

Report of the  
**Richard Commission**

Commission on the Powers and Electoral  
Arrangements of the National Assembly for Wales  
Spring 2004



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# Introduction

This chapter sets out the background to the Commission and explains our approach, processes and the structure of our report.

## Background

2. The Richard Commission was appointed in July 2002 by the First Minister of the National Assembly for Wales. Our Chair, Lord Richard, was appointed by the First Minister. Five Commissioners were appointed following open competition and interview. Four were nominated jointly by the four party leaders in the first Assembly.
6. In evaluating the evidence submitted, we have sought to distinguish between constraints or frustrations arising from the structure of the settlement, and those which could be described as ‘teething’ problems, which naturally occur in the first years of such radical constitutional change.
7. The Rt Hon Peter Hain MP, Secretary of State for Wales, suggested to us that:

*a practical delivery benchmark test should be applied to any proposal for change: how will it benefit life in Wales? How will it improve it in practical terms?*<sup>1</sup>

## Terms of reference

3. These are set out in full at Annex 1. They require us to review two aspects of the National Assembly, which came into being in July 1999: the adequacy of its powers and its electoral arrangements.
4. Within the powers part of the remit, there are two elements: the *depth* of the powers – the capacity of the Assembly to act within the fields that are devolved to it; and the *breadth* of the powers – whether more fields should be devolved.
8. We set out in Chapter 13 the vision and principles that have informed our enquiry. We have worked on two assumptions. First, that gains in democracy and accountability are valuable in themselves. Second, that more open, participative and responsive governance is likely to produce better policy outcomes. We recognise, however, that conclusive evidence on this would be elusive even if our review had been conducted at a much later stage.<sup>2</sup> It is also fair to say that better delivery of public services, or improvements in the economy, depend on many factors that are outside the scope of our enquiry.
5. In considering the way forward, we have been conscious of the fact that the current devolution settlement is only four years old, covering one Assembly and barely four UK Parliamentary sessions.

## The Commission’s approach

9. We decided to approach our remit from a broad and practical perspective. We felt that the terms of reference raised fundamental questions, which could only be addressed by looking at the operation of the devolution settlement in the round, including the work of the Assembly as a parliamentary body and the role of the Welsh Assembly Government. The questions we have addressed are practical ones: how are the arrangements working at the moment; what, if any, problems have been encountered; and how could things be improved in the interests of the people of Wales?
10. Our enquiry has drawn on the views of those who operate the present settlement, of those who work with them on a daily basis and of ordinary people in Wales. We are confident that the analysis of the first four years, set out in the following chapters, has provided a sufficient body of evidence to enable us to identify in detail the strengths and weaknesses of the present arrangements and to recommend a sustainable settlement for the long term, based upon both principle and practical experience.
11. Many aspects of the remit – the Assembly's size, powers, structure, capacity and electoral system – are inter-dependent. In reaching conclusions on individual aspects, we have sought to take account of the impact on the Assembly as a whole, and on the governance of Wales more widely, and to present a coherent and integrated set of recommendations for the way ahead.
12. Each chapter of the report examines a different aspect of the existing devolution settlement and concludes with findings specific to that chapter. The conclusions we have reached, based on those findings, are set out in Chapters 13 and 14.

### The scope of our report

13. We were clear that it was not our role to evaluate the performance of the Assembly or the Welsh Assembly Government. This would have entailed going outside our terms of reference and making subjective judgements. We have focused on the evidence and limited our observations to matters directly relevant to the Assembly's powers and its capacity to exercise them effectively.
14. On the electoral arrangements, we have not tried to go over the ground covered by previous and concurrent reviews specialising in electoral systems. We have drawn on these but focused on the practical operation of the existing system and what seem to us the realistic alternatives to it.

### The processes we have followed

15. We began our work in September 2002 when we decided on a process designed to enable us to gather solid evidence on which to base our conclusions.
16. Between October 2002 and September 2003 we held 115 evidence sessions, 3 seminars,<sup>3</sup> and issued 2 consultation papers.<sup>4</sup> We received over 300 written submissions. We held 9 public

meetings, starting in Swansea and ending at the National Eisteddfod in Meifod. We observed the Assembly in plenary and in committee, visited the Scottish Parliament in Edinburgh, met the Speaker of the Northern Ireland Assembly and visited Westminster, to meet MPs, Peers and others, three times.

17. Since our appointment, the Parliament at Westminster has produced two reports that have been of great value to us, as discussed in later chapters.<sup>5</sup> These are:
- *Devolution: Inter-institutional relations in the United Kingdom* – Report of the House of Lords Select Committee on the Constitution, HL 28 of 2002-03;
  - *The Primary Legislative Process as it affects Wales* – Report of the Welsh Affairs Committee of the House of Commons, HC 79 of 2002-03.

### The structure of the report

18. The structure of our report is as follows.

- Chapter 2 reviews the history and wider context of the Government of Wales Act 1998 and demonstrates how the establishment of the Assembly built upon and changed the model of administrative devolution that existed before. It also provides a summary of the international context;
- Chapter 3 reviews the evidence on the views of the people of Wales – drawing on views put to us at our public meetings as well as public opinion survey evidence;
- Chapter 4 describes the role and structure of the National Assembly. It examines the capacity of the Assembly and its committees to carry out the role of scrutiny and holding the government to account, and the implications for the organisation of acquiring further powers. The main focus is on the experience of the First Assembly, but relevant developments during the Second Assembly are also considered;
- Chapter 5 considers the nature of the powers conferred on the Assembly and how they have been used in practice by the Welsh Assembly Government;
- Chapter 6 reviews the Assembly's powers in relation to the non-elected public bodies it sponsors and how the relationship between government and these bodies has changed since 1999;
- Chapter 7 examines the relationship between the Welsh Assembly Government and the UK Government at Ministerial and official level. It considers the strengths and weaknesses of present arrangements and their sustainability in the future;
- Chapter 8 considers the way primary legislation affecting Wales is handled at Westminster and the impact of devolution on the arrangements for scrutiny and debate. Again the advantages and disadvantages of the system are discussed;
- Chapter 9 reviews proposals for broadening the powers of the Assembly and considers the implications of further transfers of powers from the UK Government;

- Chapter 10 examines the Assembly's financial powers and the scope for extending them;
- Chapter 11 looks at the cost of devolution in Wales and the possible implications of further development;
- Chapter 12 considers the Assembly's electoral system, examines its merits and weaknesses and the case for change;
- Chapter 13 sets out our vision for developing devolution in Wales;
- Chapter 14 presents our conclusions and recommendations.

19. We would like to express our sincere gratitude to all those who presented evidence to us. Their views were

relevant, thoughtful and perceptive and gave a unique insight into the far-reaching implications of devolution for public life in Wales. We are also most grateful to many others who have helped our research, including officers of the Parliament at Westminster and the devolved bodies, and officials in Whitehall and the devolved administrations.

20. We hope that our report does justice to the evidence we received. We believe that it represents an unprecedented examination of Welsh constitutional arrangements. The papers are being published separately so that they can be used to inform future debate and as a resource for future students of Welsh politics and governance.

### Notes

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<sup>1</sup>Oral evidence of The Rt Hon Peter Hain MP, Secretary of State for Wales, 13 March 2003.

<sup>2</sup>'Evaluating devolution in Wales', Adrian Kay, *Political Studies*, (2003),51-66.

<sup>3</sup>Seminars on the constitutional settlement and on the electoral arrangements, held jointly with the Economic and Social Research Council's Devolution Research Programme, at the University of Wales, Aberystwyth (October 2002) and Swansea (January 2003). Seminar on legal aspects of the settlement in February 2003 convened by the Law Society in Wales.

<sup>4</sup>Commission on the Powers and Electoral Arrangements of the National Assembly for Wales, *The Powers of the National Assembly for Wales: issues and questions for consultation*, November 2003, and Commission on the Powers and Electoral Arrangements of the National Assembly for Wales, *Electoral Arrangements of the National Assembly for Wales: issues and questions for consultation*, March 2003.

<sup>5</sup>In particular Chapters 8 and 10.



# The historical and international context

This chapter provides a summary of the historical and international context of devolved government in Wales. The first part of the chapter places the 1998 Government of Wales Act in the context of the governance of Wales since the 16th century. The second part reviews experience in other countries.

2. The chapter addresses the following issues:
  - why was the model of executive devolution introduced for Wales in 1999?
  - what are the elements of continuity and change in the present settlement?
  - how do the current governance arrangements in Wales and the UK compare with those in other countries?
  - what has been the impact of devolution on the role of Wales in Europe?
3. The Acts of Parliament, of 1536 and 1543, now familiarly known as the 'Acts of Union', though not known as such until 1901, were designed to complete the assimilation into the English state which had begun with the conquest of Wales by Edward I in the 13th century. The preamble to the 1536 Act asserted that:
 

*Wales is and ever hath been incorporated, annexed, united and subject to and under the imperial Crown of this Realm as a verrye member.....*
4. The legislation abolished any legal distinction between Wales and England, and established the same system for the administration of justice, the courts, shires and commissioners of the peace. The Acts granted Welsh representation in Parliament – 27 Members, which represented 7.2% of the membership of the House of Commons at the time when the Welsh population was probably 6.9% of the State.<sup>1</sup>
5. In the 19th century, proposals for political and administrative devolution for Wales, whether from a 'Home Rule all round' viewpoint, linked to the Irish question, or from the perspective of the *Cymru Fydd* movement, received little support in Parliament. There was however an intermittent series of distinctive Welsh legislation from the second half of the 19th century onwards, including the Welsh Sunday Closing Act in 1881 - the first legislative enactment to apply to Wales a different set of principles from those obtaining in England.<sup>2</sup>
6. Subsequent Wales-only measures included the Intermediate Education Act in 1889, the Disestablishment of the Church (Wales) Act 1920 and the

Welsh Language Act 1967. Many dealt with the establishment of new bodies for Wales including the Welsh Development Agency, the Development Board for Rural Wales and the Land Authority for Wales.

7. Responding to Welsh needs through distinctive Welsh legislation was seen not as a precursor to separatism but as an alternative to it. In Lord Morgan's judgement:

*The twentieth century, from the First World War down to the late 1960s, has been for Scotland and even more for Wales, an age of centralism and of unionism.*<sup>3</sup>

### Wales in the 20th century: economic crisis and the growth of administrative devolution

8. The pre-First World War Liberal Administration created separate Welsh departments within the existing Ministries for Education, Agriculture and Health. This began a process of administrative devolution which continued until the establishment of the Assembly, and was taken forward by each of the political parties when in government.
9. During the inter-war years of economic depression and mass unemployment, Aneurin Bevan, and others within the leadership of the emerging Labour and Trade Union movement, considered devolution a distraction from the crisis facing the Welsh economy and the central task of influencing the 'commanding heights of the economy', the redistribution of industrial development and the establishment of a welfare state.
10. In 1925 Plaid Genedlaethol Cymru was established to campaign for a self-governing Wales and to preserve Welsh identity, especially the language.
11. Demands for a Secretary of State for Wales received short shrift from the war-time Coalition Government, the post-war Labour Administration and the Conservative Government of Harold Macmillan. It was not until after the defeat in the 1959 election that the Labour Party gave a manifesto commitment to appoint such a Secretary of State and establish a Welsh Office with executive responsibilities. This was against the backdrop of growth in electoral support for Plaid Cymru and the readiness of the Conservatives to move in the direction of devolution.<sup>4</sup>
12. Under Conservative Governments from 1951 to 1964, a wide range of functions were transferred to Cardiff and co-ordinated by a Minister of Welsh Affairs, who was in the Cabinet by virtue of jointly holding another major portfolio. The appointment in 1957 of a Minister of State, based in Cardiff, strengthened these moves.
13. The first Secretary of State for Wales was appointed by the Labour Government in 1964. The most senior officials in Whitehall fought hard to restrict the powers of the newly appointed Secretary of State, James Griffiths, to 'oversight' over government departmental activities in Wales. A

compromise was reached and the first Welsh Office was founded round the Ministry of Housing and Local Government office in Wales.

14. Whitehall, at the highest level, continued to resist the further devolution of executive responsibility, arguing that the devolution of functions such as health and education would lead to wasteful duplication and additional costs.<sup>5</sup>
15. Arguments put forward against the devolution of specific powers included:
  - that the transfer of highways powers would lead to the disruption of roads planning between the two countries;
  - that, in education, the separation of England and Wales would create severe practical problems in respect of the supply of teachers to England;
  - the creation of a fourth agriculture department would add to potential difficulty and delay in reaching policy decisions;
  - in health, an inordinate amount of subordinate legislation would be duplicated as would a number of executive and advisory bodies;
  - in housing and local government, the concern was about the cutting off of staff in Cardiff from the experience, advice and information available in Whitehall.
16. Underlying these objections was a recognition that the creation of a Welsh Office represented a challenge to the centrally administered state that, once conceded, was likely to continue through further transfers of powers to the new department. This forecast proved accurate although new transfers were extracted slowly from a reluctant Whitehall.<sup>6</sup> The key stages in the process are summarised in Box 2.1 below.<sup>7</sup>
17. Under growing political pressure, and following the major re-organisation of the Departments of Health and Social Security, health and tourism functions were transferred in 1968 and joint responsibility for agriculture in 1969. After the 1970 General Election, responsibility for primary and secondary education was transferred by the new Conservative administration.
18. The debates in Parliament, and within Wales, throughout the period of administrative devolution foreshadow many of the arguments which were later advanced for moving to political devolution and making the devolved structures accountable to a directly elected Welsh body:<sup>8</sup>
  - a demand for policies to reflect the specific circumstances of Wales;
  - a growing consciousness of nationhood and a feeling that Whitehall structures failed to take account of national feeling in Wales;
  - a feeling that effective policy was hampered by a daunting maze of government agencies, each possessing narrow responsibilities and operating from separated and unco-ordinated offices;

**Box 2.1: the expansion of administrative devolution 1906-1999**

1906-1918	Creation of separate Welsh departments within the existing ministries for education, agriculture, insurance and health
1945-51	Establishment of unelected Advisory Council for Wales and Monmouthshire
1951-1964	Creation of Minister for Welsh Affairs (post held initially by Home Secretary, subsequently by Minister for Housing and Local Government) and gradual transfer of subject areas with appointment in 1957 of Minister of State based in Wales
1964	Establishment of Welsh Office under Secretary of State for Wales, responsible for housing, local government, planning, water, forestry, parks, museums & libraries, the Welsh language, regional economic planning and highways
1968	Tourism and health transferred
1969	Welsh Office gains joint power over Welsh agriculture
1970	Primary and secondary education transferred
1976	Welsh Development Agency and the Development Board for Rural Wales established
1978	Full responsibility for agriculture (most functions) transferred
1980	Establishment of devolved Budget system
1992	Employment training and University of Wales funding transferred
1993	Funding Councils for further and higher education in Wales established

- the view that devolution would be essential for the proper working of democracy in Wales;
- the need for a 'watchdog' Secretary of State to make sure that Wales was getting its fair share;
- that Wales should be treated on a par with Scotland.

**The impact of administrative devolution**

19. The process of administrative devolution created the capacity for successive Secretaries of State for Wales to develop policies in response to Welsh needs as they interpreted them. The staff of the Welsh Office grew from 200 in 1964 to 2321 in

1997. Secretaries of State of both political parties used the Welsh Office to further their objectives by pursuing policies that diverged from those in England.

20. This was seen, for example, in education<sup>9</sup> where a history of Welsh policy development was well established prior to the creation of the Assembly built around such institutions as the Welsh Joint Education Committee and the Schools Inspectorate. The scope for distinctive policies depended on legislation, on the use of executive powers and extensive budgetary freedom (which was inherited unchanged by the Assembly).<sup>10</sup> Other examples of policy divergence include local government reform, housing renovation subsidies and land reclamation.

21. The existence of the Welsh Office also influenced civic society in Wales, requiring non-government organisations to create Welsh structures and adding to the momentum for distinctive policies – this had a major impact on the political parties, the trade unions and the media.<sup>11</sup>

22. However, all this was against the background of the unitary state, and the requirement on the Secretary of State to operate within collective Cabinet responsibility and accountability to the UK electorate. From 1979 until the 1997 election, this had produced a government of a different political complexion from the majority of Welsh MPs. Thus the Welsh Office, and the Scottish Office,

reflected both the distinctiveness of their countries and the dynamics of the union state.<sup>12</sup>

23. Above all, the growth and power of the Welsh Office up to the 1980s brought to the fore the question of democracy and accountability:

*The Welsh Office in the 18 years of Conservative rule .... quietly changed the terms in which Welsh issues were considered. Almost by stealth, the Welsh Office's extended role after 1979 reinforced the sense of the territorial identity of Wales.....A combination of satisfaction with an active Welsh Office, and of revulsion at politically unacceptable quangos, added to a firmer sense of Welsh identity and perhaps of citizenship.*<sup>13</sup>

### Elements of continuity and change from 1999

24. Before the establishment of the Assembly a number of key elements of devolved decision making were already in place:

- formal executive powers were devolved to the Secretary of State for Wales in respect of most of the major public services in Wales;
- the Secretary of State had extensive budgetary freedom;
- the structure of the Welsh Office enabled policy to be developed on a Welsh basis although the constraints of England and Wales legislation meant that this was less developed than in Scotland.

25. The scope of the powers subsequently conferred on the elected Assembly by the Government of Wales Act were largely the same as those of the Secretary of State (Chapter 5). The key difference was in respect of accountability. The Secretary of State for Wales was (and is) a Member of the UK Cabinet and subject to collective Cabinet responsibility. By contrast, the Welsh Assembly Government is accountable through the Assembly directly to electors in Wales.

26. This separate accountability has wide-ranging implications for the expectations placed on the Assembly by people in Wales, as discussed in Chapter 3 and in later chapters. Lord Morgan suggests that it may have created a sense of momentum for the further development of devolution – we address this in Chapters 13 and 14.

*Above all, it (the Assembly) will have the essential legitimacy that arises from being elected... The people will to an increasing degree be governed by and from Wales, not from Whitehall or Westminster.... Like the constitutional reforms of the Blair government in general, the Assembly will have a dynamic all its own.*<sup>14</sup>

### Why was the Assembly established in 1999?

27. The change, in 1999, from a Secretary of State to an elected Assembly, has been described as an executive model of devolution, distinct from the administrative model which preceded it and the legislative or

parliamentary model which was adopted in Scotland at the same time.

