change for change's sake, but to ensure that it continues to meet people's needs in Wales and remains accessible and accountable to them.

Better Governance for Wales

This document highlights three key issues that the Government believes we need to tackle to develop the devolution settlement to make it work more effectively and so deliver better governance for Wales.

Firstly, the Assembly has called for a formal separation between its executive and legislative branches, so that it is clear to the public who is actually responsible for decisions. Often, decisions are made in the name of the Assembly which are in fact, quite properly, the responsibility of one Minister or official, making it hard to know who should be accountable to the public for them. This mirrors the concern which gave impetus to similar changes in local government in recent years; the Assembly also wishes to establish an executive (or Cabinet) which is clearly responsible for decisions and accountable to a legislature (the Assembly).

Secondly, though there has been significant Wales-only legislation at Westminster since devolution, there is considerable support for finding ways of enabling the Assembly Government to secure its legislative priorities more quickly and more easily, within its current areas of responsibility. Both the House of Commons Select Committee on Welsh Affairs in its report on the Primary Legislative Process as it affects Wales in 2003, and the House of Lords Select Committee on the Constitution in its report on Devolution in 2002, made recommendations in this area.

Finally voters are confused and concerned by the way the Assembly's electoral system permits candidates who lose in a first past the post constituency ballot still to become Assembly Members representing the same area through the regional list system and competing with Assembly Members who defeated them. With turnout at the Assembly elections in 2003 at disappointingly low levels, providing a backdoor route for election for those who have been defeated at constituency level can be a disincentive for voters, and can lead to unnecessary tensions between Assembly Members.

The Government was elected on a manifesto commitment to amend the current system in these areas of concern. This White Paper therefore sets out how we propose to change the corporate status of the Assembly, and explores some of the consequences of that. It explains how we intend to provide enhanced legislative powers for the Assembly and to remove the confusion in the electoral system.

One of the key reasons why the transition to devolved government in Wales has been a smooth one is because we have moved at a pace determined by the people of Wales. These new proposals reflect that guiding principle by providing a practical, common sense route-map to better governance. It is a way forward designed to meet the needs and aspirations of the people of Wales.

Better Governance for Wales

Our objective is to build a Wales that is world class, economically competitive and enjoying high quality public services; and to underpin that with a reformed structure of governance that is more accountable, participatory and effective.



Secretary of State for Wales

June 2005

Introduction

- 1.1 The Welsh devolution settlement established by the Government of Wales Act 1998 is an innovative one. As well as giving people in Wales a real say over the key decisions affecting their everyday lives, the Government's aim was to facilitate a new way of working by drawing on the best of both the Westminster and local government models.
- 1.2 The legislation was developed in the light of the narrow referendum victory to reflect the particular needs and circumstances of Wales, and to ensure that the whole of Wales felt a degree of ownership of the new institution.
- 1.3 In the six years since the Assembly was established, it has become an accepted part of the Welsh political landscape. The economy in Wales has prospered as a result of the partnership between the UK Government and the Welsh Assembly Government (the executive arm of the Assembly). The Assembly Government has developed a distinctive and popular range of policies including the abolition of prescription charges, Assembly Learning Grants for further and higher education students, and free breakfasts for primary school children.
- 1.4 The current settlement provides for Government Ministers to transfer additional functions to the Assembly. This is working well; for example, the Assembly has recently gained powers in relation to animal health and has taken responsibility for the Children and Family Court Advisory and Support Service (CAFCASS) in Wales.
- 1.5 But whilst the system has operated effectively, and government has been brought closer to the people in many different ways, there is a need to learn from the experience of the past six years. We should be seeking to make common-sense adjustments to the structure of governance for Wales which will make it both more accountable and more effective.
- 1.6 The Government has therefore concluded that the Welsh settlement can be improved in three specific areas. Detailed discussion of the issues appears in the next three chapters, but they are summarised below. These are proposals for Wales, based on the needs and concerns of Welsh people.

Chapter one

Better Governance for Wales

THE STATUS OF THE ASSEMBLY

- 1.7 The National Assembly for Wales was created as a single corporate body. This means that one organisation is responsible for discharging both legislative and executive functions, rather than separate organisations being responsible for each of these as in the traditional Westminster/Whitehall model.
- 1.8 One of the reasons why a corporate structure was favoured when the original legislation was drafted was that it drew upon existing practice in local government at that time. But over the past few years, Welsh local authorities have moved to a Cabinet style of government with executive members taking decisions and being held to account by overview and scrutiny committees.
- 1.9 Under the Assembly's existing arrangements, executive functions are not conferred on Ministers as happens in the traditional model. Instead they are conferred on the Assembly as a whole. The Assembly Members then delegate these functions to the First Minister by a vote in a plenary session-delegations which can be withdrawn at any time by another plenary resolution.
- 1.10 The lack of a clear separation between the Assembly itself and Assembly Ministers and the civil servants working for them creates two problems. Firstly, it has generated considerable confusion. While those closely involved in the system understand how it works, the wider public in Wales generally is confused about who is responsible for decisions that affect them.
- 1.11 The day to day business of governing Wales is carried out by Assembly Ministers under those Ministerial powers delegated to them by the Assembly. The confusion arises when these decisions are quite properly described as taken by "the Assembly"; people naturally assume that all Assembly Members were fully involved, when in fact – quite correctly under the terms of the delegation – they may not have been consulted. And if there are court proceedings as a result of an action of the Assembly Government, the Assembly itself is a party to those proceedings even though most Assembly Members may not have been aware of the action complained of.
- 1.12 Equally, policy makers and interest groups who want to engage Assembly Ministers and civil servants working for them in initial discussions about matters of mutual concern are concerned about confidentiality. They assume that because the Assembly is a corporate body, what is said to Ministers must immediately be passed on to Assembly Members. This can lead to Assembly Ministers not being consulted until proposals are ready for public consultation, which can result in unnecessary controversy. As people have become used to working with the

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Assembly, this problem has decreased, but there are still many areas in which the confusion exists, both inside and outside government.