28. The proposal for an elected Assembly was put to the Welsh people for the first time in a referendum in 1979, at the same time as a Parliament was put to the Scottish people. This followed the report in 1973 of the Royal Commission on the Constitution, chaired at first by Lord Crowther and, thereafter, by Lord Kilbrandon, which recommended directly elected assemblies for Scotland and Wales, elected by the Single Transferable Vote system of proportional representation.

29. The Commission presented a wide-ranging analysis of the governance of the United Kingdom and its members did not agree on a preferred scheme of devolution.<sup>15</sup> Its conclusions were complex and included a Memorandum of Dissent by two members who argued for a UK-wide federal system based on the German model. Of the signatories to the main report, six favoured legislative devolution for both Scotland and Wales. Two favoured legislative devolution for Scotland alone, with an advisory body for Wales. Two members favoured executive devolution for both countries and one favoured an advisory body for both.<sup>16</sup>

30. Thus, only two members favoured different schemes for Scotland and Wales, influenced by Scotland's separate legal system. This distinction was to influence the proposals of the Labour governments in both the 1970s and the 1990s.<sup>17</sup>



31. In Wales, the 1979 proposal for executive devolution was rejected outright; in Scotland the proposal for legislative devolution was supported, but by an insufficient majority to pass the test established by the statute.<sup>18</sup>

32. Academics<sup>19</sup> have attributed the change from a decisive 'no' vote in Wales in 1979 to a 'yes' vote by a very slim margin<sup>20</sup> in 1997 to a number of factors:

- timing – the first referendum took place at the end of a government facing economic difficulties and struggling to hold on to a wafer-thin majority, the second took place at the beginning of a new government with a very large majority and a commitment to constitutional change;
- popular will – the sense of nationhood and aspiration to greater democratic control over the Welsh Office was less well developed in 1979 than in 1997, following a long period of governance by a party without a majority in Wales and the particular strength of feeling generated by the quangos issue (Chapter 6);
- the campaigns – the 'yes' campaign was stronger, and the 'no' campaign weaker than in 1979.

### Why the executive model of devolution?

33. The model of devolution proposed in *A Voice for Wales*, the White Paper which preceded the 1997 referendum, was agreed by the Labour Party in opposition following extensive debate. The proposal was for an elected Assembly of sixty members, elected by the Additional Member System of proportional representation.<sup>21</sup> The Assembly would 'assume responsibility

for policies and public services currently exercised by the Secretary of State for Wales... and make detailed rules and regulations, through secondary legislation, within the framework laid down in Acts of Parliament'.<sup>22</sup>

34. The Rt Hon Ron Davies AM, who became Shadow Secretary of State for Wales in 1992, and Secretary of State from July 1997 to October 1998, explained that the model was a compromise solution, adopted to ensure the support of both pro and anti devolutionists in the Welsh Labour Party:

*The big issue at the time, as it is now, was the question of primary legislation. That was what separated the idea of an Assembly from the idea of a Parliament. And it was that issue of primary legislative powers that became the main battleground within the Labour Party. The powers that be within the party were not convinced of the case for primary legislative powers and the compromise was settled on therefore, that we would have an Assembly without those powers of primary legislation.*<sup>23</sup>

35. Mr Davies went on to explain that the choice of the executive devolution model, which involved transferring to the Assembly the delegated Ministerial powers previously held by the Secretary of State for Wales, and the precise means by which this was done, was influenced by timing and pragmatic considerations, which were to have far-reaching implications, as discussed in Chapter 5.

### The influence of Scotland

36. In many respects, Wales has followed Scotland – first, in the expansion of executive devolution under the territorial Secretary of State and, second, in the creation of an elected body in 1999, with a similar electoral system. Although the Scottish Office, established in 1885, had a much longer history than the Welsh Office, by 1999 the two departments of state had much in common – with the exception of policing and justice functions, the extent of the devolved executive powers were similar and included almost complete discretion within the devolved budget.
37. But there was a separate Scottish legal system and a tradition of separate Scottish legislation, with separate processes for its consideration in Parliament.<sup>24</sup> There was also a stronger tradition of, and greater capacity for, separate policy development, again subject to the constraints of collective Cabinet responsibility.
38. The sense of nationhood was also stronger in Scotland, reflecting its later Union with England and its separate institutions. The 1997 devolution proposals for Scotland built on the work of a Constitutional Convention made up of representatives of civic society, including the Labour and Liberal Democrat parties in Scotland, which advocated a Parliament for Scotland with law-making and tax-varying powers.

39. All these factors have been seen as contributing to the outcome of an asymmetrical model of devolution in the UK, driven by the momentum for constitutional reform in Scotland but leading to a more limited model for Wales. Devolution in Northern Ireland has a different structure reflecting its different circumstances and constitutional history.<sup>25</sup>
40. Lord Morgan's evidence suggested that the asymmetry in 1999 did reflect differences in history and national identity. But he questioned whether asymmetry would survive the pressures and expectations of the future:

*Broadly speaking, Wales has not had a sense of citizenship, unlike Scotland which has had its own legal and other institutions; Wales has not. Even as recently as the 1990s Scotland had a Constitutional Convention and Wales did not. So of course the settlement reflected this.*

*I think the Welsh Office achieved the most enormous amount particularly under the regime of Mrs Thatcher and Mr Major when the political discrepancies between the Wales and the UK Government became profound, and other questions about accountability were asked.*

*Now they are being asked again ...about the present settlement. Asymmetry was essential at the beginning. But it is not a final settlement at all and it creates very real problems.<sup>26</sup>*



41. Professor Rawlings emphasised Wales's historic and geographic relationship with England as a factor in this asymmetry:

*...In the case of the four countries of the Union 'one size does not fit all' for so many reasons...the uniquely powerful geo-political concept of 'England and Wales', famously expressed in, but not confined to, the overarching unity of the English and Welsh legal system, is not about to go gently into the night.<sup>27</sup>*

### Devolution in other countries

42. Comparisons with other countries are complex and we are particularly indebted to Professor Charlie Jeffery, Director of the ESRC Devolution Programme, Institute of German Studies at Birmingham University, Professor Martin Laffin of the University of Durham and Professor Drew Scott of the University of Edinburgh, for providing a comparative overview based on their research.
43. Professor Jeffery pointed to the limitations of international comparisons:

*Comparisons can only be made with a health warning: it is rarely possible simply to transfer institutional arrangements or practices from one place to another. Political institutions develop in a particular social and historical context, and reflect its idiosyncrasies. Cut loose from their founding idiosyncrasies, political institutions rarely work well.<sup>28</sup>*

44. He did see value, however, in comparing the National Assembly with models adopted in other countries, in order to help evaluate the present arrangements in Wales and identify the ways they could develop in future. His evidence reviewed experience in a mix of countries with long traditions of federal government (Australia, Canada and Germany) and formerly unitary states which have more recently embarked on decentralisation (Spain and Belgium). The key messages from Professor Jeffery's evidence are as follows.

### ***Devolved government in Wales has more limited policy autonomy than the regions in federal and regionalised states***

45. Each of the regional tiers of government examined has significant exclusive (or primary) legislative powers, typically including education, health, economic development and, in some cases, policing. But these powers are often subject to constraints which limit regional legislative autonomy. For example, in some states 'framework' arrangements apply so that, in some fields of policy, regions flesh out legislative frameworks laid down by the centre. In some respects, such framework-filling powers are similar to those of the Assembly over secondary legislation.
46. In all the countries considered, there are mechanisms – financial and administrative – which link regional and central governments, constrain the autonomy of regions and give the centre the capacity to steer regional

policies. Thus, although Wales has less policy autonomy than the other regions/states surveyed, the latter are also subject to constraints and operate within complex governance arrangements with the central and local tiers of government in their countries.

***Devolved government in Wales has greater freedom in its spending allocation decisions than many other regional tiers, but has a more constrained overall budget***

47. Each of the regions or states studied has elements of fiscal autonomy (the right to define tax bases or tax rates) and financial autonomy (the right to spend revenues as the regions see fit) but all are dependent on the centre for much of their income. This central funding is often conditional – tied to particular activities – this reduces regional autonomy and allows the centre to shape regional policies.
48. Having compared Wales with the countries mentioned above, Professor Jeffery concluded,

*In all cases, regions are dependent for some of their income on central transfers; where these are tied to particular activities, regional autonomy is reduced and central objectives shape regional policies ... Few regions have as little fiscal autonomy<sup>29</sup> as Wales, but few have as much financial autonomy.... 'Barnett' gives flexibility in the achievement of objectives defined in Wales as long as the size of the block is big enough....<sup>30</sup>*

49. Other experts make the same point about the funding system for the devolved administrations in the UK: they 'have limited control over total budget size, but have extensive discretion over expenditure composition'.<sup>31</sup>
50. Although these states and regions do have the power to raise revenues, they do not necessarily have the power to spend them as they choose. For example, in Germany, there is region-to-region equalisation designed to compensate regions with low tax-raising capacity. In other cases, the federal, or central, level operates equalisation mechanisms designed to take account of differential needs and make possible similar levels of public service in each region (Australia and Canada). Devolved government in Wales has considerably more financial freedom than most of the states/regions surveyed, although it cannot vary its overall budget. Regions do not always choose to use the powers they have to raise additional revenue (Chapter 10).

***Devolution elsewhere in Europe has shown a tendency to greater decentralisation of powers over time; initial devolution reforms have been the start of a process rather than its conclusion***

51. A wider theme in European countries which have established regional government is that there has typically been a repeated process of renegotiation of the constitutional roles of regions, after the initial act of devolution. Both France and Italy are

currently engaged in intense reform discussions on the role of their respective regions, Belgium has undergone a series of 'state reforms' which have steadily widened the scope of regional power, and the Spanish regions have been in a more or less constant renegotiation of the scope of their powers since their creation in the 1970s. Even in a mature federal state like Germany, there have been growing pressures in recent years for a strengthening of regional powers.

52. Professor Jeffery's evidence discussed in particular Spain and Germany, which are of interest because Spain's asymmetrical model of devolution is often compared with the UK and because of Germany's long history of strong regional government.

### Spain

53. The Spanish Constitution specifies a division of powers between those which are exclusive to the central government, those exclusive to the Autonomous Communities (ACs), and those to be negotiated between the central and autonomous governments.
54. Each AC has its own statute of autonomy outlining the specific powers it controls. The regional parliament exercises devolved legislative powers in the fields defined by its statute of autonomy and exercises general authority within the region.
55. There has been considerable variation in the powers devolved to each region, reflecting both history and identity as well as variations in size and prosperity. The Constitution provides two routes for autonomy. The first allows the 'historic communities' (Catalonia, the Basque Country and Galicia) to follow a 'fast route' and aim for a higher degree of competence. The second route is followed by the other fourteen ACs apart from Andalucia, which campaigned through a referendum to follow part of the 'fast route'. The process is overseen by a Constitutional Tribunal which can pass judgement on any disagreements (of which there are many) between the ACs and the central government.
56. As a result of the periodic negotiation of the statutes of autonomy, Spain has developed a growing system of inter-governmental co-ordination, with committees for each major policy sector, in order to build co-operation and contain disagreement. The asymmetry in powers was wide over the first twenty years or so of Spanish decentralisation, with topics subject to different legislative rules in different parts of the country. In more recent years there has been a convergence of regional powers across the country, with some important exceptions in the 'historic nationalities' like Catalonia and the Basque Country.
57. The second chamber in the Spanish parliament, the Senate is elected by the ACs and by the 'provinces'- an old administrative division which is answerable to the central government. The ACs have been campaigning for years to reform the Senate into a chamber of representation for the ACs.

58. The Spanish regions receive a share of income tax collected in their region and have varying competence to raise their own taxes in defined areas.<sup>32</sup> However, the Constitution requires that the financial autonomy of the communities must be exercised in co-ordination with the policies of central government. Overall, around two thirds of regional resources come from central government transfers – much of this is earmarked for provision of health care and social security services. Regions have the power to borrow to fund services and capital investment – this power has recently been restricted by the central government in order to comply with EU fiscal targets.

59. In spite of their legislative and fiscal powers, the Spanish regions have no constitutionally guaranteed role in governance at the EU level. Some regions, like Catalonia, play a prominent role in the Committee of the Regions, and maintain a high profile in Brussels, but no Spanish region has been allowed to contribute to the Member State delegation in the way that Ministers from devolved countries have done in the UK.

### Germany

60. The German constitution is symmetrical with no region-to-region variation in powers, and over time there has been a long-term, gradual migration of important legislative powers to the central, federal level. The regions, or Länder, are compensated for this by being fully involved in passing legislation through the second chamber of the federal

parliament – over half of all federal legislation requires the consent of the regions in the upper house. The outcome is a highly integrated and non-transparent form of politics based on inter-governmental bargaining and focused on generating standard policy outcomes which allow little territorial policy variation.

61. The German Länder have only limited powers to raise and spend their own revenues: the constitution requires that tax revenues should be shared out between central and regional government, and then also between financially strong and weak regions – this is ensured by the distribution of tax revenues, transfers between the Länder and supplementary allocations by the federal government. The system is under growing pressure from wealthier regions keen to assume more policy autonomy and to retain more of their own funds to invest in region specific policies. A Federalism Reform Commission established in November 2003 is currently exploring possibilities for a constitutional reform to decentralise additional legislative powers to the regions.

### Accountability in other federal systems

62. Professor Laffin's evidence considered issues of accountability from an international perspective with a particular focus on federal countries such as Australia, Canada and the US. He warned against an over simplified view of accountability which assumes that one single government body can be uniquely responsible and accountable for a particular policy area. The reality in most countries is a

more diffuse model, where different tiers of government share responsibility. This is true even in federal countries with a constitutional separation of powers between the state and federal levels.

63. For example, in Australia, responsibility for education is formally with the states, but in practice the federal government is a major player because of the strategic importance of the subject. The general picture is one of federal government becoming increasingly involved, through funding or other levers, in state responsibilities in ways which were not foreseen when the constitutions were drawn up:

*For the most part the founding fathers never foresaw the massive expansion of the welfare state... In most federal systems, particularly Australia and the US, and I believe the Canadian system too, in practice almost all spheres of activity that the states are involved in involve a great deal of overlapping and very complex lines of responsibility.*<sup>33</sup>

64. The expansion of social policy, and aspirations to national standards, creates pressure for greater uniformity in some federal systems which contrasts with the move towards greater diversity in unitary states where central government has been devolved:

*The themes in those countries [US and Australia] in the post war period have been, broadly speaking, a general trend towards greater*

*centralisation whereas... we are seeing this country in a sense going in a different direction.*<sup>34</sup>

65. Professor Laffin suggested that, while accountability shared between different layers of government are seen by some as a weakness, there could be advantages in providing a system of checks and balances which give the citizen more forms of access or redress:

*If you have got overlapping powers, that might actually be an advantage because citizens can take up problems, not just at the state or federal level, but they can play them off against each other to some extent, you have got two points of access, two centres of powers competing against each other.*<sup>35</sup>

*Thus in a federal system, especially where powers are concurrent, the loss of accountability in the narrow (responsible government) sense is counterbalanced by the gain in terms of accountability in a wider (checks-and-balances) sense. The zero sum metaphor that what one level of government gains, the other loses, can be misleading.*<sup>36</sup>

66. In both the US and Australia, there have been numerous efforts to define from first principles the roles and responsibilities of the centre in greater detail vis-a-vis the states, provinces or regions. However, these efforts have proved difficult to agree and implement, as relationships are

influenced by pragmatic and political considerations and shifts in the balance of power over time, and so are not susceptible to simple, once and for all codification. Nevertheless, the formal institutional framework within which negotiations take place could be vital in a situation of conflict.

### The EU and devolution

67. This was set in context by Professor Scott who provided an overview of the debate about the role of regions in the governance of Europe.
68. In spite of expectations, efforts to put enhancing the role of the regions on the agenda for the Future of Europe Convention in 2004 had failed – the focus will remain on subsidiarity in relation to the EU-Member State division of competences. Thus it is most realistic to view the regions as an influential pressure group – at the EU level through the groupings of constitutional and legislative regions, and at the Member State level through their influence on the national negotiating line.
69. Professor Scott suggests that there is no clear evidence to help evaluate whether the absence of primary legislative powers in itself was a major factor influencing the ability of Wales to pursue its interests at either level. Within the UK it was always an uphill struggle for the devolved countries to seek to influence the national line.
70. In relation to the EU, Wales is in exactly the same constitutional position as Scotland. On balance, Scotland seemed to have a higher profile but this was possibly due to having more staff to attend meetings, as well as a long history of engagement with the EU, and a strong presence in Brussels, particularly on agriculture and fisheries issues. The existence of the Parliament, and its scrutiny of the way Scottish interests had played out in EU negotiations, might strengthen the hand of the Scottish Executive but it was difficult to say whether this was due to the formal powers or political pressure.
71. Within the wider groupings of EU regions, the fact that Wales had executive rather than legislative devolution did not seem to Professor Scott to be a major issue.<sup>37</sup> Since the inception of the Assembly, Wales was increasingly adopting a higher profile in Europe and benefiting from participating in European networks. The formal powers could become more important if there were moves to give regions a role in European governance.
72. The proposed Constitution for Europe presented to the EU Heads of State and Government in July 2003 contains two Protocols that have a direct bearing on the position of sub-state Parliaments across the EU:
  - the Protocol on the Role of National Parliaments in the European Union provides for national parliaments to be consulted on EU legislative proposals regarding their compliance with the principle of subsidiarity;
  - the Protocol on the Application of the Principles on Subsidiarity and Proportionality provides for national



parliaments to extend this consultative exercise to include regional parliaments with legislative powers, where appropriate.<sup>38</sup>

73. Professor Scott's view is that, assuming these Protocols are included in a future Treaty revision, they do provide a potentially powerful mechanism for the UK's devolved Parliament and Assemblies to influence UK policy with respect to the EU. However, to be effective in the context of the arrangements for consultation between UK Government and the devolved administrations that already operate, he suggests that this would need enhanced provision for 'regional' parliamentary scrutiny of the position adopted by the devolved administrations, and conveyed subsequently to the UK Government.

## Findings

Our findings from the evidence in this chapter are as follows:

- since the early beginnings of administrative devolution there has been a growing momentum to increase its range and impact;
- the momentum has come from within the devolved institutions, as politicians sought to use the tools available to them, and from Welsh society, as the expectations of distinctive policies grew;
- the process up until 1999 was intermittent and piecemeal, due to a reluctant Whitehall and limited capacity, but the direction of travel was consistent;
- the formal devolved powers were largely unchanged in 1999 but the creation of the elected Assembly added a new democratic dynamic to their implementation;
- from the outset, the administrative cost has been recognised and weighed against the benefits of local decision-making;
- although the momentum for devolution is strong, the practical logic of the England and Wales legal relationship established in the 16th century remains powerful;
- international comparisons suggest that no system of governance provides for simple lines of accountability;
- the momentum in other countries is for greater regional freedom in decision making – but there are also strong forces for greater convergence in social provision, and in economic and fiscal policies, within and across national boundaries.

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## Notes

<sup>1</sup>John Davies, *A History of Wales*, (London, Penguin Books, 1994) 233 – 236. S.T. Bindoff, *The History of Parliament 1509 – 1558*, (London, HMSO, 1981) 264–266.

<sup>2</sup>Kenneth Morgan, 'Welsh devolution: the past and the future', in Bridget Taylor and Katarina Thomson (eds), *Scotland and Wales: Nations Again?* (Cardiff, University of Wales Press 1999), 204.

<sup>3</sup>Ibid. 205.

<sup>4</sup>John Davies, op. cit. 663, 664.

<sup>5</sup>Sir Lawrence Helsby, Head of the Home Civil Service, Minute to the Prime Minister, Rt Hon Harold Wilson MP, 1 July 1966. (London, Public Record Office, PREM 13/3236).

<sup>6</sup>E Rowlands MP, 'The Politics of Regional Administration: the establishment of the Welsh Office', *Public Administration*, Autumn 1972, 333-351.

<sup>7</sup>Adapted from Table 2.1 in Russell Deacon, '*The Governance of Wales, the Welsh Office and the Policy Process*', 1964-99, (Welsh Academic Press, 2002) 37-38.

<sup>8</sup>J. Graham Jones, 'Socialism, Devolution and a Secretary of State for Wales, 1940 – 1964', *Transactions of the Honourable Society of Cymmrodorion* (London 1989).

<sup>9</sup>Russell Deacon op. cit., Chapter 9.

<sup>10</sup>Chapter 10.

<sup>11</sup>John Davies, op. cit., 666.

<sup>12</sup>James Mitchell, *Governing Scotland: The Invention of Administrative Devolution*, (London, Palgrave Macmillan 2003), 259.

<sup>13</sup>Kenneth Morgan, op. cit., 209, 210.

<sup>14</sup>Kenneth Morgan, op. cit., 214, 215.

<sup>15</sup>Vernon Bogdanor, *Devolution in the United Kingdom*, (Oxford: Oxford University Press, 1999), 170-177, 254-255.

<sup>16</sup>*Royal Commission on the Constitution, 1969-1973, Volume 1, Report Cmnd. 5460* (London, HMSO, 1973), 336 –337 and 484-486.

<sup>17</sup>Bogdanor, op. cit., 255.

<sup>18</sup>The result of the 1979 referendum in Wales was: 20.2% in favour, 79.8% against, with a turnout of 58.8%. In Scotland: 51.6% voted in favour, 48.5% against, turnout 62.9%. Bogdanor, op. cit. 190.

<sup>19</sup>Geoffrey Evans and Dafydd Trystan, 'Why was 1997 different?', in *Scotland and Wales: Nations Again?*, Bridget Taylor and Katerina Thomson (eds.) (University of Wales Press, 1999). McAllister, L., (1998), 'The Welsh Devolution Referendum: Definitely, Maybe?', *Parliamentary Affairs*, vol. 51, no. 2, 149-165.

<sup>20</sup>The result of the 1997 referendum in Wales was: 50.1% in favour, 49.9% against, turnout just over 50%. In Scotland, with a turnout of 60.2%, 74.3% voted in favour of a Parliament and 63.5% in favour of tax-varying powers, 25.7 voted against a Parliament and 36% against tax raising powers.(Bogdanor, op. cit., 199).

<sup>21</sup>Chapter 12.

<sup>22</sup>Welsh Office, *A Voice for Wales*, Cm 3718 (London: The Stationery Office, July 1997), 7.

<sup>23</sup>Oral evidence of The Rt Hon Ron Davies AM, 26 September 2002.

<sup>24</sup>Bogdanor, op. cit., 115.

<sup>25</sup>Chapter 13.

<sup>26</sup>Oral evidence of Lord Morgan of Aberdyfi, 26 July 2003.

<sup>27</sup>Written evidence of Professor Rick Rawlings, May 2003.

<sup>28</sup>Adrian Reilly and Charlie Jeffery, 'Powers and electoral arrangements: international comparisons', written evidence to the Richard Commission, July 2003.

<sup>29</sup>Fiscal autonomy is the right to define tax bases or, in a more limited form, to define tax rates, financial autonomy is the right to spend revenues as the regions see fit.

<sup>30</sup>Adrian Reilly and Charlie Jeffery, op cit.

<sup>31</sup>David Heald and Alasdair McLeod, 'Beyond Barnett? Financing devolution.', in *Devolution in Practice: Public Policy Differences within the UK* John Adams and Peter Robinson (eds), (London: IPPR, 2002).



<sup>32</sup>such as luxury and heritage goods, inheritance taxes and gambling taxes.

<sup>33</sup>Oral evidence of Professor Martin Laffin, 25 October 2002.

<sup>34</sup>Ibid.

<sup>35</sup>Ibid.

<sup>36</sup>'Future Options: an assessment of the Powers of the National Assembly for Wales', Martin Laffin, Alys Thomas, Ian Thomas, (Glamorgan Policy Centre, March 2003).

<sup>37</sup>The Plaid Cymru MEPs who gave evidence took a different view (Chapter 5).

<sup>38</sup>*Draft Treaty Establishing a Constitution for Europe*, produced by the European Convention and submitted to the European Council Meeting in Thessaloniki, 20 June, 2003.



# The views of the people of Wales

This chapter reviews the evidence on how the people of Wales see the Assembly and its future.

2. The evidence includes:

- views put to us directly in 9 public meetings held between January and August 2003 in: Swansea, Llandudno, Haverfordwest, Llandrindod Wells, Newport, Merthyr Tydfil, Cardiff, the Royal Welsh Agricultural Show, Llanellwedd and at the National Eisteddfod in Meifod;
- young people's views, put to us directly in meetings with young people and representative organisations;
- public opinion survey research;
- responses from members of the public to our consultation documents, issued in November 2002 and February 2003, the first dealing with the powers and the second with the electoral arrangements of the Assembly.

3. The public opinion survey findings are vital because they provide scientific evidence of public opinion on devolution and how it has changed since 1999. But the public meetings gave us a chance to explore these issues in more detail with interested members of the public and to hear why people feel these issues matter. The views expressed provide a vivid introduction to the questions discussed in this report – for this reason we have included them at the beginning of this chapter.

## The public meetings

4. The public meetings are not, of course, a representative sample of people in Wales – those who chose to come to our meetings, or respond to our consultation, were people particularly interested in the Assembly and its future. It is not surprising that they expressed their views strongly.
5. The following is a summary of the points made to us.

## The benefits of devolution

### *Identity and nationhood*

//

The National Assembly has given Wales its own identity in Britain.

Written opinion  
Public meeting, Llandudno

//

//

The National Assembly has acquitted itself well in its first four-year period. ...It has helped to raise the profile of Wales as a nation, and emphasises the contribution that Wales can continue to make to the United Kingdom.

Written opinion  
Public meeting, Merthyr Tydfil

//

*Openness and accessibility*

//

I would like to praise what the Assembly has done by the effect on me as an individual and in my work – I feel that things are much more effective than they were previously with the Welsh Office – the Assembly is much more willing to listen to opinion and to influence practical things.

Speaker  
Public meeting, Llandudno

When devolution was mooted I was highly sceptical and voted against it. Now that we are four years down the road, I would vote for the Assembly. I have witnessed a transparency and availability of AMs and Ministers to the general public, the likes of myself, which I have not seen anywhere.

Speaker  
Public meeting, Haverfordwest

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*Working for Wales and bringing decisions closer to people*

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Devolution is up and running and working in our favour. As a community we have just fought a battle to save the children's paediatric Centre in Morriston...We managed to convince our Welsh Government....You can imagine the impact of the voice of South West Wales on the British Government at such a distance away. That's devolution working at its best.

Speaker  
Public meeting, Swansea

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The greatest attraction of the Assembly to me personally is it brings government closer in a real sense to people where they live and work.

Speaker  
Public meeting, Llandudno

//

*Could do better?*

6. As well as identifying the positive changes brought about by the Assembly, we also received some consistent messages expressing disappointment, including a sense that it was over-focused on South East Wales.

//

People in North Wales are saying they are not going to vote because it's done nothing for North Wales. This is a major problem because the Assembly has been put in there to work for the whole of Wales – we talk about North South divide in Great Britain but believe me the North South Divide seems to be a line North of Cardiff.

Speaker  
Public meeting, Llandudno

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7. Suggestions for overcoming this included the Assembly establishing a presence outside of Cardiff, by opening offices across Wales:

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There should be a North Wales Assembly Building in the area, the site chosen by the people of North Wales and not imposed by the South.

Written opinion  
Public meeting, Llandudno

//

or by the whole Assembly meeting outside Cardiff.

//  
Why don't they come up here and meet occasionally...perhaps twice a year would make a difference.

Speaker  
Public meeting, Llandudno

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### Views on the way forward

8. The most frequently cited cause for disappointment was the inability of the Assembly to fulfil its potential due to its limited powers.

//  
The National Assembly as it is presently constituted has a great deal of responsibility but not enough authority or power. There seems to be a mismatch between expectations of what it's able to do and what the UK Parliament has empowered it to do.

Speaker  
Public meeting, Cardiff

We need to ensure that this body that we have voted into being is empowered to carry out the task for which it was set up. It has been set up to represent the people of Wales, provide us with a local voice, to allow us in Wales to have a say in the matters that affect us and not to be run at arm's length from Westminster.

Speaker  
Public meeting, Newport

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//  
Yes, we have an Assembly - that is good but it does need improvements and it does need a lot more powers to effect real change.

Speaker  
Public meeting, Llandudno

I started off with great hopes and ambitions for the Assembly. I still have those ambitions but they have not been realised up to now...We do not have an Assembly that can actually make a difference.

Speaker  
Public meeting, Haverfordwest

You can't have half a devolution – you can't just have executive devolution, it's a mistaken concept. It doesn't work.

Speaker  
Public meeting, Merthyr Tydfil

The Welsh Assembly should have increased powers as a matter of urgency. The low turnout at the 2003 election is an indication of people's disillusionment and misconceived understanding of the Assembly's powers.... We were very despondent to learn that they had even less powers than the Scottish Parliament.

Written opinion  
Public meeting, Cardiff

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9. Others commented that within the existing powers the Assembly had shown a capacity to innovate effectively.

“

I can see that, within the limits imposed by the devolution legislation, innovative ideas such as the reconstruction of the health service in Wales, the easing of teacher's work lives and the baccalaureate experiments, there is a real focus on people's needs for the future.

Written opinion  
Public meeting, Llandrindod Wells

”

10. Among those who felt that the Assembly's current powers are inadequate, opinion varied on the scale and extent of the changes needed to enable the Assembly to operate effectively.

11. Some people thought that the priority was to extend the Assembly's power to act in areas which were already mainly or partly devolved. Examples quoted included transport, agriculture and fisheries, education and planning.

“

I think you have got to cut down these jagged edges so people know who is responsible for what. We have to look in terms of the health service and education.

Speaker  
Public meeting, Merthyr

”

“

Some of the rounding up ... at a very early date ..by a transfer of functions order [should] include: Electricity Act powers, ...powers under the Harbours Acts,... powers over the Wales Transport Office,... powers over building regulation matters... animal health powers.

Written opinion  
Public meeting, Cardiff

The Assembly has no control, and very little influence, over rail service provision in Wales, either in terms of service specification or funding. These powers remain with the Strategic Rail Authority (SRA) in London.....This means the Assembly is unable to deliver a fully integrated transport system.

Written response to consultation

”

12. Others saw a need to extend the Assembly's executive powers into new areas including the police and emergency services.

“

When will all planning and monitoring of Police and Emergency service provisions be fully devolved to Wales? .....If we had fully devolved powers we would have had the opportunity to have looked at not only a safer but a more efficient and cost effective system.

Written opinion  
Public meeting, Swansea

”

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Councils...under the encouragement of the National Assembly, are setting up community safety partnerships in order to deal with these problems, and it seems to me that because the Assembly is in charge of local government, if it was in charge of local police we could strengthen these partnerships and make a considerable difference to the residents of our areas.

Speaker  
Public meeting, Merthyr

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//

The Assembly does not have adequate powers to fully develop devolved Government in Wales. In particular primary legislative powers are required in the areas of education and health policy, if truly Welsh solutions are to be found.... However at this stage I would not support tax-varying powers as I believe there is still a public credibility gap for the Assembly to bridge and it is too early to consider tax-varying powers.

Written opinion  
Public meeting, Swansea

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### A law-making Assembly?

13. Many of those who expressed a desire to increase the Assembly's powers were not specific about their scope, but were clear that, to fulfil its potential and work effectively, the Assembly's powers should include primary legislation.

15. Most of those who favoured additional powers for the Assembly looked to the Scottish model of devolution. Some people advocated this for symbolic reasons and a sense of nationhood and pride.

//

Since its inception in 1999 the National Assembly has failed to capture the public imagination...What the public sees is an elected body struggling to deliver secondary legislative policies. If the Assembly is to deliver a meaningful and productive government it needs the tools to do the job. The full provision of primary legislative powers...can deliver a full and practical government for Wales.

Written response to consultation

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They made a mistake in the very early stages when they drew two different types of devolution for Scotland and Wales....We will have a greater sense of pride in ourselves and self belief if we don't have to ask for things that we can do for ourselves. The nation will be working together for the benefit of the whole of Wales, and I think it's then that people really will have faith and belief in their Assembly.

Speaker  
Public meeting, Llandudno

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14. Some were keen for the Assembly to increase its law-making powers but not to take on tax-varying powers.

“

Why are we being seen as second class in the devolution model? Why is it that Scotland have these powers and we do not? We want to be able to take pride in the body that represents us and not see it as a second choice institution that has been installed rather than one that we actually want.

Speaker  
Public meeting, Newport

”

16. For others, the Scottish model was favoured as the means to improve effectiveness and stability.

“

The constitutional arrangements contained in the Act were intolerably complicated....this has bedevilled quite a lot of the doings of the Assembly. We should now look to a constitutional solution which would bring consistency in the relationship between Westminster, Scotland, Northern Ireland and Wales, probably on the Scottish model because it has clearer lines of definition, accords clearer rights and would probably withstand better any conflicts that might arise.

Speaker  
Public meeting, National Eisteddfod

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“

I spent two years in Scotland after the establishment of the Parliament, and I can see the difference in the quality of debate which takes place in the Scottish Parliament and that which takes place in the Assembly. The policy community has grown around the Parliament in Edinburgh because of its ability to change law – that creates a political imperative and a process which I believe leads to better policy making and better democracy.

Speaker  
Public meeting, Cardiff

With law-making and tax powers, I believe that people in Wales will take the body more seriously, election turnout will be higher, decisions made quicker.

Written opinion  
Public meeting, Swansea

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### Too early for change?

17. Some contributors argued that it is too early to consider additional powers for the Assembly, and that the current arrangements should continue.



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Three years in to what is only the Assembly's first term is much too soon to make a sensible judgement as to whether it really needs them.....before asking for any extension...Members should ensure full use of the powers they already have.

Written response to consultation

I am not yet convinced that there is a need for greater powers. The people of Wales in 1997 voted for the establishment of the Assembly with the powers we have now. I'm not closing the door permanently on increases in power, but I don't think the time is right yet.

Speaker  
Public meeting, Merthyr Tydfil

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18. Some concern was expressed about the capacity of the Assembly to handle additional powers.

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I do not think that ... the current Assembly is experienced or mature enough to deal with increased powers....They must first of all get on with making a success of handling those issues on which they were initially elected.

Written response to consultation

Developing skills at policy development and legislative process takes time. The Assembly needs to put effort into this even for its present work.

Written opinion  
Public meeting, Cardiff

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### *Criticism of the Assembly – opposition to further powers*

19. Some commentators felt strongly that the Assembly should not be given further powers. Some of these were fundamentally opposed to devolution itself.

//

I am totally against the Assembly. It is dividing the country, dividing parts of England, parts of Wales, Scotland...We have seen enough division. We should all have the same rights and benefits right throughout the country.

Speaker  
Public meeting, Newport

//

20. Others were more concerned about performance, bureaucracy and costs.

//

The people of Wales are over governed. All that is needed is one local and one national level of government, i.e., Westminster and the unitary authorities. The Welsh Assembly is not needed and wasn't wanted by the Welsh people. It should be abolished so freeing hundreds of millions of pounds wasted on this extra layer of government.

Written opinion  
Public meeting, Swansea

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Far too much money is spent on this talking shop. It is not achieving anything.....We should abolish the Assembly.

Speaker  
Public meeting, Llandudno

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### **Another referendum?**

21. Some people felt that there was a need for a further referendum on any proposed extension to the Assembly's powers.

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I feel that the result in 1997 was so close that the Assembly does not deserve any more powers and, if more powers were proposed, there should be another referendum.

Speaker,  
Public meeting, Royal Welsh Agricultural Show

There was a very narrow vote for an Assembly for Wales – an Assembly with limited powers – at the referendum. The National Assembly cannot have greater powers by stealth. Wales cannot have a Parliament through the back door.

Written opinion  
Public meeting, Llandudno

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### **Structure and working arrangements of the National Assembly**

22. Few respondents expressed a view about the structure of the National Assembly. Those that did tended to support reconstitution on the parliamentary model.

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It is important that citizens recognise how the institutions of government work and in the UK the parliamentary system is well understood.... It is debatable whether the current model has produced a more consensual form of politics and the ability to work thematically has not been very evident in the first term.

Written opinion  
Public meeting, Merthyr Tydfil

A point about the model of devolution...we need to have something along the lines of the Scottish model where the executive is separate from the Parliament itself because it seems that people will blame the Assembly for the decisions of the Government. I think in order to have clarity in our democracy we need to have a separation of the executive and the Assembly.

Speaker  
Public meeting, Newport

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23. Others welcomed the less adversarial approach of the National Assembly compared to Westminster.