- 1.13 Given these uncertainties, it is not surprising that, in its report on the 2003 Assembly elections, the Electoral Commission highlighted the low level of public awareness of who does what in the Assembly and ignorance over its powers and responsibilities as contributory factors in the relatively low levels of turn-out.
- 1.14 The second issue arising from the corporate structure of the Assembly relates to the scrutiny of Ministers. Welsh devolution was intended to give greater democratic accountability for decisions about government activity in Wales, and to a large extent this aim has been achieved. The work of the Assembly in plenary and in Committee has meant far greater discussion of decisions taken by the Assembly Government than was possible before devolution in relation to decisions taken by the Secretary of State.
- 1.15 The structure of the committees means that they play an important role in policy development, with the relevant Minister as a member of the committee to aid that role. However, this structure can mean that committees are not able to devote sufficient time to questioning Ministers and that they may find it difficult to switch from a consensual policy development mode to one of scrutiny where the Minister is subjected to detailed questioning.
- 1.16 This is of concern to many commentators, including Assembly Members, Assembly Ministers themselves and the Commission on the Powers and Electoral Arrangements of the National Assembly for Wales, chaired by Lord Richard, which reported in March 2004.
- 1.17 The Assembly has done its best to address these problems by making clear the distinction between the Assembly and the executive within the terms of the current settlement. Following the Assembly's own cross-Party review of procedures in 2001-2 it was unanimously resolved to create a de facto separation between the "executive" (Welsh Assembly Government) and the "legislative" arms of the Assembly, in as far as it was possible to do so within the terms of the Government of Wales Act. However, while this has helped the operation of the current system, it does not solve the underlying problem.

THE LEGISLATIVE POWERS OF THE ASSEMBLY

- 1.18 It is generally agreed that these problems cannot be resolved under the present structure. This White Paper therefore contains the Government's proposals for legislation to effect a formal separation between the Assembly and the Welsh Assembly Government. This change would make for better government and better public understanding of the differences between the responsibilities of Ministers on the one hand and the roles of opposition parties and backbenchers of all parties on the other.
- 1.19 The Government has worked with the Assembly Government in Cardiff to ensure that primary legislation has been secured to enable it to deliver its distinctive policy agenda for Wales.
- 1.20 Since its creation, the Assembly has made 23 bids for primary legislation, no fewer than 17 of which have resulted in legislation or proposals for legislation, often in Bills with a significant number of Welsh clauses. However, as the Richard Commission noted "even with goodwill on both sides, there are practical constraints on the achievement of the Assembly's legislative requirements".
- 1.21 A particular problem is that the Assembly has to compete alongside Whitehall departments when bidding for legislative time at Westminster. This has meant that on occasion, the Assembly Government has been unable to take prompt action in an area of policy where the public expects it to be able to do so, and that can be the case even where the proposed legislation would be non-contentious, such as the inclusion of social landlords in the remit of the Welsh Housing Ombudsman.
- 1.22 A formal separation between the Assembly and the Welsh Assembly Government, as proposed in this White Paper, will affect how the Assembly and its Committees operate in relation to legislation. Under this Westminster-type model, the role of the Assembly must be primarily legislative. Once executive powers are conferred directly on Assembly Ministers, their accountability to the Assembly will no longer depend on the delegation of those functions. It is important, therefore, that Assembly Members have a significant role in deciding the legislative framework under which Assembly Ministers operate.

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- 1.23 The Government is committed to ensuring that the Assembly has the tools to deliver change in the areas for which it has responsibility. We are therefore proposing to give the Assembly, gradually over a number of years, enhanced legislative powers in defined policy areas where it already has executive functions.
- 1.24 First, the Government intends immediately, in drafting primary legislation relating to Wales, to delegate to the Assembly maximum discretion in making its own provisions, using its secondary legislative powers. This will not require any change to the provisions of the Government of Wales Act 1998.
- 1.25 As a further enhancement of the Assembly's legislative powers, which would require primary legislation, the Government proposes to put in place a procedure enabling Parliament to give the Assembly powers to modify legislation or make new provision on specific matters or within defined areas of policy within the fields in which the Assembly currently exercises functions. Orders in Council conferring these powers would be made at the request of the Assembly and would be subject to specific authorisation by Parliament. They would relate to specific pieces of legislation or clearly defined topics, which could cover a wide or narrow area.
- 1.26 In the long-term, the Assembly could be given general powers to make primary legislation in those areas where functions have already been devolved. As a fundamental change to the Welsh settlement, this would require the support of the Welsh electorate through a post-legislative referendum. The Government envisages no particular timetable for this as it would be dependent on a consensus which does not exist at present. However, in order to avoid the necessity of a third Government of Wales Bill should such a consensus emerge, the Government proposes to provide for this option in the forthcoming legislation, so that a referendum seeking the electorate's approval for the transfer of primary law-making powers in devolved areas could be called at some time in the future.
- 1.27 The Additional Member System by which Assembly members are elected has worked well in ensuring representation in the Assembly of all those parties that have commanded a significant proportion of the vote in Assembly elections. However, the system does have one weakness that the Government believes should be addressed in the light of the discussion on this issue which has taken place in Wales.

THE ELECTORAL SYSTEM

- 1.28 The electoral system in the UK has historically attached great importance to the relationship between Members - whether of Parliament, local authorities or the devolved bodies - and their constituents. The present operation of the regional lists in Wales is damaging that relationship.
- 1.29 There is considerable dissatisfaction that candidates who are rejected by a particular constituency can still become Assembly Members through the regional list and so be able to claim to represent the constituency that rejected them. It has happened in Wales that candidates defeated in a constituency have become Assembly members via the regional list for that same constituency. This can have done little to enhance the credibility of the electoral process or the voters' level of engagement with it. It also causes considerable confusion among the electorate that list members can set up constituency offices and seek to deal with constituency case work as a "local member" in competition with the constituency member.
- 1.30 The Government therefore proposes to legislate to provide that candidates should be able to stand either in a constituency or on the party list, but not both. This would ensure that candidates who had been rejected by the voters in a particular constituency could not then become members of the Assembly via the list, and claim to represent that constituency.

A New Executive Structure

- 2.1 This chapter sets out the Government's proposals to change the provisions in the Government of Wales Act to allow for the creation of a separate Ministerial executive authority for Wales, fully accountable to the National Assembly but legally distinct from it. This will strengthen the accountability of Ministers by facilitating more detailed scrutiny of their actions and provide a less confusing and more open and effective decision-making process to which the public can relate.
- 2.2 Under "Westminster Model" constitutions, executive and legislative authority are separate but inter-related. At the United Kingdom level, the division is between Ministers of the Crown on the one hand, and Parliament on the other. Although the Government of the day derives its democratic authority from majority party support in Parliament and is accountable to Parliament in the way in which it exercises its powers, Ministers are actually appointed to office by Her Majesty and exercise their powers as Ministers of the Crown. The devolution arrangements created for Scotland by the Scotland Act 1998 follow this traditional pattern. The Scottish First Minister is appointed by Her Majesty. Both he and other Ministers (who together form the Scottish Executive) exercise their statutory functions on behalf of the Crown, but are accountable to the Scottish Parliament. (This arrangement is characteristic of Westminster model constitutions even where there are no institutions of monarchy; so, for example, Irish Cabinet Ministers receive their seals of office from the President of the Republic but answer to the Dáil for their conduct of affairs).
- 2.3 The structure of the Assembly, established under the Government of Wales Act 1998, is very different. The National Assembly for Wales was created as a single corporate body with its own legal personality. Under the Act, there is no formal division between executive and legislative authority in Wales. The Assembly's functions are discharged either by the Assembly itself, for example when exercising its legislative powers, or by those (usually Ministers but occasionally officials) acting on its behalf under a complex system of delegations of executive authority.

Chapter two

THE BACKGROUND

2.4 These arrangements have not prevented the Assembly from operating effectively since its creation six years ago. However, they have undesirable consequences and limitations which need to be addressed:

- Accountability is confused. Decisions are said to be taken by “the Assembly”, whereas in most cases few Assembly Members are party to them or will know much about them. This is because in reality, and perfectly properly, the decisions have been taken by individual Ministers or civil servants under their delegated powers. People in Wales ought, however, to know and be able to see who is actually responsible for decisions and who is accountable for them. Attributing such decisions to the Assembly as a corporate whole clouds this accountability.
- The civil service supporting the Assembly is expected to serve both the Ministers discharging executive functions and also the legislative branch of the Assembly which holds Ministers to account. This can be managed on a pragmatic basis for most civil servants most of the time. But it can place officers at the highest levels of the civil service in Wales in difficult positions of apparently conflicting loyalties. As the Richard Commission Report pointed out, “the clarity of differing responsibilities that applies to parliamentary and government officials in Scotland, Northern Ireland, Westminster and most Commonwealth countries does not apply in Wales”. In the Government’s view, it is now time that it should.
- Ministers act as delegates on behalf of the Assembly, rather than in their own right as appointees of the Crown. This means that their delegated authority to take any or all decisions could be withdrawn at any time by a simple majority vote in the Assembly. That is, in the Government’s view, far too insecure a foundation on which to build effective government for Wales in a sustainable way. It means, for example, that on a single vote in plenary, the Assembly could move from a Ministerial to a committee-based model of decision-making. In contrast local government in Wales has moved away from the traditional committee structure and adopted an “executive and scrutiny committee” model.
- Another feature of the “Ministers as delegates” model which can give rise to practical difficulty is that, like other Assembly Members, Ministers cease to be AMs immediately before an

Assembly election. They therefore also cease to be Ministers and there are no elected politicians who can exercise executive functions until after a new First Minister has been elected by the Assembly. Following a close election outcome, this might take some time, during which civil servants would have to take any necessary executive decisions without political direction. That is not, in the Government's view, an appropriate arrangement.