//

I would hope that the Assembly would not have to become more like the Parliamentary model with its yah boo politics and confrontational chamber layout. We want a government which looks and behaves as if it is really working together for the benefit of all people in Wales.

Written opinion  
Public meeting, Llandrindod Wells

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24. The Assembly's Committees was discussed in a few meetings. Some felt the role played by members of the Governing party should be changed.

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Ministers should not be members of Committees. They should be able to appear before the Committees as they do in the Select Committees in Parliament.

Speaker  
Public meeting, Newport

The Committees don't work as well as they should – particularly the committees chaired by the members of the governing party.....A much better change would be to suggest that the Chair has to come from the non governmental parties because there would be much more opportunity to discuss and scrutinise the more contentious issues.

Speaker  
Public meeting, Newport

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### The relationship between the Assembly in Cardiff and the Parliament at Westminster

#### *Who's responsible for what?*

25. Many people expressed concern about the complexity of the present settlement and the confusion over the extent of the powers transferred to the Assembly.

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One of the major weaknesses of the current system is that it is complex. There are about 300 laws that have been transferred and thousands of discretions by various departments in Cardiff – it's little wonder that on occasion we don't know where they stand in the Assembly.

Speaker  
Public meeting, National Eisteddfod

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26. The most frequently cited example was the foot and mouth outbreak of 2001.

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The weaknesses of the current arrangements became obvious during the foot and mouth crisis at the start of 2001 when the Assembly seemed to be unsure or unwilling to use its powers, or possibly they were being stopped from doing so by Ministers in Westminster, we are not quite sure, but the result was confusion, delays and further losses to farmers in Wales.

Speaker  
Public meeting, Haverfordwest

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We saw the dramatic problems that arose in Wales as a result of foot and mouth where we were unable to make any decision without reference to Westminster.

Speaker  
Public meeting, Royal Welsh Agricultural Show

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### *Long term stability?*

27. Others thought that the settlement was unstable because of the tensions that would arise if different political parties were in power in Cardiff and Westminster.

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We will reach the day when we have different political parties in various positions in the country. What would be the clashes that might arise as a consequence of that – that would be constitutional crunch time.

Speaker  
Public meeting, Cardiff

One can only imagine how Wales might suffer if and when different parties are in power on either side of the border – the Westminster Government in that case would have a vested interest in frustrating and stalling the decisions of the Assembly Government.

Written opinion  
Public meeting, Cardiff

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### *Shared law making*

28. Others focused on the impact of shared law making on the Assembly's effectiveness.

//

Assembly Members need to have clear powers and to know that they can develop and implement policies without depending on the goodwill of the government in London, with limited Parliamentary time and perhaps little interest or understanding of Wales.

Written opinion  
Public meeting, Cardiff

There is delay in the actions that can be taken because we need the stamp of the government in London on things. This causes delay in our priorities – we have no influence on the party in London which governs the legislative programme.

Speaker  
Public meeting, Llandudno

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29. A few respondents identified mechanisms for improving current arrangements.

//

Possibly your report could suggest an interim improvement. This could be in the form of a Concordat between the Assembly, the Wales Office and Parliament to guarantee the Assembly Parliamentary time for two Bills a year, as well as Welsh clauses in general Bills where appropriate. This could be linked to procedures to ensure the Welsh MPs have a scrutiny role thereby helping involve them in the Assembly's activities and hopefully win their support and trust.

Written opinion  
Public meeting, Cardiff

//

***The role of elected representatives***

30. Many people felt that the representational role of MPs and AMs (and to some extent local councillors) was unclear, leaving constituents confused about where to go for advice.

//  
People are often confused about which of the three [MP, AM, Councillor] they should use for their particular problem and as an elected member it is always difficult to turn down a plea from a member of your electorate. There is duplication, or triplication in those areas. Do we need as many MPs?

Speaker  
Public meeting, Haverfordwest

//

31. Some commented on the future role of Welsh MPs, particularly if the Assembly acquired further powers.

//  
Absolute devolution would make it difficult to justify the role of Welsh MPs. Reality suggests that such a position is unlikely and that primary law making, at least initially would be limited. As such Welsh MPs would continue to have a role in representing the interests of the Principality in all areas where sovereignty of decision making remains in Westminster.

Written opinion  
Public meeting, Merthyr Tydfil

//

//  
I think we need to lower the number of MPs who are elected to Westminster and then that can pay the cost of an increased membership of the National Assembly in Cardiff.

Speaker  
Public meeting, Newport

//

***The role of the UK government and the Secretary of State for Wales***

32. The role of the Secretary of State was raised following the machinery of government changes announced in June 2003.

//  
It seems that the Secretary of State will now be part time, which in the light of present arrangements for the governance of Wales does not seem very satisfactory. Of course, if the Welsh Assembly should aspire in time to be a full blown Parliament then the role of the Secretary of State could indeed be diminished without detriment.

Written opinion  
Public meeting, Llandrindod Wells

//

33. In general, people felt the role of the Secretary of State and Welsh MPs would continue to be important, whether or not the Assembly obtained further powers.

//

This would depend on the extent of primary law making powers. If defence, social security matters etc., are still to be dictated by Westminster we would still need to have strong representation by Welsh MPs and by the Secretary of State.

Written opinion  
Public meeting, Llandrindod Wells

The Wales Office would remain as a conduit between the Assembly and Westminster and would still be needed for the areas of responsibility retained by London.

Written response to consultation

//

35. Others argued that the Membership of the Assembly was too small even to cope with its existing powers.

//

The very damaging and inevitable consequences of such a small number of Welsh AMs have been: an impossibly small Cabinet, Ministers greatly overburdened and...committees, each with a membership much too small to give proper and close scrutiny...annual spend, soon to be £12 billion, should be effectively tested, scrutinised and closely monitored. How can this be properly done by 60 AMs?

Written response to consultation

//

### The size of the Assembly

34. Among those who favoured greater powers for the Assembly, many felt that it would be necessary to increase the size of the Assembly in order to cope with the additional workload.

//

I certainly think that 60 is insufficient....It would be feasible to increase the numbers to 90 and I think that is essential for any efficient government body even with what they have to do now. If they have legislation as well it will certainly be necessary, no doubt at all.

Speaker  
Public meeting, National Eisteddfod

//

36. Others put the opposite view, that the current size of the Assembly should be sufficient to enable it to operate effectively.

//

60 people are more than adequate, with the existing powers and remit, to achieve the visions set by the National Assembly. ..In the current climate it would be counter productive to seek to increase the number of AMs.

Written opinion  
Public meeting, Cardiff

The number of members..should only increase if the Assembly received extra powers.....The small size of the Assembly has its advantage..every member needs to know quite a lot of what is going on in Wales.

Written response to consultation

//



### *Effectiveness?*

37. Some commentators identified areas for possible change in order to improve effectiveness without creating more members.

//

It would seem difficult to justify an increase in the number of AMs, particularly given the recent public debate about how many days they actually spend in the Assembly..... Is there justification in the modern age for the lengthy periods of recess that the Assembly has?

Written opinion  
Public meeting, Merthyr Tydfil

Increasing AM numbers is absolutely unnecessary. What we need to do is to get the Assembly working better than it currently does.....The subjects which are currently debated in the Assembly are often quite anodyne and unnecessary.

Speaker  
Public meeting, Newport

//

38. A few respondents felt that 60 Members was too many.

//

I am not convinced that there is enough business to fully occupy the time of the existing members. I submit that the members...be reduced to 40.

Written response to consultation

//

### *The Assembly's electoral system*

39. In most of the public meetings, the powers of the Assembly prompted much more comment than the electoral arrangements. The meeting in Merthyr Tydfil was the exception – held just after the Assembly election in May, and after a great deal of media coverage had been given to the Additional Member System (AMS) of election.
40. Written responses also tended to comment more on the Assembly's powers. Those respondents that did focus on the electoral arrangements put forward a wide range of views both for and against the current voting system.

### *The present system – does the electorate understand it?*

41. Some people told us that the current system was not understood by voters, and that this had contributed to low voter turnout at the elections.

//

In preparation for this meeting I held a consultative meeting with 160 senior citizens and I found they had not the slightest idea of what the list member was. I think this is one of the reasons why we have got a low voting turnout. People simply do not understand, it does not work clearly and obviously so that they can understand what their vote does.

Speaker  
Public meeting, Merthyr Tydfil

//

***The present system – how representative is it?***

42. Opinion on the representativeness of the current system was mixed, with strong views expressed by those in favour of proportional representation as well as those against.

//

I welcome the fact that it is more difficult for one party to dominate and that there is a higher potential for coalition government which must of necessity widen government representation.

Written opinion  
Public meeting, Llandrindod Wells

The system we have for the National Assembly, 40 FPTP, 20 list candidates is an excellent system. Please keep it.

Speaker  
Public meeting, Swansea

I think the mix that we have got is a good one in that it does make sure that minorities have an opportunity to be represented.

Speaker  
Public meeting, Haverfordwest

//

43. Critics of the present system focused on aspects of the constituency and regional member system.

//

The current method also allows candidates to have two bites of the cherry, by appearing in the ballot for a constituency first past the post election, and then if rejected by those voters, appearing on a party's regional list for top up seats.

Written opinion  
Public meeting, Swansea

PR in its present form is undemocratic, when 20 AMs are elected to the Welsh Assembly without anyone personally voting for them. They get rejected by voters in the constituency then get elected by the back door by the regional top-up list.

Written opinion  
Public meeting, Merthyr Tydfil

The allocation of regional seats is disproportionate to the votes cast. We see a party who receives the most in the regional vote is left empty-handed, whilst a party that is rejected under the First Past the Post system is rewarded with the greatest number of the regional allocation. This system cannot be a fair and equitable system.

Written opinion  
Public meeting, Merthyr Tydfil

//



44. Mixed views were expressed about proportionality and its perceived link with coalition government.

//

On the question of proportional representation, that would result in horse trading and we would have some of the results we had in the previous Assembly ...The smaller party is driving the larger one which can't be right in a democratic society.

Speaker  
Public meeting, Newport

One advantage of adding extra list AMs would be that in future, it would be very unlikely that any one political party would achieve a majority. Those countries with a long history of PR elections all have a political culture where parties are used to working together within parliaments to achieve efficient, effective government.

Written response to consultation

//

45. We received few opinions on the question of gender and ethnic balance, and these were mixed.

//

The election of 2007 must be structured to show positive discrimination in PR seats to cater for Welsh minorities of ethnicity, disability etc.

Written opinion  
Public meeting, Swansea

I feel uneasy about too much imposition of characteristics of candidates. I believe that the parties are aware of their responsibility to look to gender and ethnic balance.

Written opinion  
Public meeting, Llandrindod Wells

//

### *Constituency and regional AMs - two types of representation?*

46. We were told on many occasions that there was seen to be a difference in representation and workload between constituency and regional AMs.

//

It creates two classes of AMs...in some minds this attaches different levels of legitimacy to different AMs. The regional top up seats are not identified by the electorate in general. This means local casework tends to go to those elected on a parliamentary constituency basis. It also means the AMs elected on a regional basis are more able to pick and choose what issues to campaign on.

Speaker  
Public meeting, Swansea

We have got 40 very over-worked constituency AMs answerable to the constituents and 20 very under-worked [regional AMs] who are not accountable or responsible to anyone.

Speaker  
Public meeting, Merthyr Tydfil

//

### *The constituency boundaries*

47. Those who expressed a view were largely in favour of retaining the link with the Parliamentary boundaries.

//

It is very important to keep these the same for Parliamentary and Assembly elections. People are confused enough as it is.

Written opinion  
Public meeting, Llandrindod Wells

//

### Options for change

48. Opinion was mixed on possible changes to the current electoral system, and the suggestions put forward were not always associated with increasing the Assembly's size.

#### *Retaining the mixed system – with changes*

49. Some respondents suggested changes in the ratio of constituency to regional members, or changing the boundaries of the regional constituencies.

“ On proportional representation, I am in favour of the idea but there is too much of it...in the Assembly we have 33% through this method, we must decrease the number but keep the system.

Speaker  
Public meeting, Llandudno

Increase the additional members to 40 - parity between the constituency AMs and the regional AMs. The regional AMs to be elected using the current AMS system on the former 8 Welsh counties. Someone who lived in Gwynedd would feel better if they had 5 AMs elected in Gwynedd.

Speaker  
Public meeting, Royal Welsh Agricultural Show

”

50. A few respondents were in favour of retaining the current list system but replacing the regional list with a national list.

“

The problems which have been identified with the AMS...could be overcome by moving to a single, Wales-wide list for the additional members.

Written response to consultation

”

#### *Replacing the mixed system with another proportional system – STV?*

51. The alternative to AMS that was most often suggested by members of the public was the single transferable vote (STV) system.

“

AMs should be elected through one ballot, by single transferable vote. ..This would give each AM the same electoral legitimacy. It would improve the principle of PR brought in for the Assembly elections, as it is easier to understand and would not be felt to be imposed by bureaucracy after the election.

Written opinion  
Public meeting, Swansea

I am a 75 year old voter who has participated in every election for which I have been eligible since the age of 21 and whose vote has not once, in all those 54 years, had any bearing on the result whatsoever. To all intents and purposes I feel disenfranchised by the present system. I want to be able to make my vote effective and can see no other way of achieving this than by means of a change to STV.

Written opinion  
Public meeting, Cardiff

”

//

What Wales needs is an election system that values every vote equally and so obliges all political parties to campaign with equal intensity in all constituencies...This is my primary argument for advocating STV.

Written response to consultation

I am firmly in favour of PR but have reservations about a list system because any list system keeps power within the political parties. I very much favour systems of PR which are not based on regional list systems. I would prefer to see multi member constituencies and the single transferable vote.

Speaker  
Public meeting, Haverfordwest

//

### *First past the post?*

52. We also heard support for a move away from proportional representation and to First Past the Post, particularly at our meeting in Merthyr Tydfil.

//

The current AMS is totally undemocratic...a third of the Assembly's members have no direct accountability to voters...The true democratic system is first past the post whereby the electorate can identify with their chosen candidate..PR undermines the democratic link between member and his or her constituents...The system must be changed.

Written response to consultation

//

//

I totally disagree with the way it is at the moment. The Assembly has not produced the goods. That is as a result of PR because there was no clear party that had control there...You were held back in lots of areas. You have to have someone that has the control and you have to then have effective opposition that works against it. I firmly believe that first past the post is the right way to go.

Speaker  
Public meeting, Merthyr Tydfil

//

### **The views of young people**

53. We held two sessions, one in Llandudno, with representatives of young people's forums in North Wales, and one in Cardiff, where we received evidence from young people and young people's organisations. In general, their views on the Assembly and its future mirrored the range of opinions set out above. The young people from North Wales had the same concerns about the Assembly's interest in North Wales as we heard at our public meeting in Llandudno.

**Improvements brought about by the Assembly**

54. The sessions demonstrated that for some young people the Assembly has made a positive impact.

“  
What we feel is that what the Welsh Assembly Government has achieved for Wales is good, as there are more opportunities for young people.....It is doing well as it is on things....like establishing the youth forums, Funky Dragon, Young Peoples Partnerships, free prescriptions and dental checks for the under 25s.<sup>1</sup>

Carry on the good work – carry on and just improve.<sup>2</sup>

”

**Knowledge and understanding of the Assembly**

55. The young people felt that knowledge and understanding of the work of the Assembly was very limited, and that this lack of knowledge was not exclusive to young people.

“  
I don't think many people understand a lot of what is going on, or the difference between Cardiff and Whitehall.<sup>3</sup>

I think people in general do not know what the Assembly does so I think that we have to balance this out so that people, older people and young people, get educated.<sup>4</sup>

”

56. Communication between politicians and young people was thought to be a problem.

“  
It would be better if politicians and young people communicated better with each other and perhaps politicians would then understand young people.<sup>5</sup>

We need to be heard more than we are being, and questions need to be answered directly rather than just pushed to the side.<sup>6</sup>

”

57. As a result, some young people said that they would not turn out to vote.

“  
Seems to be more young people leaning away from voting...I am old enough to vote, I wouldn't vote<sup>7</sup> because I do not know what is what.<sup>7</sup>

Maybe even friendly presentations where you can learn what the policies of the different groups are ...consider giving us a little bit more information that we could understand.<sup>8</sup>

”

**Public opinion research**

58. The Commission received evidence from the Institute of Welsh Politics at the University of Wales, Aberystwyth on the four major academic surveys conducted in recent years on the social and political attitudes of people in Wales, funded by the Economic and Social Research Council: the 1997 Welsh Referendum Survey, the 1999 Welsh Assembly Election Study, the 2001 Wales Life and Times Study and the 2003 Wales Life and Times Survey.<sup>9</sup> Analysis of the 2003 survey findings began in the autumn 2003 and we are grateful to

Dr Richard Wyn Jones and Roger Scully for providing an early indication of the findings relevant to our work.

### Survey evidence: powers

59. These Surveys provide detailed and scientific evidence of public attitudes to governance in Wales and how they have changed since 1997. On the powers of the Assembly we felt that two findings were particularly striking.

### Assembly or Parliament

60. First, growth in support for a Parliament in Wales has virtually doubled since 1997 – this is the most favoured option among the four choices offered.<sup>10</sup> Support for an Assembly has remained broadly constant, as has support for independence, and support for no elected body has almost halved.

**Table 3.1: constitutional preferences (%) in Wales**

Preference	1997	2003
Independence	14.1	13.9
Parliament	19.6	37.8
Assembly	26.8	27.1
No elected body	39.5	21.2

### Trust

61. Second, trust in the Assembly to act in the best interests of Wales was high, with over two thirds responding that they would trust the Assembly at least most of the time.

**Table 3.2: trust in UK government NAW to 'act in Wales' best interests' (%)**

Response	2003	
	UKGovt	NAW
Just about always	2.1	12.1
Most of the time	21.0	55.5
<b>Trust at least most of the time</b>	<b>23.1</b>	<b>67.6</b>
Only some of the time	57.9	26.3
Almost never	19.0	6.0

62. The other findings of particular interest included those on the influence of the Assembly and on its impact.

### Influence

63. A majority believe that London has the most influence over the way Wales is run but most believe the National Assembly should have the most influence – although the timing of the 2003 Survey immediately after the Assembly election may have raised awareness of the Assembly and thus influenced the results.

**Table 3.3: most influence over 'the way Wales is run' (%)**

Response	2003	
	Does Influence	Ought to Influence
NAW	22.4	56.0
UK Govt	57.9	29.1
Local Councils	15.0	13.8
European Union	4.7	1.2

**Impact**

64. More people feel that the Assembly is not making a difference than that it is improving things. The proportion seeing a positive impact seems to have increased since 2001 although, as mentioned above, the timing of the Surveys may have influenced this.<sup>11</sup>

**Table 3.4: impact of the Assembly on standard of living (%)**

Response	2001	2003
Improve	34.7	37.8
No difference	57.4	54.5
Reduce	7.9	7.7

**Table 3.5: impact of the Assembly on health (%)**

Response	2001	2003
Improve	31.0	43.3
No difference	63.6	47.7
Reduce	5.4	9.0

65. Nor do most people feel that the Assembly has given them a larger say in government.

**Table 3.6: Assembly will give/has given 'ordinary people more say in government'**

Response	2001	2003
More	35.1	38.6
No difference	61.5	55.8
Less	3.4	5.6

**Survey evidence on electoral arrangements**

66. The Survey evidence suggests that large number of voters in Wales are unconvinced that voting matters much at the UK level: this sense is even greater for elections to the Assembly:

**Table 3.7: make a difference who wins?**

Response	NAW Elections	UK Elections
A great deal	16.6	23.5
Quite a lot	26.3	29.0
Some	19.5	15.4
Not very much	26.2	22.9
None at all	11.5	9.2

**Preferred electoral system**

67. Most people express support in principle for proportional representation for elections to Westminster, the Assembly and local government, but they also express a preference for being represented by a single representative.

**Table 3.8: should be elected via PR? (%)**

Response	Westminster	NAW	Local Govt.
Strongly agree	20.2	19.1	18.6
Agree	33.6	39.4	38.4
Neither agree nor disagree	31.0	27.8	28.1
Disagree	10.7	9.7	10.8
Strongly disagree	4.5	4.0	4.0



**Table 3.9: how would you prefer being represented?**

Response	%
Single representative	63.6
Several representatives	21.9
Can't choose	14.5

**Fairness**

68. Over 40% believe that the voting system for the Assembly is fairer than that for Westminster but about the same number are not sure:

**Table 3.10: voting system for NAW elections is fairer?**

Response	%
Strongly agree	7.2
Agree	33.5
Neither agree nor disagree	42.3
Disagree	13.4
Strongly disagree	3.5

**Complexity**

69. Few voters find the current system of election to the Assembly too difficult to operate - although around half found the allocation of seats in the Assembly difficult to understand.

**Table 3.11: difficult to fill in ballot papers for NAW election?**

Response	%
Very difficult	3.3
Fairly difficult	13.0
Not very difficult	35.7
Not at all difficult	47.9

**Table 3.12: difficult to understand allocation of seats in NAW?**

Response	%
Very difficult	12.2
Fairly difficult	37.1
Not very difficult	35.1
Not at all difficult	14.6

**The Electoral Commission report on the 2003 election<sup>12</sup>**

70. In November 2003 the Electoral Commission published its report on the 2003 National Assembly elections. In preparing its report, the Electoral Commission drew upon a wide range of sources, including opinion polling which was conducted by NOP and the Institute of Welsh Politics at the University of Wales, Aberystwyth.<sup>13</sup> The results of this opinion poll evidence confirms in many respects the Survey evidence quoted above. The evidence also suggested a lack of understanding of the Assembly, its powers, what it has done since it was created or the voting system for elections. In particular, younger people had very modest levels of knowledge and felt uninformed about the Assembly.



71. The opinion polling also showed that, despite the lack of understanding of the Assembly and its activities, more people (46%) said that it had improved things in terms of how Wales is governed than thought it had made these matters worse (11%). This seems more positive than the findings of the Life and Times Survey (Tables 3.4-3.6 above). However, the fact that only 6% thought that the impact had led to a lot of improvements, and that for around a third of the sample the Assembly had made no difference, may explain this. Indeed, NOP/IWP concluded that 'substantial numbers of voters feel that devolution has changed little and done little to improve their lives'.

### *Devolution and turnout*

72. NOP/IWP also concluded that there is only a weak relationship between voter turnout and attitudes to devolution, pointing to: 'little evidence that the rise in electoral abstention reflects substantial public antipathy to the devolved institution. Public support for devolution in Wales has grown since 1999'.

73. Indeed, the NOP/IWP findings suggest that the greatest impact on participation would have been felt by extending the Assembly's powers 'to change things that shape people's daily lives'. 54% said they would have been more likely to vote in such circumstances, and, in group discussions, perceptions tended to be that the Assembly does not have adequate powers with decisions having to be finalised in Westminster.

However, The Electoral Commission concluded in its report that 'it is important not to exaggerate this factor. Almost as many people say they would be more likely to vote for other reasons'.

### **Overview of survey evidence**

74. Overall, this survey evidence seems broadly consistent with the messages from the public meetings particularly the key themes:

- people can and do draw a distinction between the performance of the Assembly so far, and the role and powers they feel it should have in the governance of Wales;
- thus many people support further devolution without being over impressed by what has been achieved so far.

75. The apparent paradox, of low levels of enthusiasm for what has been achieved and growing support for more devolution, may be explained by two factors:

- the view that the Assembly is held back by its limited powers;
- in spite of criticising its performance so far, people do trust the Assembly to act in the interests of Wales.

76. The most striking difference between the messages received in our public meetings and the survey evidence quoted above relates to Table 3.6. The fact that 56% of respondents thought that the Assembly has made no difference to the voice of ordinary people in government contrasts with

the impression from our meetings, and other evidence sessions, that people find the politicians and the processes of the Assembly vastly more open and accessible than the Welsh Office prior to 1999.

### Limitations of the evidence

77. Taken together the evidence summarised above does provide some valuable insights into the perceptions of the Assembly and its powers and electoral arrangements at the end of the first term. The major limitation of the evidence on constitutional preferences (Table 3.1) is that it presents the Assembly and Parliament as two distinct choices – this does not give us any evidence on the scope of the powers of the Parliament or how the work of law making for Wales could be shared between Westminster and Cardiff.
78. A further limitation of the evidence is that it does not provide an indication of how those who support devolution, or the extension of devolution, view the balance of costs and benefits from such a change. In the public meetings those who criticised the costs of the Assembly were opposed to further change – we do not know how those who favour change in principle would view the cost and capacity constraints discussed later in this report.

### Findings

Our findings from the evidence in this chapter are as follows:

- people are critical of the Assembly in a number of respects but they believe it should lead the governance of Wales, most do not want to get rid of it and many feel that it needs the tools to do its job effectively;
- people draw a distinction between the performance of the Assembly and the role they feel it should have in the governance of Wales - many support further devolution without being over impressed by what has been achieved so far;
- many believe that the performance of the Assembly has been constrained by the present powers;
- the feature of the Assembly that people particularly value is its openness and responsiveness;
- the sense of having a second best form of devolution is a strong theme, but so is the feeling that the present devolution settlement should be allowed 'to bed down';
- on the electoral side, there are many criticisms of the present AMS system but support for its two key features: the single member constituency and proportionality.

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*Notes*

<sup>1</sup>Oral evidence of representatives from the Wrexham, Conwy & Gwynedd Youth Forums, 27 March 2003.

<sup>2</sup>Ibid.

<sup>3</sup>Oral evidence of representatives from Llais y Ddraig Girlguiding Cymru, 25 July 2003.

<sup>4</sup>Oral evidence of representatives from the Wrexham, Conwy & Gwynedd Youth Forums, 27 March 2003.

<sup>5</sup>Oral evidence of representatives from Llais y Ddraig Girlguiding Cymru, 25 July 2003.

<sup>6</sup>Ibid.

<sup>7</sup>Oral evidence of representatives from the Wrexham, Conwy & Gwynedd Youth Forums, 27 March 2003.

<sup>8</sup>Ibid.

<sup>9</sup>Commissioned Papers, Scully, R. and Wyn Jones, R. *Public opinion, the National Assembly & Devolution – Briefing Note on latest evidence* (Aberystwyth, Dept of International Politics, 2003).

<sup>10</sup>The question is: 'Which of these statements comes closest to your view?' with each option given to respondents. Note that the full wording of the 'Parliament' option is "Wales should remain part of the UK, with its own elected parliament which has law-making and taxation powers"; the full wording of the 'Assembly' option is "Wales should remain part of the UK, with its own elected assembly which has limited law-making powers only" (emphasis in original).

<sup>11</sup>This apparent increase in the perceived importance of the Assembly may be merely an artefact of the context in which the two surveys were conducted: in 2001 immediately after a UK election where the importance of that level of government would have been in voter's minds; and 2003, after a devolved election where parties – and the Electoral Commission! – sought to raise voters' awareness of the importance of the NAW.

<sup>12</sup>The Electoral Commission, *The National Assembly for Wales elections 2003, The official report and results* (Cardiff, The Electoral Commission 2003).

<sup>13</sup>NOP Research Group and Institute for Welsh Politics, *National Assembly for Wales Election 2003, Opinion research* (Cardiff, The Electoral Commission 2003).

# The role and structure of the National Assembly for Wales

This chapter examines the capacity of the National Assembly as a representative and accountable body for the whole of Wales. It provides evidence for the Commission's recommendations on the size and structure of the Assembly.

2. The first part of the chapter describes the role and structure of the current Assembly, including the corporate body model and the Assembly in plenary and in committees. The second part discusses the evidence received on the capacity of the Assembly and sets out the issues that would need to be addressed if the powers of the body were to be increased. The main focus is on the First Assembly from July 1999 to April 2003 (when most of the evidence cited in this chapter was taken), but the chapter also takes into account relevant developments in the Second Assembly (from May 2003). It does not deal with the executive powers that are delegated by the Assembly to the First Minister, which are considered in Chapter 5.
  - deliberative – debating issues that affect Wales;
  - scrutiny – examining the actions of the Assembly Government including its use of devolved legislative powers and its spending decisions;
  - policy development – analysing problems and recommending solutions.

## Design of the Assembly: *A Voice for Wales*

4. The origins of each of these roles can be found in the White Paper proposals which preceded the 1997 referendum and were implemented in the Government of Wales Act.<sup>2</sup> The key theme was that of accountability – making the Welsh Office and its sponsored bodies accountable to a directly elected body:

*[The UK Government] believes that those controlling the spending and setting the standards for public services should be answerable to the people they serve...<sup>3</sup>*

## Part I: The role of the Assembly

3. The Commission's consultation paper on the National Assembly's electoral arrangements<sup>1</sup> defined the roles of Assembly Members as follows:
  - representative – representing the public in their constituencies or regions and advocating on their behalf;

5. The role of the new Assembly was both to provide a democratically elected voice for Wales and to hold to account the executive government of Wales. Within this general design, the White Paper gave particular emphasis to the number and accountability of “quangos” (see Chapter 6).
6. The second theme of the White Paper was that the Assembly would be able to make the governance of Wales more responsive by setting policies and standards for public services in Wales to suit Welsh needs and circumstances. How this has been addressed within the devolved powers is discussed in the next chapter.
7. The third theme was inclusiveness – the desire to include the whole of Wales, across party as well as sectoral and geographical interests, in governance. This underpinned both the structures of the Assembly, discussed below, and its electoral arrangements, which are discussed in Chapter 12. The Rt Hon Ron Davies AM, who was Secretary of State for Wales at the time, explained the original intentions:

*The construction that we had... wasn't an attempt to replicate a Parliament, it was an Assembly, and therefore the architecture of the Assembly was very clear, it was about inclusivity, it was about power sharing, it was about having a system of committees where information, power and decision making would be shared. It was based on a degree of proportionality so that the elected representatives from all parties in Wales would be included.<sup>4</sup>*

### Structure of the Assembly: the constraints of the Government of Wales Act

8. The Government of Wales Act 1998 put in place the key elements of the Assembly's present structure. These include: the unitary body structure; the number of Assembly Members (AMs); the First Secretary (now known as the First Minister) and Cabinet; and the various other types of committee and their cross-party membership. These and some other aspects of the structure and operation of the Assembly cannot be changed without further primary legislation.
9. In addition, the Government of Wales Act specified some seventy requirements for the procedures of the Assembly, thereby placing some significant constraints on the institution's ability to determine for itself how it will work. Although the legislation establishing the Scottish Parliament also contains many procedural provisions, it is highly unusual in the UK for an Act to lay down so much parliamentary procedure in statute law.

### Corporate body structure

10. The decision to establish the Assembly as a single corporate body has been a key element in its subsequent evolution.<sup>5</sup> The body proposed in *A Voice for Wales* was a single executive body, setting and implementing policies in Wales within the frameworks created by primary legislation passed in Westminster, and accounting to the people of the Wales for delivery.

11. Once the Assembly was in place, however, it became clear that Members wanted it to operate more like a parliament with a separation between government and opposition, so that it would be clear to the people of Wales who was responsible for decisions and policy implementation.<sup>6</sup> Following its own cross-party review of procedures in 2001-02,<sup>7</sup> the Assembly resolved unanimously to create a de facto separation between the “executive” (Welsh Assembly Government) and “parliamentary” arms of the Assembly – and to take this as far as possible within the constraints of the Government of Wales Act.
12. This tension between the original design of an executive body subordinate to the UK Parliament at Westminster, and the aspirations of a body with its own democratic mandate, was identified in debate during the passage of the Government of Wales Bill. One of the resulting modifications to the Bill that foreshadowed later developments was the introduction of an executive cabinet structure to exercise the devolved functions.
13. *A Voice for Wales* had envisaged that cross-party committees would deal with much of the work and decisions of the Assembly, in a model similar to that operating in local government at the time of devolution. This model was claimed to support more open and inclusive decision-making and to prevent power being concentrated in a dominant governing group within the Assembly. For example, Julie Morgan MP argued during debates on the Government of Wales Bill that:

*[Inclusiveness] means that there should be a role for all Members elected to the Assembly, including those who are not First Secretary or Secretaries... Another important principle on which to structure the Assembly is the involvement of organisations from outside it... It will be done more easily and effectively via a committee system.<sup>8</sup>*

14. Critics of the local government committee model, who included all the main opposition parties in Parliament, argued that it would be too slow and would obscure accountability for decisions. The Rt Hon Dafydd Wigley MP pointed out that:

*We should remember that the Assembly will be composed of only 60 persons. The Executive will therefore not be remote from its membership. An Executive would enable the Assembly to take decisions quickly, coherently and strategically. A cabinet system would also provide necessary credibility in Europe and elsewhere.<sup>9</sup>*

15. The Assembly was created at a time when the value of the local government committee system was being questioned. Just as the Government of Wales Act was receiving Royal Assent, the Welsh Office was publishing proposals that subsequently led to the abolition of the committee system in local government in Wales.<sup>10</sup> In the light of wide political support for the cabinet model, the Bill was amended in Parliament to allow the Assembly to delegate its executive functions to Ministers, while keeping open the committees option that had been part of the referendum proposals.<sup>11</sup>



16. The first set of Standing Orders for the new Assembly was drafted on the basis of the cabinet model, which has now become widely accepted within the Assembly as the best approach. Nevertheless, the hybrid formulation of the 1998 Act continues to influence the role and operation of the Assembly, particularly its committees.

### Advantages and disadvantages of the corporate body structure

17. The corporate body structure was intended to reflect and promote the principles of inclusiveness and power-sharing in the new Assembly. The evidence suggests that this approach has been most evident in relation to the Subject Committees, which have worked co-operatively to achieve cross-party consensus on policy issues such as higher education, culture and organic farming. Mari James, one of the members of the National Assembly Advisory Group that helped to shape the working arrangements of the Assembly, argued that:

*I think the Subject Committees are one of the most innovative and interesting parts of the Assembly system... The points that I think are strongest here are the way in which the Subject Committee system militates in favour of a collegiate approach to the formulation and the development of policy, and also the way in which they encourage iterative debate and policy development.<sup>12</sup>*

18. On the other hand, the corporate body structure does not clearly identify to the public those who are accountable

for decisions, nor promote their effective scrutiny – the examination and challenge of policies, expenditure programmes and legislation.

19. Features of the Assembly's evolution from the original consensual model to a more parliamentary structure have included:

- a more marked distinction between the roles, working patterns and influence of Ministers or Deputy Ministers and opposition Assembly Members who hold the Government to account;
- greater resources for the Presiding Office to create independent advice and information services for individual AMs and committees (although the committees still make considerable use of the policy capacity of the Welsh Assembly Government);
- the transfer of formal responsibility for parliamentary services for Members from the First Minister to the House Committee (see Box 4.3);
- the development of different roles and loyalties for officials working in the two parts of the organisation. While this effective separation has been possible with pragmatic goodwill at most levels, the clarity of differing responsibilities that applies to parliamentary and government officials in Scotland, Northern Ireland, Westminster and most Commonwealth countries does not exist in Wales. Moreover, the job of Permanent Secretary to the National Assembly for Wales cannot be so readily divided. The Permanent Secretary, Sir Jon Shortridge KCB, illustrated the



potential difficulties posed by the current arrangement:

*If you talk to probably every Member they would say that my role is to serve the government of the day, and I cannot serve the government of the day at the same time as serving the other two parties and the other 51 elected Members...It does cause me, on occasions, problems. If you are the accounting officer for the Assembly at large, with its £10 billion plus expenditure, and you do not know for sure what decision the Assembly might take on a matter which you think reflects on your own personal interests [ie the personal responsibility of the accounting officer], that is an uncomfortable position to be in.*<sup>13</sup>

20. The first months of the Second Assembly have brought further shifts towards a pattern of government and opposition. In his evidence, Ron Davies AM questioned whether imposing a parliamentary way of working onto the corporate body structure enshrined in the Government of Wales Act will be sustainable in the long term:

*Certainly I think the operation is creaking now because...we have a government which acts as a government, we have an institution that tries to act as a parliament, but it isn't constructed to act as a parliament. Members don't have the capacity or research support to challenge the government... Ministers*

*feel very pressured if they are questioned Select Committee style - they feel that somehow the Committee is being unfair to them, that that is not part of an inclusive process.*<sup>14</sup>

21. The Assembly Counsel General, Winston Roddick QC, was of the opinion that:

*What now obtains is probably as good a solution as the circumstances will permit; to go further would require primary legislation.*<sup>15</sup>

### **The role and operation of Cabinet, Committees and Plenary**

22. In the following sections, we examine in more detail the role and operation in practice of the three main structural elements of the Assembly – the Executive Committee or “Cabinet”, the other Assembly committees and the plenary.