- 2.5 The Assembly has itself identified these weaknesses in its institutional design. In February 2002 it unanimously agreed a resolution calling for as clear as possible a separation between the work of its executive and legislative arms as the legal constraints of the Government of Wales Act permit. More recently, in its response to the report of the Richard Commission in October 2004, the Assembly adopted a resolution calling for legislation to effect a formal separation between its executive and legislative branches. The Government agrees that such a formal separation is now required as a matter of priority, and detailed proposals for achieving this are set out in the remainder of this chapter.

(i) Ministers

- 2.6 Under the Government's proposals, the terms "First Minister" and "Assembly Ministers" will be put on a statutory footing. The First Minister will be appointed by Her Majesty from amongst AMs on the nomination of the Assembly and will then, with Her Majesty's approval, appoint other Ministers. The provisions in the Government of Wales Act will be changed to allow for the appointment of deputy Ministers, who will also be appointed by the First Minister in the same way and will receive a salary. Ministers will discharge their legal responsibilities on behalf of the Crown rather than by delegation on behalf of the Assembly. The Welsh Assembly Ministers collectively will be known as the Welsh Assembly Government.

(ii) Counsel General

- 2.7 Under the Welsh devolution settlement, the UK Government retains responsibility for a number of significant areas of government including criminal and civil justice and the courts. This reflects the fact that England and Wales comprise a single legal jurisdiction. Legal advice in relation to Wales for such matters is provided to the UK Government by the UK Law Officers.

EXECUTIVE AUTHORITY

- 2.8 However, the role of providing authoritative legal advice to the Assembly Government cannot be carried out by the UK Law Officers, since they are members of a different administration. This role has been exercised by the Assembly's Counsel General, a member of the Assembly's staff. The new status of Welsh Assembly Ministers as Ministers of the Crown, and the developing role of devolved government for Wales, now makes it appropriate to make more formal provision. A new statutory post of Counsel General to the Assembly Government, will therefore be created.
- 2.9 The Counsel General will be appointed by Her Majesty on the recommendation of the First Minister made with the agreement of the Assembly. He or she will be a member of the Welsh Assembly Government but need not necessarily be an Assembly Member. The Counsel General will be able to address the Assembly, for example to answer AMs' questions. His or her principal role will be to advise the Welsh Assembly Ministers on legal matters relating to the exercise of their devolved functions. The Counsel General will also have the power, as do the UK Law Officers, to refer to the courts any issue as to whether the Assembly (acting as a legislature) or the Assembly Government are acting within their legal powers.

(iii) The civil service

- 2.10 Civil servants will in future act exclusively in support of the Welsh Assembly Ministers. This will affect the position of those staff currently working in the Assembly Parliamentary Service. They are the nearest Welsh equivalents to the staff employed by the Scottish Parliamentary Corporate Body, who provide support for the Scottish Parliament. These implications are further discussed in paragraph 2.20 below. Because Welsh Assembly Ministers and civil servants will in future be acting on behalf of the Crown, it will be possible to do away with the complex delegation arrangements currently required by the Government of Wales Act when functions are being discharged on Ministers' behalf by their staff.

- 2.11 Under the “corporate body” structure created by the Government of Wales Act, it is the Assembly as a whole (rather than Ministers) which has legal responsibility for the performance of statutory functions (powers and duties). These functions derive from very many Acts of Parliament, including ones passed before 1999, when the Assembly came into being, and from others passed since, and they also include functions created by the Government of Wales Act itself. As part of the formal separation of the Assembly’s executive and legislative elements, it will be necessary to decide, in relation to each function, who should be responsible for discharging it in the future.
- 2.12 The Government based its original devolution proposals on transferring to the Assembly the wide range of statutory functions exercised at the time by the Secretary of State for Wales. As a consequence, the vast majority of the Assembly’s current functions are of a Ministerial or executive character. The Bill formalising the separation of executive and legislative arms will therefore transfer responsibility for most of the Assembly’s current executive functions to Welsh Assembly Ministers. These will include the kind of powers to make subordinate legislation traditionally exercised by Ministers under the Westminster (and Edinburgh) model. The Assembly will however retain important legislative functions (as well as gaining powers under the proposals set out in Chapter 3). Some important kinds of legislative orders may continue to be made by it, and its approval will be required for others. Other orders made by Ministers will be open to be annulled by AMs. The responsibility for the final approval of major statutory strategic plans such as the Wales Spatial Plan will continue to rest with the Assembly even after the separation takes effect; the Bill implementing the Government’s proposals will make appropriate provision for these matters.
- 2.13 Some specific statutory duties are laid on the Assembly as a corporate whole by the Government of Wales Act. Examples are those requiring it to publish an annual report on its arrangements for securing equality of opportunity in discharging its functions, and to make a scheme setting out how it proposes, in the exercise of its functions, to promote sustainable development. Since these functions are to be exercised in future by Welsh Assembly Ministers rather than by the Assembly as a whole, the corresponding duties will also fall on Ministers. In the same way, Ministers will in future be responsible for discharging the various duties currently laid on the Assembly to

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SCRUTINISING MINISTERS

establish partnership or consultative arrangements with business, local government and the voluntary sector (although it would of course remain possible for AMs, including those from opposition parties, to attend such meetings at Ministers' invitation). Consultation or joint-decision making arrangements with UK Ministers will be formally expressed as the responsibility of Welsh Assembly Ministers rather than of the Assembly. (In fact, this will do no more than bring the formal legal position into line with what actually happens now). Future Acts of Parliament will normally confer executive functions on Welsh Assembly Ministers rather than on the Assembly.