#### ***The Assembly Cabinet***

23. The “fields” in which executive functions were transferred to the Assembly at the start were specified in the 1998 Act (see Box 4.1). The Assembly delegates the exercise of almost all of its functions to the First Minister, who in turn delegates the majority of them to other Assembly Ministers in the Cabinet.<sup>16</sup> Many routine functions are then delegated to officials to carry out.<sup>17</sup> The First Minister also allocates formal accountability for the exercise of Assembly functions in these fields among the members of the Cabinet (see Box 4.2).<sup>18</sup>

**Box 4.1: Fields in which some or all functions were transferred to the Assembly by the first Transfer of Functions Order<sup>19</sup> (Schedule 2 to the Government of Wales Act 1998)**

Agriculture, forestry, fisheries and food	Industry
Ancient monuments and historic buildings	Local government
Culture (including museums, galleries and libraries)	Social services
Economic development	Sport and recreation
Education and training	Tourism
The environment	Town and country planning
Health and health services	Transport
Highways	Water and flood defence
Housing	The Welsh language

24. A development that was not anticipated in the 1998 Act has been the appointment of Deputy Ministers. As Deputy Ministers have no statutory status, they are not entitled to exercise delegated functions of the Assembly, but they assist their Cabinet members in committee and on specific policy issues. Cabinet Ministers and Deputy Ministers together comprise one fifth of the whole Assembly.

***The role of other Assembly Committees***

25. The Government of Wales Act 1998 requires the Assembly to establish Subject Committees, Regional Committees, a Subordinate Legislation Scrutiny Committee and an Audit Committee.<sup>20</sup> It also allows the Assembly to establish any other

committees that it considers appropriate (see Box 4.3) and allows the use of sub-committees.

26. In this chapter, we focus on the role and capacity of the Subject Committees, because they would be likely to bear the main burden of the extra work created if additional powers were conferred on the Assembly. We also examine briefly the Regional Committees, because of their important role in representing the views of the different areas of Wales in the Assembly's work. The role of the other committees is summarised in Box 4.3.

### Box 4.2: The Assembly Cabinet and Ministers

The Assembly must elect a First Secretary (known as the First Minister), who in turn must appoint Assembly Secretaries (Ministers) up to a maximum of eight (the number being specified in Standing Orders).<sup>21</sup> The First Minister and Ministers together comprise the Executive Committee or Cabinet of what is now termed “the Welsh Assembly Government”. Members of the current Cabinet are listed below:

#### *The Ministers of the Assembly Government Cabinet, December 2003*

- First Minister<sup>a</sup>
- Minister for Finance, Local Government and Public Services<sup>b</sup>
- Business Minister<sup>a</sup>
- Minister for Social Justice and Regeneration<sup>c</sup>
- Minister for Health and Social Services<sup>c</sup>
- Minister for Economic Development and Transport<sup>c</sup>
- Minister for Education and Lifelong Learning
- Minister for Environment, Planning and Countryside
- Minister for Culture, Welsh Language and Sport

#### Notes

- a. These Ministers do not have counterpart Subject Committees.
- b. This Minister’s counterpart Subject Committee is solely in respect of Local Government and Public Services.
- c. At present, there are also three Deputy Ministers, who have been appointed to assist the Cabinet Ministers indicated by taking specific responsibility for communities, older people and transport respectively.

### **Subject Committees**

27. The 1998 Act requires the Subject Committees to be of the same number, and have the same division of fields of responsibility, as the Assembly Ministers who are accountable for functions in any of the fields set out in the 1998 Act.<sup>22</sup> There are currently seven Subject

Committees, whose chairs are appointed from the party-balanced “Panel of Chairs” elected by the whole Assembly.<sup>23</sup> The relevant Minister must be a member of the Subject Committee;<sup>24</sup> and the practice has evolved that the Deputy Ministers also sit on their counterpart committees.

### Box 4.3: Standing and Other Committees of the Assembly

#### *Standing Committees*

A further six committees have been established as required by the Act or in line with the advice of the National Assembly Advisory Group:

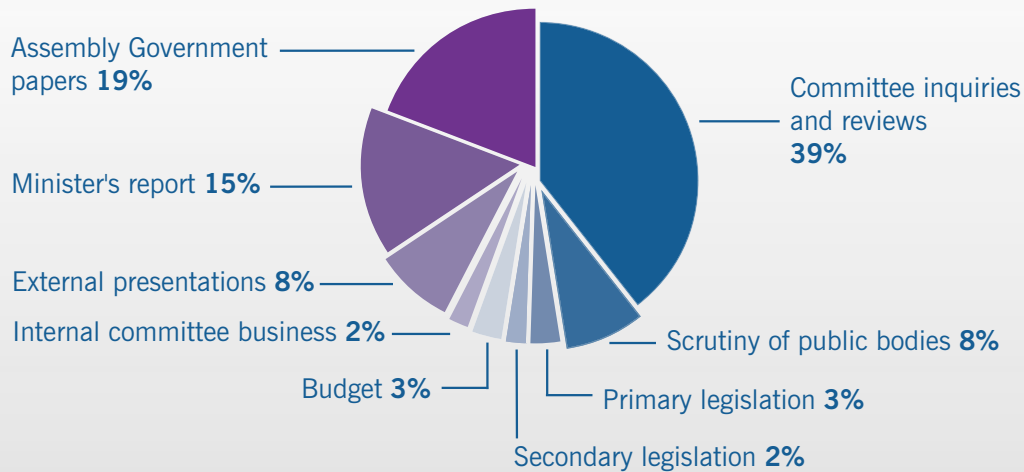
- *Audit Committee* – which considers reports prepared by the Auditor General for Wales<sup>25</sup> on the economy, efficiency and effectiveness with which the Assembly has used its resources. The Committee normally meets monthly.
- *Legislation Committee* – which considers and reports to the Assembly on draft subordinate legislation.<sup>26</sup> Like the Audit Committee, it must be chaired by a Member who is not from the largest party that has an executive role in the Assembly, and may not include Ministers among its members.<sup>27</sup> The Committee meets weekly when the Assembly is in session.
- *Business Committee* – which advises on the management and procedures for the Assembly's business. The Committee, which must meet weekly when the Assembly is in session, comprises one Member from each of the political parties and a chair.
- *Equality of Opportunity Committee and European and External Affairs Committee* – the National Assembly Advisory Group recommended that the Assembly should establish Standing Committees to co-ordinate policy development on issues that cut across subject areas, including at least committees on equal opportunities and European issues. Typically, the Committees meet three times a term.
- *Standards of Conduct Committee* – this Committee considers complaints and other matters relating to the register of Members' interests and Members' conduct. It meets four to six times a year.

The other Assembly committees operating in the Assembly are:

- *Planning Decision Committee* – four Members are elected as necessary on a cross-party basis from the Subject Committee that deals with planning to determine certain planning matters that come to the Assembly. This system is designed to increase the transparency of decision-making on planning cases and is felt to be working successfully.<sup>28</sup>
- *House Committee* – this has responsibility for services, facilities and accommodation, Members' allowances and related matters that support the operation of the Assembly. The Committee meets every four sitting weeks and has established sub-groups to handle various aspects of its work.
- *Special task committees* – for example, those set up to consider the seating plan of the Assembly and the Public Audit (Wales) Bill.

The House and Planning Decision Committees are the only committees to which the Assembly has delegated executive functions.

**Box 4.4 Allocation of Subject Committee time: percentage of time envisaged on committee agendas, 1999 (July) - 2003 (April)<sup>30</sup>**



28. The functions of each Subject Committee are set out in the Assembly's Standing Orders as being to:
- contribute to the development of the Assembly's policies;
  - keep under review the expenditure and administration connected with their implementation;
  - keep under review the discharge of public functions by public, voluntary and private bodies;
  - advise on proposed primary, secondary and European legislation affecting Wales;
  - provide advice to the Assembly Cabinet on matters relating to the allocation of the Assembly's budget;

- perform functions under Standing Order 21 (complaints);
- perform any functions assigned to it under the Code of Practice on Public Appointments Procedure made by the Assembly; and
- consider matters referred to it by the Assembly within its fields.<sup>29</sup>

29. Each committee has had to decide how best to use its time to fulfil all these functions (Box 4.4). In practice, the committees as a whole have allocated most time (over a third) to conducting their own policy reviews. Individual committees have varied in the focus given to different activities, reflecting factors such as the nature of their policy responsibilities and the relationship between the committee chair and Minister. For example, in 2002:

- the Culture Committee allocated almost two-thirds of its time to policy reviews, with correspondingly less time on scrutiny of the Minister and Assembly Government policy papers;
- the Agriculture and Rural Development Committee allocated around a quarter of its time to scrutinising the Minister's report.

### **Strengths and weaknesses of the Subject Committee role**

30. The evidence points to a number of strengths and weaknesses in the operation of committees during the First Assembly. Witnesses included chairs and members of the committees themselves as well as bodies scrutinised by them or involved in policy development with them.

31. The strengths of the committees' hybrid role can be summarised as follows:

- quality of policy development – a number of committee reports were commended for the detail of their analysis and the breadth of involvement from stakeholders;
- inclusivity – reports such as the Subject Committee review of the Welsh Language (*Ein Hiaith – Ei Dyfodol/Our Language – Its Future*)<sup>31</sup> were felt to have helped build an evidence-based consensus within and beyond the committee on the way ahead:

*There was a serious debate and there were disagreements, but the emerging study produced a report by the Committee, a response by the Government and millions of pounds of public investment in a new direction.*

*That to me is proof of the way that the system can work.*<sup>32</sup>

- responsiveness and relevance – the Agriculture and Rural Development Committee conducted its own short review to examine the particular issues that arose in handling the foot and mouth disease outbreak in Wales;
- accessibility – committee members were felt to be readily available to interested bodies and to have built up knowledge and expertise of the subject area. The Presiding Officer also praised the open form of participation in policy debate that has developed in committees:

*Officials and Members sit around the same table, having a discussion very often with members representing the public or bodies, and there will be a debate taking place between Ministers and officials with Members and the representatives of organisations. That is quite a unique forum which the Assembly has created.*<sup>33</sup>

32. Weaknesses highlighted in evidence included:

- a lack of focus in scrutiny – some of those who appeared before committees felt that the sessions were not sufficiently rigorous or challenging, or that committees had spent their time on policy development at the expense of scrutiny of Ministers and quangos. For example, Huw Davies of the Forestry Commission suggested that:

*[The Committee] should have scrutinised more, rather than just the overall policy, how we are*



*implementing it – particularly on the Assembly's own estate, in terms of value for money. There has not been a great deal of scrutiny.*<sup>34</sup>

- in our own observations of the committees at work, we have been struck by the wide coverage and crowded nature of the meeting agenda, which often leaves insufficient opportunity to probe key issues within each agenda item. Kirsty Williams AM, chair of the Health and Social Services Committee, argued that:

*The breadth of our portfolio and the limitations on the number of meetings we can hold has made it difficult for the Committee to carry out some aspects of its work: in-depth policy scrutiny and reviews in parallel with scrutiny of legislation, the Minister and other bodies...*<sup>35</sup>

- the extent to which committees have been able to influence Assembly Government policy has varied.<sup>36</sup> Glyn Davies AM, chair of the Agriculture and Rural Development Committee, concluded that:

*The policy-making role of committees is to a large extent superficial. The Committee can develop new policy just so long as it coincides with what the Minister thinks.*<sup>37</sup>

- too consensual for effective scrutiny – some argued that Ministers' membership of committees is too cosy.

### **The role of Ministers on Committees**

33. A legacy of the original executive committee structure proposed for the

Assembly is the statutory requirement for most Ministers to serve as full members of their counterpart Subject Committees, which was intended to facilitate wide participation in policy development.<sup>38</sup>

34. Most evidence from within the Assembly pointed to the strengths of this arrangement:

- it allows committees (and those who contribute to committee policy reviews) to have a stronger and wider-ranging influence on policy development. For example, Kirsty Williams AM suggested that:

*[The Minister] will have heard exactly the same facts, figures, arguments as we would have heard in the Committee and, therefore, I think has a better understanding of where the Committee is coming from when they are coming forward with their proposals because she has been a part of that process.*<sup>39</sup>

- it gives the committees greater access to the expertise of officials working for the Welsh Assembly Government – an arrangement that was formally supported by the Assembly Review of Procedure.<sup>40</sup>

35. However, some evidence suggested that Ministers' dual role places them in a potentially awkward position, because they may wish to take decisions that do not coincide with the conclusions of a committee policy review in which they took part.<sup>41</sup> One Minister (Edwina Hart MBE AM) has decided to deal with this by not attending the meeting items on committee policy reviews.



36. The main criticism offered of Ministers' committee membership is that it weakens scrutiny of Ministers, because:
- it is hard for committees to switch from a co-operative policy development relationship with the Minister to an adversarial scrutiny mode;
  - it gives the Minister more scope to try to influence committee decisions, a situation that is compounded in the case of those committees upon which the Deputy Minister also sits;
  - "backbench" AMs from the party of government tend to see their role as being to defend, rather than scrutinise, the Minister in committee;
  - as a member of the committee, the Minister receives in advance the committee's briefing and lines of questioning.
37. Over the lifetime of the Assembly, the Subject Committees as a whole have increased the time devoted to scrutinising Ministers' regular reports on developments within their portfolios (while reducing the time spent discussing Welsh Assembly Government policy papers, which usually invite the committee simply to note the proposals contained within). Some Members did not feel that the arrangement necessarily favours the Minister. For example, Richard Edwards AM, chair of the Environment, Planning and Transport Committee, argued that:
- It might from the outside seem like a bit of a cosy relationship but the reality is that the Minister has no place to hide... She is subject to questioning all the time.*<sup>42</sup>
38. The evidence also suggested that Ministerial membership of the Subject Committees contributes to the confusion as to who is responsible for decision-making within the Assembly. This issue is discussed further in Chapter 6.
- ### **Regional Committees**
39. The 1998 Act requires the Assembly to establish committees for North Wales and the other regions of Wales (whose number and boundaries are to be determined by the Assembly), each with the job of providing advice to the Assembly about matters affecting the region.<sup>43</sup> The membership of the four Regional Committees comprises the Assembly Members whose constituencies or electoral regions fall partly or wholly within the region concerned. Because the Regional Committee boundaries adopted by the Assembly follow economic forum rather than Assembly constituency boundaries, some AMs serve on more than one Regional Committee. The Regional Committees each meet three to six times a year (the frequency having declined following the Assembly Review of Procedure).
40. Although it received evidence arguing for more specific roles for Regional Committees, the *Assembly Review of Procedure* favoured retaining their broad remit to act as 'advocates for their regions.'<sup>44</sup> Issues raised at Regional Committee meetings are notified in writing to the relevant Minister or Assembly committee.

41. We were given some positive evidence about the committees' success in taking the Assembly out to the people of Wales. For example, Tom Middlehurst AM told us:

*In North Wales, we get massive attendance, not only because Rhodri Morgan has an open-mike session... for an hour people throw whatever they like at him and he deals with it... But even without that, people turn up for our meeting and visit the website to discuss key issues in those meetings: Wales transport, strategy for young people, strategy for the elderly, those sort of things.*<sup>45</sup>

42. However, the overall message was one of disappointment and a sense of unfulfilled potential. The following comments are typical:

*I went to a meeting of the [Regional] Committee, where I think of a total membership of eleven at the most there was three, and at one stage there was one Assembly Member... The Regional Committees were sold to us as giving the Assembly a public face throughout Wales and a chance for people to see their Assembly Members, particularly the list members who are not directly accountable, within their various areas, and they have not worked.*<sup>46</sup>

43. *The Assembly Review of Procedure* introduced some minor changes to the purpose and format of Regional Committee meetings, but was unable to reach agreement on changes to

the committees' boundaries. The Assembly can determine the number of Regional Committees to be established in addition to the North Wales Committee, but abolition of the Regional Committees altogether would require the amendment of the Government of Wales Act.

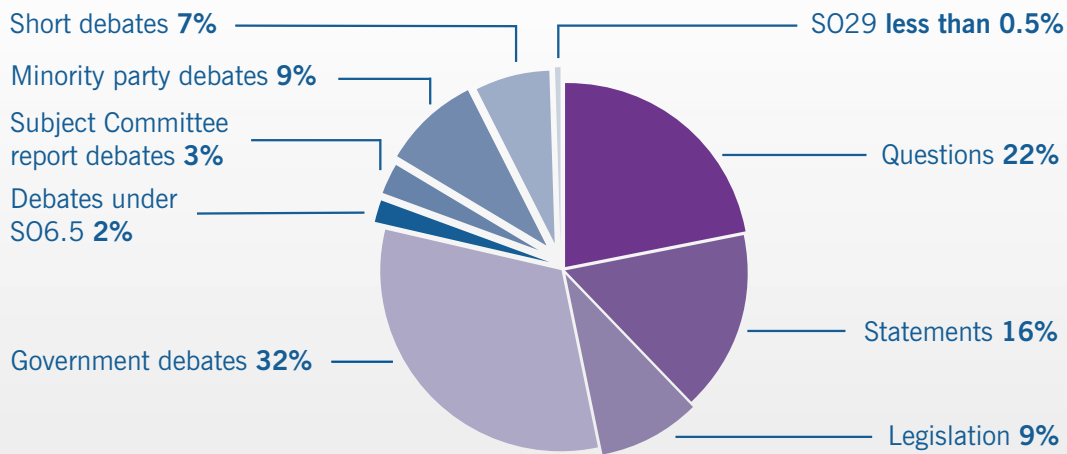
### **The Assembly plenary**

44. *A Voice for Wales* suggested that 'The Assembly will be the forum for the nation, able to debate all matters of concern in Wales, not only those it directly controls.'<sup>47</sup> The Assembly's own Review of Procedure leant towards a parliamentary mode of working in identifying the broad functions of plenary meetings as being to:

- consider, amend and approve subordinate legislation, the Assembly budget and other formal expressions of policy;
- scrutinise Ministers and their policies;
- allow "backbench" Members the chance to influence policy and/or highlight issues of concern to them;
- act as the most public face of the Assembly's work.<sup>48</sup>

45. A breakdown of all business in plenary during the First Assembly is shown in Box 4.5.

**Box 4.5: Breakdown of plenary business in the First Assembly<sup>49</sup>**



**Notes**

- Short debates – a half-hour debate held each week on a motion proposed by a non-Cabinet Assembly Member.
- Debates under Standing Order 6.5 (includes debates on the Budget, the Westminster legislative programme, Subject and Audit Committee reports, and annual reports of the First Minister, the House Committee, the partnership and sustainable development schemes, equal opportunity arrangements, arrangements for working with business, and the EU).
- Standing Order 29 – debates on proposals for subordinate legislation made by non-Cabinet Assembly Members.