- 2.14 The Government of Wales Act requires that each Minister who has responsibility for a particular portfolio has to be a member of a subject committee whose remit exactly mirrors that of the Minister. The functions of subject committees include scrutiny of Ministers' performance in relation to their portfolios through receipt and questioning of regular Ministerial reports, but in addition they are expected to contribute (side by side with the Minister) to policy development within each portfolio area. The Richard Commission concluded however that Ministers' membership of subject committees had inhibited the exercise of an effective scrutiny function, and that a culture of scrutiny on traditional parliamentary lines had failed to develop. The present arrangements had served to blur accountability. The Commission accordingly recommended that Ministers should cease to be members of subject committees.
- 2.15 The Government agrees with that analysis. One way forward could simply be to remove the provision in the Act requiring Ministers to be members of the relevant subject committees. The Government however favours a more wide-ranging reform. Comparison of the Government of Wales Act with the Scotland Act shows that the former is significantly more prescriptive in specifying an elaborate committee structure that must be put in place. In addition to the (currently seven) subject committees, the Act requires the Assembly to have an Audit Committee, a Subordinate Legislation Scrutiny Committee, and (currently four) regional committees, as well as an Executive Committee (the Cabinet). The Scotland Act, on the other hand, makes only a basic reference to committees. Whether to establish particular committees and what tasks they should be set are matters left almost entirely to the Scottish Parliament's Standing Orders.

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- 2.16 In the Government's view, this simple and straightforward approach ought now to apply to the Assembly. The Assembly should generally be able to establish such committees as it sees fit, in accordance with its Standing Orders. The only legislative control which should be required would be to lay down the principle that in determining the membership of such committees as the Assembly chooses to set up it should have regard to the balance of political parties in the Assembly. The Government therefore proposes that, with limited exceptions, the existing statutory restrictions relating to Assembly committees (including that requiring Ministerial membership of subject committees) should be removed, and should be replaced by a simple provision that the Assembly's internal organisation and procedures should be regulated by its own Standing Orders. One clear exception to this general rule would be the continuing requirement for an Audit Committee, to which important functions have been given directly by other legislation.
- 2.17 In proposing this approach, the Government is not expressing any view on the current structure of Assembly committees. It may well be that the Assembly will choose to retain many of those already in place. The crucial point is that the Assembly's committee structure should in future be a matter for Assembly discretion rather than be fixed by statute: the Assembly should be free to establish such committees as it considers necessary in order to ensure that effective scrutiny of Ministers takes place.
- 2.18 Scrutiny will be particularly important in relation to the Welsh Assembly Government's expenditure. The Assembly's resources are determined by application of the Barnett Formula. The current arrangement is for Parliament to vote resources to the Secretary of State for Wales, who passes them to the Assembly after taking a "top-slice" to meet the costs of the Wales Office. This arrangement will continue once the Assembly's legislative and executive elements are separated, except that it will be necessary for the Assembly, having received moneys from the Secretary of State, to vote resources to the Welsh Assembly Government and to hold the Welsh Assembly Ministers to account for the use made of those resources. The Assembly's Standing Orders relating to financial procedures will need to be adjusted to take account of both of these functions.
- 2.19 The Assembly's scrutiny of the use made of resources will be assisted by the work of the Auditor-General for Wales. Currently, the Auditor-General is appointed by the Crown on the advice of the Secretary of State. The Government considers that when the Welsh Assembly Government is established, as

ASSEMBLY STAFF

described above, it would be more appropriate for future appointments to that office to be made by Her Majesty on the nomination of the Assembly. In the same way, it is proposed that future holders of the office of Public Services Ombudsman for Wales should be appointed by Her Majesty on the Assembly's nomination. Both of these offices will assist the Assembly in holding the Welsh Assembly Ministers to account, and in the Government's view it is right that appointments to these offices should be seen to be entirely independent of executive authority in Wales.

- 2.20 Under the arrangements proposed in this chapter, staff serving the Welsh Assembly Ministers would continue to be civil servants. Staff supporting the Assembly would, like servants of both the UK and Scottish Parliaments, not be part of the civil service. The Assembly as a legislature and scrutinising body would employ its own staff, although it would be expected to maintain terms and conditions for staff broadly comparable to those applying to Assembly Government civil servants. Assembly staff would continue to be eligible for membership of the Principal Civil Service Pension Scheme (PCSPS), just as staff supporting the Westminster and Holyrood Parliaments are.