**Assembly scrutiny of secondary legislation**

46. Although by no means the only policy tool available to the Assembly, secondary (or subordinate) legislation is one of the most tangible outcomes of the Assembly's work. The Government of Wales Act<sup>50</sup> lays down the main requirements for the procedures by which the Assembly develops, scrutinises and approves Assembly general subordinate legislation:<sup>51</sup>

- all legislation must be approved by plenary;

- a “regulatory appraisal” of the likely costs and benefits of the legislation must be undertaken before the legislation is laid before the Assembly, unless it is inappropriate or not reasonably practicable to do so;
- if the costs of complying with the legislation are likely to be significant, consultation (which must include business interests) must be carried out before the legislation is laid;
- a bilingual draft of the legislation must be prepared before the legislation is approved, unless it is inappropriate or not reasonably practicable to do so;

- legislation must not be approved until the Assembly has considered the related report of the Legislation Committee and regulatory appraisal.
47. The Act also allows the Cabinet to override these requirements if they are not reasonably practicable in the circumstances concerned, through what has become known as “the Executive Procedure”. Other types of procedure for subordinate legislation are set out in the Assembly’s Standing Orders, including a mechanism whereby the Deputy Presiding Officer may refer an item of draft legislation to the relevant Subject Committee for consideration.<sup>52</sup>
48. The potential strengths of the Assembly’s subordinate legislation procedures are:
- they provide the opportunity for a greater degree of democratic scrutiny of subordinate legislation than occurs at Westminster. For example, Assembly
- Members may propose amendments to draft subordinate legislation;
  - they provide statutory underpinning to measures designed to assess the impact of proposed legislation and to allow those affected to comment on the proposals;
  - they allow the Assembly Government to develop distinctive policies for Wales. Policies such as free bus travel for disabled and older people, free prescriptions for people under 25 years and free dental checks for the under 25s and over 60s have been delivered using these powers. The Assembly’s Counsel General told us that, in 2001, nearly a third of the Assembly’s legislation was either unique to Wales or differed significantly in content from its equivalent in England.<sup>53</sup> Overall, the advent of the Assembly has led to significantly more secondary legislation affecting Wales being made in Wales (see Table 4.1 for a comparison of the numbers before and after the Assembly was created).

**Table 4.1: General and local subordinate legislation made by the Secretary of State for Wales and the National Assembly for Wales<sup>54</sup>**

Subordinate Legislation	General	Local <sup>a</sup>	Total
<i>The Secretary of State for Wales (legislation made in respect of Wales only)</i>			
1998	66	24	90
<i>The National Assembly for Wales</i>			
1999	29	28	57
2000	119	109	228
2001	241 <sup>b</sup>	90	331
2002 (to 3 December)	173	103	276
<b>Notes</b>			
a. A category of subordinate legislation, which is local in nature.			
b. The figure for 2001 includes forty-five general statutory instruments made in response to the outbreak of foot and mouth disease.			

49. However, evidence from the First Assembly suggests that the opportunities for scrutiny are not being used:

- in the First Assembly, 291 statutory instruments nearly – 42 per cent of all Assembly general subordinate legislation – were made by the Cabinet under the Executive Procedure (this figure includes legislation made in connection with the foot and mouth disease outbreak);<sup>55</sup>
- in the same period, the Deputy Presiding Officer referred only twelve pieces of subordinate legislation to Subject Committees for consideration. In total, the Subject Committees allocated just two per cent of their meeting time in the First Assembly to subordinate legislation;<sup>56</sup>
- in the First Assembly, nine per cent of plenary time was spent debating subordinate legislation. Amendments to statutory instruments were proposed on only nine occasions, and none was successful; one SI (which concerned the use of genetically modified crops and other plant varieties) has been rejected.<sup>57</sup>

50. Assembly Members have also made relatively little use of the procedure by which they may propose items of subordinate legislation. Of the eight proposals that have been debated, five were approved by the Assembly and two have resulted in new regulations.<sup>58</sup> Ieuan Wyn Jones AM and Jocelyn Davies AM explained the problems they had encountered in this process:

*We found it intensely difficult to find anything that (a) was in the competence of the Assembly and (b)*

*was a statutory instrument you could promote.*<sup>59</sup>

(Translated from the original spoken in Welsh)

*A lot of effort and resources are wasted in working something up then to be told, 'we thought we could do this but we can't do it.'*<sup>60</sup>

51. Reasons why there has been less legislative scrutiny than expected might include:

- although subordinate legislation can be used to implement major policy decisions, much legislation of this kind is technical, routine or implements EU legislation (and therefore offers little scope for Assembly discretion). More information and experience is needed to sift out and prioritise the significant regulations for scrutiny;
- the Assembly's subordinate legislation procedures laid down by the Government of Wales Act are complex, time-consuming and difficult to use – for those both within and outside the Assembly;
- Subject Committees do not have enough time to carry out all their different roles in policy development and scrutiny;

*The Committee does not have time to consider in detail every order. There would not be any subordinate legislation coming out of the Assembly at all if we did what we were supposed to do. We do no more than scratch the surface.*<sup>61</sup>

52. There is evidence that the Subject Committees are paying increasing attention to the scrutiny of subordinate legislation, aided in part by changes introduced following the Assembly Review of Procedure that help committees to identify the most significant pieces of forthcoming legislation. More generally, Mick Bates AM, chair of the Legislation Committee, commented that:

*There is a process of education for such an infant body as the Assembly to understand where you can make significant input on the policy side and then change the legislation... [Also] we need to make sure that in the civic society of Wales people are aware they can impact and change legislation by the Assembly itself.<sup>62</sup>*

## Part II: Managing the business of the Assembly

53. This part of the chapter examines in more detail the capacity of the Assembly's existing membership, structures and working arrangements, in order to assess whether the Assembly has sufficient capacity to exercise its current powers effectively and the impact that further powers might have on its working pattern.

### The size of the Assembly

54. The Government of Wales Act provides that the Assembly will have sixty Members (although, unlike the legislation underpinning Scottish devolution, it does not link the number of AMs to the number of Members of Parliament in Wales). During the debate on the Government of Wales Bill, the then Secretary of State for Wales explained that:

*[The size] was arrived at by a policy commission of the Labour party... The 60 figure results from the fact that there are 40 parliamentary constituencies. At that time, we had five European constituencies. It was believed that a first-past-the-post system based on the existing parliamentary constituencies and an additional member system using the combination of five European constituencies, each with four Members, would be the best way of achieving an Assembly that was broadly proportional.<sup>63</sup>*

55. Evaluation of the evidence on the number of Members needed to exercise the functions of the Assembly is



complex and requires a number of judgements to be made: for example, about the balance between work in the Assembly and in the constituency, and the balance between strategic focus and breadth of subject coverage. Comparisons with other legislative bodies around the world demonstrate that there are no accepted rules of thumb to follow; local conventions seem to be just as important as factors such as representation at other tiers of government within the country concerned.

56. Several sources of evidence pointed to the working constraints imposed by the Assembly's current size, particularly in relation to committee meetings. However, the Assembly's Panel of Subject Committee Chairs argued that the small size of the Assembly also obliges it to 'adopt a disciplined and focused approach to its use of time and to operate effective forward planning arrangements'<sup>64</sup> – although some other evidence on the operation of the committees did not support this claim.<sup>65</sup> The Panel also suggested that the current size has advantages for the culture of the organisation:

*There are... benefits in terms of closer working relationships between Members and excellent informal communication networks. It could also be argued that the small scale of the Assembly encourages an "esprit de corps" among Members: AMs take their responsibilities very seriously, as evidenced by the high attendance levels at committee meetings.*<sup>66</sup>

57. On the other hand, Rhodri Glyn Thomas AM suggested that the Assembly's size affected Members' willingness to challenge each other:

*In the House of Commons, if you fall out with somebody, you can avoid them for three or four weeks, or even three or four years. In the Assembly, you will bump into them the following morning. It is that kind of close, cosy arrangement...[that] does potentially, I think, lead to a situation where scrutiny is not a natural process.*<sup>67</sup>

### The capacity of the Assembly: current working arrangements

58. The current working arrangements largely owe their design to the National Assembly Advisory Group (NAAG), which sought the views of organisations and people in Wales in preparing its advice on how the Assembly should work. In its public consultations, the National Assembly Advisory Group found that there was strong support for:
- the principles of democracy, openness, inclusiveness and participation, balanced with efficient and effective decision-making;
  - effective mechanisms for consulting and listening to people from all parts of Wales;
  - a break from Westminster working traditions and a move to more family-friendly working practices;
  - bilingual operation of the Assembly.<sup>68</sup>
59. Based on these views, the NAAG established some important principles that have influenced the working



patterns of the Assembly since its inception. The Advisory Group's principles include:

- the Assembly's timetable should allow adequate time for AMs to travel to and from their regions and constituencies. Over half of AMs have constituencies within ninety minutes' travel time of Cardiff, but the typical travel time for North Wales Members is four to five hours;
- the Assembly's annual timetable should be arranged as far as possible to coincide with school term times;
- formal working hours should be scheduled between 8.30am and 6.00pm, Monday to Friday;
- Members should be allowed to spend Fridays in their constituencies or regions.<sup>69</sup>

60. The NAAG report also established the principle that, unlike normal practice at Westminster, there should be full attendance at plenary sessions and committee meetings. This is reflected in the Assembly's Protocol on Conduct in the Chamber, in which 'Members are encouraged to give priority to attendance at plenary meetings';<sup>70</sup> and in the practice of not scheduling plenary and committee meetings at the same time.

61. These principles were largely translated into the Assembly's Standing Orders, which set out how the Assembly shall agree its forward work programme. A typical sitting week of the Assembly at the time of writing is illustrated in Table 4.2.

**Table 4.2: Outline timetable of a typical week of the Assembly in session**

	AM	PM
<b>Monday</b>	Constituency business	15.00: Cabinet meeting
<b>Tuesday</b>	9.00-10.30: Business Committee 9.30-10.30: Legislation Committee 10.45-1.00: Party Group meetings	14.00-17.30: Plenary Meeting (including First Minister's Question Time)
<b>Wednesday</b>	9.00-12.30: Subject Committee Meetings	14.00-17.30: Plenary Meeting
<b>Thursday</b>	9.30-12.30: Standing Committee Meetings	14.00-17.00: Time available for additional committee business Travel to Regional Committees/constituencies (each Regional Committee meets 3-6 times a year)
<b>Friday</b>	Constituency business/ Regional Committees	Constituency business

**Table 4.3: Plenary sitting times in the First Assembly and the First Session of the Scottish Parliament**

	Sitting weeks	Allocated sitting time	Actual sitting time
National Assembly for Wales <sup>71</sup>	135	910 hours	863 hours
Scottish Parliament <sup>72</sup>	156	1,424 hours	1,362 hours

62. Both the Scottish Parliament and the Northern Ireland Assembly have adopted timetables that typically conclude formal business before 5.30pm and 6pm respectively, with the option of sitting later if necessary. However, each of these bodies has held more plenary sessions each week, and their subject committees have been able to meet at least weekly (see Box 4.6). Overall, the Scottish Parliament has routinely undertaken formal plenary and committee business on three days of the sitting week. The comparable business at the Assembly is allocated around two and a quarter days per week<sup>73</sup> plus the time for Regional Committee meetings.

### The capacity of the Assembly in plenary

63. The Assembly spends less time in plenary each week than either the Scottish Parliament or the Northern Ireland Assembly. For example, in their respective first sessions (1999-2003), the National Assembly for Wales sat for roughly two-thirds of the sitting time of the Scottish Parliament, which usually holds three plenary meetings totalling nine hours in each sitting week (see Table 4.3). The

Scottish Parliament also sat for more weeks in total in this period.

64. *The Assembly Review of Procedure* considered the plenary timetable in its 2002 report. It commented:

*On the one hand, there is a considerable weight of business which needs to pass through plenary... On the other, the timing of plenary meetings needs to recognise the demands of Assembly committees and their other duties on Members' time as well as the Assembly's duty as regards equal opportunities and its commitment to family-friendly working for both Members and staff...*

*Extending plenary later into the evening would encroach on or do away with the time currently used for special events, Members' informal meetings with outside bodies, meetings of committee chairs, other preparatory work in relation to committees, and so on... [and] have staffing and financial implications.<sup>74</sup>*

**Box 4.6: Working patterns in the Scottish Parliament and the Northern Ireland Assembly**

The routine working week of the **Scottish Parliament** is:

- all day Tuesday and Wednesday morning – committees;
- Wednesday afternoon and all day Thursday – meetings of the Parliament.

However, the Parliament can meet on any sitting day during a normal Parliamentary week, which is:

- Mondays: 14:30-17:30
- Tuesdays-Thursdays: 09:30-17:30
- Fridays: 09:30-12:30.

There are 129 Members of the Scottish Parliament. The Parliament has sixteen committees, plus a separate Scottish Parliamentary Corporate Body (with a similar role to the Assembly's House Committee) and Parliamentary Bureau (equivalent to the Assembly's Business Committee). In addition, five Bill Committees were convened in the first Parliament. Committees have seven or nine members; Ministers do not serve as members of the committees. Most committees meet weekly.

When it was sitting, the **Northern Ireland Assembly** held plenary sessions on Monday (routinely, from 12 noon – 6pm) and Tuesday (10.30am – 6pm), with the scope to go on to 7pm if necessary. The pattern and length of committee meetings was less regular. Most took place weekly on Wednesday and Thursday, although additional meetings were often scheduled on other days (including Friday) or in the evening.

The Northern Ireland Assembly has 108 Members. The Assembly had ten departmental committees, each with eleven members, six standing committees and a separate, smaller Commission to oversee the operation of the Assembly.

65. On balance, the Review Group felt that more plenary time should be made available and recommended that Tuesday afternoon sessions should normally end at 6pm, with flexibility to continue until 7pm.

Plenary rejected the proposed change to Standing Orders that would have given effect to this recommendation, because it was considered incompatible with the commitment to family-friendly working.

### The capacity of Assembly Committees

66. The most significant difference between the capacity of the National Assembly for Wales and its counterparts in Scotland and Northern Ireland – both of which have more Members – is the volume of committee work. The main policy committees in Scotland and Northern Ireland have usually met weekly. In contrast, the Assembly's Subject Committees met every two weeks during the First Assembly, with the opportunity to arrange additional informal sessions, off-site meetings or visits once or twice a term.<sup>75</sup>

67. In the Second Assembly, the frequency of Subject Committee meetings has changed to once every three weeks. This change, which was proposed by the current Labour Welsh Assembly Government and opposed by the other parties in the Assembly, was introduced with the stated aim of improving the quality and focus of committee work and providing more opportunities for these committees to conduct their work outside Cardiff.<sup>76</sup> Opposition parties claimed that the purpose was to reduce the scrutiny of government.

68. Many Members serve on at least two Subject or Standing Committees (see Table 4.4) and meetings are scheduled so as to avoid timetable clashes for individual committee members. The Assembly's Panel of Subject Committee Chairs and several other witnesses told us that the scope for additional committee

meetings is extremely limited. For example, Gareth Jones AM, chair of the Education and Lifelong Learning Committee, explained that:

*Organising such [additional] meetings... causes difficulties because if a member is on a number of committees, two or three for some members, that then complicates the issue and how frequently one can meet in order to ensure that all members are present.<sup>77</sup>*

(Translated from the original spoken in Welsh)

69. In theory, having smaller committees might allow Subject Committees to meet more frequently. The size of committees is determined by the Assembly on a motion tabled by the Business Minister, after the Business Committee has reached a view on the preferred size. Committees do not all have to be the same size; but the 1998 Act requires that the membership of most committees must reflect the party balance of the whole Assembly, 'as far as is practicable'.<sup>78</sup>

70. In the current Assembly, ten-member committees have been agreed because they allow a party balance that is very close to that of the Assembly as a whole. In the First Assembly, no one size clearly offered the best match, and committee sizes between nine and eleven members were agreed between the parties.

71. The main argument made against reducing the size of committees is that it would have no impact on the number of members needed to represent the smallest parties in the Assembly, because of the requirement to reflect party balance on each committee. For example, in the current Assembly, the Liberal Democrats would still have to field one member per committee whether the committee size was seven or eleven members. In contrast, Labour Party membership could vary between three and six members, depending on the options chosen.
72. Following this argument, if the Assembly were to reduce committee size in order to have more meetings or more committees, this might force AMs from the smallest parties to miss some committee meetings because of timetable clashes.
73. Having smaller committees could also reduce the committee workload for individual AMs (although again, this benefit might not be realised for Members of the smallest parties, for the reason set out above).
74. At the start of the Second Assembly (July 2003), there were 109 Subject and Standing Committee seats<sup>79</sup> to be filled by 46 AMs.<sup>80</sup> The National Assembly Advisory Group expected that most AMs would be members of at least two and probably three committees, including a Subject and a Regional Committee. In practice, twenty-six AMs sit on three or four Subject or Standing Committees; if the Regional Committees are included, nearly half of all AMs sit on four or five committees (Table 4.4). In addition, there are fifteen seats for AMs on the three partnership councils with local government, business and the voluntary sector, which each meet between two and four times a year.
75. In comparison, the current Scottish Parliament has smaller committees (most have seven or nine members). Together with its larger size overall, this means that fewer Members serve simultaneously on more than one committee (around a third of MSPs did so in 2001-02, of whom only four sat on three or more committees).<sup>81</sup>
76. On a three-weekly cycle of Subject Committee meetings, the AMs who are members of most committees will typically be required to attend in the region of forty-five formal meetings each year; this drops to around a third of that number for those who are members of fewest committees. Chairing a committee significantly increases the amount of work involved.
77. But for some witnesses, the main problem of multiple membership is the breadth of issues to be mastered. Although the Assembly's Panel of Chairs argued that doubling up can help AMs to make connections between policy development in different fields, one committee chair (Richard Edwards AM) summed up the more common view<sup>82</sup> that:

Table 4.4: Distribution of committee membership among Assembly Members (as at July 2003)

Number of committees per AM	Number of AMs <sup>a</sup>		
	Subject Committees only	Subject and Standing Committees only <sup>b</sup>	Subject, Standing and Regional Committees <sup>b</sup>
5	-	-	9
4	-	4	19
3	-	22	18
2	17	18	14
1	36	16	-
0	7	-	-

**Notes**

a. Includes the Presiding Officer, who attends the House Committee but is not entitled to vote.

b. Standing Committees listed in Box 4.3 plus the House Committee.