Enhancing the Assembly's Legislative Powers

- 3.1 This chapter sets out the Government's approach to enhancing the Assembly's legislative powers. Though there has been significant Wales-only legislation at Westminster since devolution, we believe there is a strong case for enabling the Assembly Government to secure its legislative priorities, and deliver its policy agenda, more swiftly.
- 3.2 When the National Assembly was established, the powers conferred on it were those previously exercised by the Secretary of State for Wales – that is, they were primarily executive, not legislative, powers. However, all Secretaries of State do have powers to make Orders and regulations, or issue statutory codes, under a wide variety of Acts of Parliament. These powers to make secondary legislation are usually subject to scrutiny by Parliament. Most of them undergo what is known as the negative resolution procedure; that is, they are made by the Secretary of State and come into force automatically after a certain period unless Parliament votes to annul them (although this rarely happens). Some of the more significant pieces of secondary legislation are subject to the affirmative resolution procedure; that is, they must be debated and agreed in the House of Commons and the House of Lords before they can be made.
- 3.3 Together with his other powers, those secondary legislative powers previously exercised by the Secretary of State for Wales were also transferred to the Assembly in 1999. Subsequent Acts of Parliament have conferred additional secondary legislative powers on the Assembly on an ad-hoc basis. Some of these, from both before and since 1999, include the ability to amend earlier Acts of Parliament for specific purposes.
- 3.4 Once executive powers are conferred directly on Welsh Assembly Ministers rather than on the Assembly as a corporate body, they will also be able to exercise many of the Assembly's existing powers to make secondary legislation. The exercise of those powers will be subject to scrutiny by the Assembly in whatever way it may determine. Even so, these powers will not give the Assembly the ability significantly to influence the legislative framework within which the Assembly Government will operate. The Government believes that the Assembly should have this function.

Chapter three

THE BACKGROUND

Better Governance for Wales

- 3.5 In addition, experience has shown that the Assembly's current legislative powers are too fragmented to enable the Assembly Government to implement its policies as effectively as it should. The Assembly's powers do not amount to a coherent whole; they arise under many different Acts and vary both in their scope and in their significance to the discharge of the Assembly's functions. They are often conferred under Acts of Parliament applying to both England and Wales and reflect what Parliament is prepared to confer on Government Ministers. However, the Assembly is a democratically-elected body, with checks and balances built into it through its robust legislative procedures - quite different in nature from an individual Secretary of State. That consideration should be the basis underlying Parliament's deliberations when conferring powers on the Assembly.
- 3.6 In the Government's view, therefore, the relationship between Parliament and the Assembly on these issues needs to be reconsidered. Both Parliament and the Assembly currently make law for Wales, and the question is what should be the balance of responsibility between the two bodies. The Government believes that it is now time to re-balance legislative authority towards the Assembly, without affecting the overall constitutional supremacy of Parliament as regards Wales within the United Kingdom.
- 3.7 Parliament has conferred law-making authority, including the ability to amend Parliament's own primary legislation, on bodies such as the Scottish Parliament and the Northern Ireland Assembly, and to a lesser extent, on Ministers. As noted above, the Assembly already has some of these powers. The issue is to what extent and on what terms Parliament might be willing to confer additional authority on the Assembly to make law, and in so doing strike a new balance of legislative authority for Wales as between Parliament on the one hand and the Assembly on the other.

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- 3.8 In the Government's view, there is at present no consensus in Wales for a move to full law making powers for the Assembly along the lines of the Scottish Parliament model. The Government therefore proposes a more gradual, staged move towards greater legislative powers. The first step will be implemented from the publication of this White Paper as part of the current settlement. The second needs legislation which will be introduced during the current Parliamentary session. A possible final stage would also require legislation, and the necessary provisions will be included in the proposed Bill, but its implementation would only be triggered by a referendum at some future date.
- 3.9 Whatever final decision is taken on further powers for the Assembly, the Government proposes that a more liberal approach should be reflected in Government and Parliamentary attitudes to making legislation at Westminster which affects the Assembly's areas of responsibility. Whatever longer-term changes might be made, a significant proportion of legislation for Wales will still be made by Parliament for the foreseeable future, so such a change of practice is important in itself, not just as an interim measure.
- 3.10 Up to now, the decision on how to make different provision for Wales in a particular Bill has been taken in isolation. In some cases, such as the Children Act 2004, the Act sets out what the Assembly can do in some detail. These details have, of course, been agreed with the Assembly Government whose policy making procedures involve Assembly Members in committee and in plenary session. Nevertheless, Assembly Members have not had the opportunity to debate the final form which the legislation takes.
- 3.11 In other cases, such as the Education Act 2002, the Act has left the Assembly with a very wide discretion as to what should be contained in the secondary legislation which it will make as a result of the passing of the Act. This means that Assembly Members do have the opportunity to debate the detail of the implementation of the legislation for Wales when the regulations are tabled in the Assembly.
- 3.12 The Government believes that there should be a more consistent approach to drafting legislation for Wales. It also recognises that legislation made by the Assembly is subject to scrutiny by Assembly Members using procedures at least as rigorous as those available to Members of Parliament. In the light of that,

THE WAY FORWARD

Developing the current settlement

Enhancing the current settlement

the Government intends for the future to draft Parliamentary Bills in a way which gives the Assembly wider and more permissive powers to determine the detail of how the provisions should be implemented in Wales.

- 3.13 This is an important and necessary move, but it still does not fully address the weaknesses that have become apparent in the present system. To do this, there need to be changes to the provisions currently in the Government of Wales Act 1998. The Government favours an incremental approach, both to permit the Assembly to develop the capacity to deal with enhanced legislative powers and also to allow Parliament and the Assembly to develop a balance between them which provides the best possible legislative framework for Wales and the UK.
- 3.14 This will require legislation to change the provisions in the Government of Wales Act 1998, but the Government considers that the proposals set out in the following paragraphs do not represent a fundamental change to the current settlement.
- 3.15 An important limitation on the Assembly Government's power to implement its policies is that its opportunities to promote any changes to legislation are constrained by the legislative priorities of the UK Government. There have been a number of occasions where it was clear that changes to legislation were necessary to enable the Assembly Government fully to implement its proposals, but there was no suitable Bill in the Government's programme to which these changes could be attached, and no time for a Wales-only Bill, given both the Government's and the Assembly Government's other priorities. This enhancement is designed to deal with that problem.
- 3.16 The Government of Wales Act 1998 allows only for the transfer of UK Ministerial functions to the Assembly. The Government proposes the creation of a wider power which would allow Her Majesty to make Orders in Council to give the Assembly powers, in specified areas of policy, to modify – ie, amend, repeal or extend – the provisions of Acts of Parliament in their application to Wales, or to make new provision. This power of modification would apply to Acts currently in force and also to any Acts which Parliament might make in the future in the specified areas (unless a particular Act contained a specific prohibition precluding use of the Assembly's modifying powers). It would also be possible to frame these Orders in Council to permit the Assembly to do something not already covered by statute - for example, an Order in Council to permit the Assembly to create a Commissioner for Older People and make consequential amendments to UK primary legislation.

- 3.17 It would need to be made clear that the Assembly's powers could only apply to policy areas which were the responsibility of Assembly Ministers and could not be used to alter primary legislation relating to policy areas for which UK Ministers were responsible in Wales.
- 3.18 The power would be framed to ensure that no Order could give the Assembly powers over the whole of any of the fields listed in Schedule 2 of the Government of Wales Act. Within this constraint, the decision as to how wide a policy area such a power would cover on any particular occasion would be a matter for Parliament. There is a range of possibilities illustrated below by examples from Wales-only legislation that has been passed at Westminster since devolution:
- a) something very specific, such as the functions of the Ombudsmen in Wales. Powers in this policy area would have allowed the Assembly to amend the existing legislation so as to combine the three existing Welsh Ombudsmen's offices into one. This had to be done by a Wales-only Bill as there was no suitable England and Wales legislation going through Parliament or in prospect. While the issue was important, the Bill was uncontroversial; it is not clear that this was the best use of Parliamentary time, which is invariably at a premium. It would have been far more appropriate for the Assembly to legislate on this matter.
 - b) something rather wider, such as the protection and welfare of children. This would be a limited policy area, but one cutting across a range of the Assembly's functions, such as education, local government and social care. Such a power could have been framed to have allowed the Assembly to make new provision setting up a Children's Commissioner for Wales. This was done in response to the Waterhouse Report on child abuse in North Wales and needed urgent legislation. At the time of the report, the Care Standards Bill was going through Parliament and it was possible to do some of what was required as part of that Bill but not everything. As a result, it was necessary to have a Wales-only Bill in the next session to finish the job, absorbing valuable Parliamentary time and resulting in the legislation governing the Commissioner being quite complex. If Parliament could have conferred legislative powers on the Assembly to deal with the matter, the provision would have appeared in a single, more straightforward, piece of legislation.

c) something considerably wider, such as the structure of the NHS in Wales. This would have allowed the Assembly to make secondary legislation to achieve the reforms that were included in the NHS Reform and Health Care Professions Act 2002. The Assembly Government's policy for Wales in this instance was very different from the Government's policy for England. While the Government was willing to include provisions in the Bill implementing the Assembly Government's policies, it complicated both the drafting and the debating of the legislation. The process would have been far simpler and more efficient if the Assembly had been able to make its own legislation to implement its policy. This is a case where Assembly Members would have wished for a more direct influence on the detail of the legislation.

- 3.19 At a minimum, these Orders in Council to permit the Assembly to exercise additional legislative powers would need to undergo the same Parliamentary procedure as Orders in Council which transfer functions to the Assembly under the current settlement. This is the Affirmative Resolution procedure, which means that they must be debated and agreed by both Houses of Parliament before Her Majesty can be asked to make them.
- 3.20 Clearly it would not be appropriate for the Assembly to be able to compel the Secretary of State to accede to their request, any more than he is in a position to require them to take any particular action. However, it is equally important that the Secretary of State should not refuse to lay a draft Order in Council before Parliament for trivial reasons. The legislation would therefore provide that if the Secretary of State were unwilling to proceed, he would be obliged to reply to the Assembly Government within 60 days, giving his reasons for refusal; this letter would be made public.
- 3.21 The procedure for considering these draft Orders would be for Parliament to determine. However, as the Government believes that this process should allow the growth and development of the relationship between Parliament and the Assembly, it is important that Parliament should be confident that it had properly considered the issues raised. Therefore the Government considers it likely – indeed, desirable – that they would be considered by Parliamentary Committees, or perhaps a Joint Committee of both Houses, before the Affirmative Resolution procedure on the floor of each House. This consideration could be informed by understanding the use the Assembly might propose to make of these powers in the immediate future. However, as the power would be a general and continuing one

for that particular policy area, this would serve only as an example of what could be done; the issue for the Committees and for each House would be the appropriateness in general of delegating legislative authority to the Assembly on the particular policy area specified in the draft Order in Council.

- 3.22 The enhanced powers described in the preceding paragraphs would be adaptations of the current settlement and the Government believes that they do not require a referendum. However, it may prove in the future that even these additional powers are still insufficient to address the Assembly's needs and the option of providing the Assembly with further enhanced law-making powers needs to be available.
- 3.23 This would mean transferring primary legislative powers over all devolved fields direct to the Assembly. The Government is clear that this would represent a fundamental change to the Welsh settlement and would have to be endorsed in a referendum. The Government has no current plans for such a referendum but, in order to avoid the necessity of a third Government of Wales Bill, it proposes to provide for the possibility in this legislation.
- 3.24 The proposed legislation will specify the conditions which will trigger a referendum. The decision to hold one would need to be approved in both Parliament and the Assembly. If one was proposed by the Assembly Government, the motion would need to be endorsed by two thirds of all Assembly Members voting in favour. If the Secretary of State was minded to table an Order in Parliament, he would first be obliged to undertake such consultation as he considered appropriate. The referendum would not take place unless the Order was approved by Parliament.
- 3.25 Alternatively, the Government would be able to table the Order in Parliament, again after appropriate consultation, even if the Assembly had not requested it. However, the referendum would not take place unless the Order authorising it was approved both by Parliament and also by a two thirds majority in the Assembly. Whichever procedure was followed, the result of the referendum would be decided by a simple majority of those voting.
- 3.26 Conferring primary legislative powers on the Assembly would mean that, like the Scottish Parliament, it would be able to make law on all the matters within its devolved fields. This would not include those subjects which remain the responsibility

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of Whitehall Departments for Wales as well as for England. Like Scotland, these would include Fiscal and Monetary Policy, Immigration and Nationality and Social Security. Also excluded would be fields where the Scottish Executive, and the Secretary of State for Scotland before devolution, have functions but the Assembly does not, such as civil and criminal law, the administration of justice, police and the prison service.

- 3.27 But the existing provision in the Government of Wales Act for the transfer of additional functions of UK Ministers to the Welsh Assembly Government would remain; and the legislation would provide that if any functions were so transferred, the exclusion of legislative competence in respect of those matters could also be removed.
- 3.28 A radical change of this type would not necessarily mean that the Assembly would become the principal law maker for Wales. At present, with the full agreement of the Assembly Government, much legislation made in Westminster makes exactly the same provision for Wales as for England. As in the Scottish and Northern Irish settlements, Parliament will retain the absolute power to legislate for Wales and on many occasions it will be more efficient for measures to be enacted once in Westminster rather than having to be replicated in Cardiff.
- 3.29 The Scottish Parliament deals with this sort of situation by voting on a motion that Westminster should legislate for Scotland on these matters (Sewel motions). As more legislative powers are transferred to the Assembly it may be appropriate to introduce the same sort of procedure.
- 3.30 The changes made as a result of these proposals will require changes to the provisions in the Government of Wales Act about the Assembly's procedures if it is to be able to fulfil its new role effectively. The Act is highly prescriptive, and inflexible, on the form that the Assembly's procedures should take, whereas the Scotland Act is much less so and leaves much detail to the Parliament's Standing Orders. In particular, the Government believes that, while it is necessary that Parliament should lay down minimum standards of scrutiny for Assembly legislation under these new powers, the Assembly should also be given greater freedom to make its own decisions on procedure within that framework. It proposes that the provisions currently in the Government of Wales Act should be changed to follow the Scotland Act approach in this respect.

STANDING ORDERS

Better Governance for Wales

- 3.31 The proposal that legislative procedure should largely be regulated by Standing Orders, together with the separation of the executive and legislative arms of the Assembly and the proposal that the Assembly's committee structure should in future be regulated by Standing Orders rather than prescription in statute, will all require major amendments to the Assembly's current Standing Orders. The Government proposes that the Secretary of State should take powers to make a new set of Standing Orders for the Assembly, to take effect when the separation of the executive and the legislative elements comes into force. The Secretary of State would be assisted by an advisory committee with a broad-based representative membership, which would prepare a draft of the new Standing Orders for his approval.
- 3.32 Thereafter it would be for the Assembly to regulate itself through amendment of its Standing Orders from time to time as it sees fit. The Government proposes that the many requirements prescribed by the Government of Wales Act as mandatory content in the Standing Orders should so far as possible be repealed, and that, building on the foundations laid by the new Standing Orders, decisions on the content of Standing Orders should be left to the Assembly.
- 3.33 As noted above, Parliament will continue for at least some years into the future to enact "Wales-only Bills" at the request of the Assembly. It has increasingly become the practice to submit most such Bills to pre-legislative scrutiny. Until recently, the House of Commons Welsh Affairs Committee and the relevant Assembly subject committee undertook parallel scrutiny exercises, but in 2004 a draft Transport (Wales) Bill was examined by the two committees working together. The Government believes that this was a useful and worthwhile experiment, and, subject to the House's views, one which could be built into Parliament's and the Assembly's Standing Orders on procedures for Wales-only Bills on a longer-term basis. It would illustrate the principle of mutual recognition between the legislatures which the Government considers a key element of a stable devolution settlement for Wales.

RELATIONS BETWEEN THE ASSEMBLY AND WESTMINSTER



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