*It is very difficult for Members to achieve their maximum potential in terms of knowledge and expertise of subject matter when they are members of several committees and the pressure of time means they cannot research as thoroughly as they might be able to do otherwise. I think this is reflected perhaps in the scrutiny function of the Committee. I think there is plenty of breadth in terms of scrutiny, but perhaps depth when it comes to subject matter is questionable.*<sup>83</sup>

78. Greater flexibility in achieving party balance on the committees would create more scope to reduce committee size. For example, we show in Table 4.5 how eight-member committees could be established in the current Assembly so as to match closely the party balance of the whole Assembly across the

committees, while requiring only three AMs to sit on more than one Subject Committee.

79. Another way in which committees in some legislative bodies<sup>84</sup> increase their capacity, in terms of both expertise and time, is by using sub-committees or rapporteurs (members of the committee who take lead responsibility for a policy issue or specific task and report back to the full committee). The Assembly has made only limited use of these approaches so far. For example, the Culture Committee has appointed rapporteurs to evaluate Assembly Sponsored Public Body corporate plans; and the European Committee is considering establishing a sub-committee to examine the subsidiarity implications of draft EU legislation.<sup>85</sup>

**Table 4.5: Meeting the requirement for party balance with smaller committees**

This table illustrates one option for establishing eight-member committees in the current Assembly. This option achieves a close match with the party balance of Assembly across committees as a whole, but does not offer as good a match on each individual committee as does the option of ten-member committees, which the Assembly adopted.

	Labour	Plaid Cymru	Cons	Lib Dems	Other
<b>The Second Assembly</b>					
AMs elected in May 2003	30	12	11	6	1 <sup>a</sup>
<i>% of Assembly</i>	<i>50.0</i>	<i>20.0</i>	<i>18.4</i>	<i>10.0</i>	<i>1.6</i>
Number of AMs available to sit on Subject Committees	28	10	10	5	0
<b>Option 1: Eight-member committees</b>					
Number of committee members from each party, on four Subject Committees and three Standing Committees	4	2	1	1	-
<i>% of seats on each committee</i>	<i>50.0</i>	<i>25.0</i>	<i>12.5</i>	<i>12.5</i>	<i>-</i>
Number of committee members from each party, on three Subject Committees and two Standing Committees	4	1	2	1	-
<i>% of seats on each committee</i>	<i>50.0</i>	<i>12.5</i>	<i>25.0</i>	<i>12.5</i>	<i>-</i>
<i>% of total committee seats</i>	<i>50.0</i>	<i>19.8</i>	<i>17.7</i>	<i>12.5</i>	<i>-</i>
<b>Option 2: Ten-member committees</b>					
Number of committee members from each party, on all Subject and Standing Committees	5	2	2	1	-
<i>% of seats on each committee</i>	<i>50.0</i>	<i>20.0</i>	<i>20.0</i>	<i>10.0</i>	<i>-</i>
<b>Notes</b>					
a. John Marek AM, Deputy Presiding Officer, who sits on the House Committee and attends meetings of the Business Committee.					
b. At the time of writing (December 2003) the First Minister and other party leaders, the Presiding Officer and the Business Minister do not sit on Subject Committees.					



### Role, size and structure of the Presiding Office

80. An important element of the capacity of the Assembly is the organisational and staff support provided to its Members. The Presiding Office comprises the arm of the National Assembly for Wales civil service whose role is to serve all the Members of the Assembly, regardless of their party affiliation, and to ensure its successful functioning as a democratically elected body.
81. The Office operates under the direction of the House Committee (see Box 4.3) and the guidance of the Presiding Officer. As well as a suite of services to support the Assembly and its Members and communicate its work to the public, the Presiding Office also includes the translation service for the whole of the National Assembly, including the Welsh Assembly Government. Unlike their counterparts elsewhere in the UK, officials working in the Presiding Office belong to the UK Home Civil Service rather than a separate parliamentary service – another feature that arises from the Assembly's corporate body structure.
82. In July 1999, 110 staff worked in what was then known as the Office of the Presiding Officer. At the end of March 2003, there were 225 permanent and 24 casual staff working in the Presiding Office (against a total of 294 funded posts).<sup>86</sup> The number of permanent staff working in the various functions of the Presiding Office is shown in Table 4.6. Areas of change since 1999 have included:
- the growth in translation services to meet the increase in demand by the Assembly and the Assembly Government;
  - an expansion of the number of staff involved in public information and education;
  - a new human resource function and expanded finance functions;
  - the creation of a small legal advice capacity separate from those working to the Assembly Government; and
  - the expansion of the Members' research and briefing service.
83. Most of these changes stem from the need to create independent services to support the Presiding Office as the Assembly moves to a more parliamentary structure. The need to have separate staff to deal with services to Members in general, as opposed to services to the Assembly Government, was highlighted during the parliamentary debates on the Government of Wales Act;<sup>87</sup> and we heard no arguments against this in evidence.

Table 4.6: Number of permanent staff in the Presiding Office, 31 March 2003<sup>88</sup>

Function	Number of staff in post
<b>Clerk and Deputy Clerk Offices</b>	3
<b>Assembly Communication Services</b>	
Director	1
Information Communication Technology	4
Public Information & Education	28
Record of Proceedings	15
Translation Services	39
<b>Corporate Services</b>	
Director	1
Fees & Finance (including Members' pay and allowances)	11
Human Resources	9
Office & Facilities	42
<b>Members' Research &amp; Committee Services</b>	
Divisional Head	1
Committee Secretariat	30
Members' Research Services	27
<b>Chamber Secretariat &amp; Table Office</b>	7
<b>Legal Division</b>	2
<b>Private Office for the Presiding Officer and Deputy</b>	4
<b>Trade Union Side</b>	1
<b>TOTAL</b>	<b>225</b>

### Overview of the implications for the Assembly of taking on primary legislative powers

84. Evaluating the impact on the Assembly in plenary or in committee of taking on primary legislative powers is complex, because much would depend on the scale of the legislative programme and its distribution between committees. This in turn would be influenced by capacity constraints, including committee time and the implications for the staff of the Presiding Office. The key issues are:

- the extent to which the work of passing Bills would require the Assembly generally, and some or all committees, to become a legislative machine, with much time taken up discussing and scrutinising Bills;
- whether law-making could be integrated into the work of policy development and scrutiny in a way that would preserve the strengths of the existing system.

85. This would depend on a number of factors, including:

- how the Assembly itself determined its legislative programme;
- the extent to which the Assembly could work in partnership with the UK Government and Parliament, so that Welsh legislation in devolved areas could still be passed at Westminster;
- the nature of the legislative process adopted by the Assembly. The Rt Hon Sir David Steel KBE MSP, Presiding Officer of the Scottish Parliament, highlighted his concern that the

scrutiny of some Bills in Scotland had been rushed;<sup>89</sup>

- how the Assembly prioritised legislation alongside other business;
- the extent to which the Assembly Government and the Assembly as a whole saw legislation (as opposed to other policy delivery tools) as necessary to achieve their objectives for Wales. Speaking about the experience of the first four years of the Scottish Parliament, Fiona Hyslop MSP argued that:

*Just because you can legislate doesn't necessarily mean you should... if there was a criticism of our first period, there has been too much legislation... I think there is also a danger that the government looks first for legislative solutions rather than policy solutions.*<sup>90</sup>

86. These issues are developed in later chapters and the Commission's overall assessment is considered in Chapters 13 and 14. In this section, we look at the nature of the demands on the Assembly's capacity as a legislative body that would be created by primary legislative powers.

### The primary legislative process

87. In essence, the process of considering primary legislation has three main stages:

- scrutiny of the Bill's principles;
- detailed scrutiny and amendment of the precise wording of the Bill;
- second revision and adoption of the legislation.

88. Different legislative bodies vary in the time spent on these stages and their allocation between plenary and committees. In the Westminster Parliament, Bills are considered by both the Commons and the Lords, which means that there is substantially more capacity for scrutiny and revision than is available in the unicameral devolved legislative bodies. Bills in the Lords go through largely the same stages as in the Commons: a formal first reading, a substantial debate on second reading, detailed amendments at committee stage and report, and further consideration (and, in the Lords only, amendments) at third reading.
89. In the devolved bodies, the absence of a revising chamber makes it vital that the procedures are robust and allow for full scrutiny and consultation before the Bill is sent for Royal Assent. For illustration, the primary legislation process of the Scottish Parliament is summarised in Box 4.7.

**Box 4.7: Scottish Parliament procedures for making primary legislation<sup>91</sup>**

Bills can be introduced into the Parliament by different means:

- Executive Bills are introduced into the Parliament by a Minister;
- Committee Bills are introduced by the convener of a committee and may follow a committee inquiry on the need for legislation in a particular area;
- any MSP who is not a member of the Executive can propose a Member's Bill. If the proposal attracts support from eleven other MSPs, the MSP can then introduce a Bill to give effect to it at any time during the four-year session;
- Private Bills are introduced by a person (other than an MSP) or body ("promoter").

The usual parliamentary process for a Bill consists of three stages:

- Stage 1 – consideration of the general principles of the Bill by parliamentary committee(s), and a debate on these by the Parliament;
- Stage 2 – detailed consideration of the Bill by parliamentary committee(s);
- Stage 3 – final consideration of the Bill by the Parliament and a decision whether it should be passed or rejected.

After a Bill has been passed by the Parliament, it is sent to Her Majesty the Queen for Royal Assent.

90. The Acts made by the First Session of the Scottish Parliament and by the Northern Ireland Assembly between 1999 and 2002 are listed in Annexes 6 and 7. Individual Bills vary enormously in the amount of legislative work required – not just because of the length or complexity of the policy proposals, but also because a controversial issue such as personal care for older people will require substantially more time for consultation, debate and scrutiny. An example is set out in Box 4.8: the Scottish Public Services Ombudsman Act 2002 (a relatively short, uncontroversial Bill, which implemented proposals similar to those for which the Assembly has sought legislation in Westminster).

91. If the Assembly were to be given primary legislative powers, the main work of scrutiny would fall on committees, who would have the task of scrutinising in detail, line by line, the proposed new laws, usually following a process of consultation.

92. This work has proved to be a major task for the committees of the Scottish Parliament. Unlike the House of Commons, which has essentially two types of committees – Select Committees that deal with the scrutiny of policy and Standing Committees that examine individual Bills – the Scottish committees bear both the full weight of scrutiny of legislation and a policy challenge and scrutiny role similar to that of the Assembly's committees. This is also the norm elsewhere in Europe.

93. The burden of legislation is not evenly spread. The First Scottish Parliament

passed sixty-two Bills, which were shared between lead committees as shown in Table 4.7.

94. The Scottish committees cope with this workload by meeting weekly and, on five occasions in the first session of the Parliament, by establishing special Bill committees. This option is feasible because there are more Members than in Cardiff and some committees are smaller. Nevertheless, even with a weekly meeting cycle, the work of scrutinising Bills can sometimes be onerous, as Alex Fergusson MSP, the Convener of the Scottish Parliament Rural Affairs Committee, and Sir David Steel MSP, Presiding Officer of the Scottish Parliament, explained:

*Our main role is to scrutinise Bills and propose amendments to legislation. We have dealt with, up to now, three Members' Bills ranging from one of the shortest Bills, a Sea Fisheries Amendment... which simply went through on the nod, to one of the longest Bills, the Protection of Wild Mammals Bill, known as the Hunting Bill, which is a Private Member's Bill by Mike Watson and that took us virtually almost two years of extremely hard work... [and] we have had two very large Executive Bills.<sup>92</sup>*

*As you can imagine, health is a popular issue and the Committee set off with a whole list of issues they wanted to have inquiries into. However, they soon discovered they were so busy dealing with legislation that they simply could not get on with their inquiries and other work.<sup>93</sup>*

**Box 4.8: Parliamentary time needed for the scrutiny of primary legislation**

**The Scottish Public Services Ombudsman Act 2002**

This Act of the Scottish Parliament, which has twenty-seven sections and seven schedules, creates the Scottish Public Services Ombudsman to investigate maladministration complaints against Members of the Scottish Executive and other office-holders in the Scottish Administration. The new Ombudsman also investigates certain complaints relating to the Health Service, local government and housing associations. The Act therefore has parallels with the Welsh Assembly Government's request for new primary legislation to establish a single Ombudsman for Wales (see Chapter 5).

Stage	Body	Time taken
<b>Pre-legislation consultation</b>	Local Government Committee	1h 30m
<b>Stage 1: consideration of principles</b>		
Evidence session (18 December 2001)	Local Government Committee (lead Committee)	2h 30m
Consideration of draft report (private session on 15 January 2002)		Not known
Evidence session (5 December 2001)	Health and Community Care Committee	2h 10m
Consideration of draft report (private session on 12 December 2001)		Not known
Consideration of draft Bill (11 and 18 December 2001)	Subordinate Legislation Committee	<5m
Stage 1 debate (31 January 2002)	Full Parliament	1h 45m
<b>Stage 2: detailed Bill scrutiny</b>		
Consideration of amendments (5 March 2002)	Local Government Committee	0h 40m
<b>Stage 3: final consideration</b>		
Debate and vote on Bill (21 March 2002)	Full Parliament	0h 30m

**Table 4.7: Committee consideration of Bills that became law in the First Session of the Scottish Parliament<sup>94</sup>**

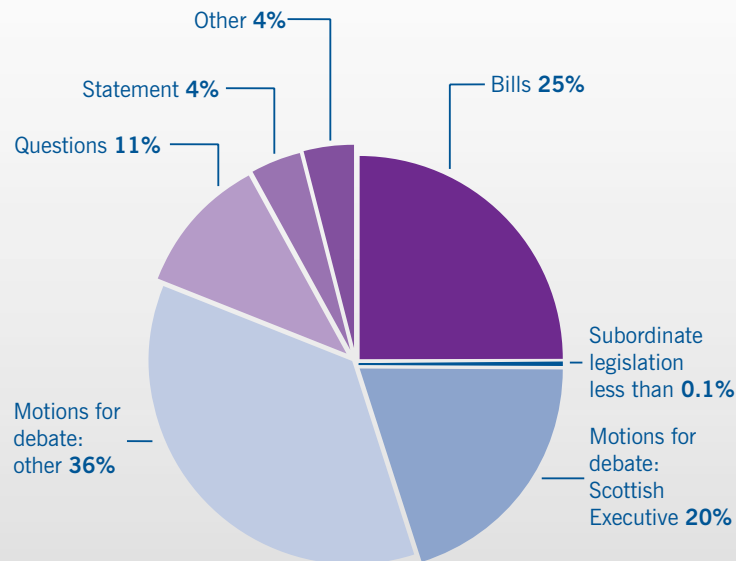
Committee	Number of Bills considered <sup>a</sup>
Education, Culture and Sport	5
Enterprise and Lifelong Learning	3
Health and Community Care	3
Justice 1 (formerly Justice and Home Affairs)	10
Justice 2 <sup>b</sup>	5
Local Government	9
Rural Development (formerly Rural Affairs)	6
Social Justice (formerly Social Inclusion, Housing and Voluntary Sector)	4
Transport and the Environment	4
Other <sup>c</sup>	13
<b>Notes</b>	
a. The number refers to the number of Bills considered by each committee as lead committee (committees also consider other Bills in which they have an interest). It does not include Bills that were considered by committees but did not subsequently become law.	
b. Created 14 December 2000.	
c. Bills considered by full Parliament, special Bill or other committees.	

95. Like the committees, the Assembly plenary would also have to allocate its time differently and/or sit for longer to allow time for the scrutiny of Bills. The experience of the Scottish Parliament (Box 4.9) suggests that some government business in the form of statements or policy debates would

make way for debate on Bills, and that much less time would spent scrutinising subordinate legislation. On the other hand, the need to debate primary legislation would be likely at least to maintain the government's influence on the timetable of the elected body.



**Box 4.9 Division of time on plenary business in the Scottish Parliament, May 2001 - May 2002<sup>95</sup>**



### Findings

The evidence on the role, structure and operation of the Assembly points to the following conclusions:

- the corporate body concept enshrined in the Government of Wales Act still has a significant influence on the Assembly's operation, particularly the Subject Committees;
  - whatever hopes there may have been that the corporate body concept would promote a new kind of inclusive and open style politics, it seems that it is no longer a sustainable structure, and has also contributed significantly to the public's confusion as to who takes decisions;
  - the structures of the National Assembly should make it absolutely clear that there is a Welsh Assembly
- Government responsible for executive acts and decisions, separate from the National Assembly itself but directly answerable and accountable to it;
  - there is a trade-off between policy development and effective scrutiny – not only in terms of committee time, but also in the style of committee work;
  - Ministers' membership of Subject Committees has benefited their deliberations, but it suppresses the development of a scrutiny culture in committee and obscures the lines of accountability;
  - gaining primary legislative powers would increase and change the pattern of work of the Assembly – but the scale of the impact would depend on the size of the legislative programme;

- primary legislative powers would also require a stronger culture of scrutiny within the Assembly;
- there is capacity within the existing size of the Assembly to absorb some of the additional work that would accompany primary legislative powers, by:
  - focusing Subject Committees on a scrutiny role;
  - extending the working week for formal Assembly business to at least three days every week and adjusting the balance of time spent on different activities;
  - increasing the number of sitting weeks per year;
  - adopting a more flexible approach to implementing the Assembly's commitment to family-friendly working;
- re-aligning the Regional Committee boundaries so that no AM serves on more than one Regional Committee;
- reducing committee size and making more use of flexible approaches to committee working, such as rapporteurs;
- however, these changes would not be enough to accommodate a primary legislative programme;
- primary legislative powers would also require changes to the nature and scale of support provided by the Presiding Office;
- the existing size and structure of the Assembly would be placed under considerable strain if the Assembly's powers were significantly broadened to include new policy fields.

### Notes

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<sup>1</sup>Commission on the Powers and Electoral Arrangements of the National Assembly for Wales, *Electoral Arrangements of the National Assembly for Wales: Issues and Questions for Consultation* (Cardiff, March 2003).

<sup>2</sup>Welsh Office, *A Voice for Wales*, Cm 3718 (1997).

<sup>3</sup>*Ibid*, 7.

<sup>4</sup>Oral evidence of the Rt Hon Ron Davies AM, 26 September 2002.

<sup>5</sup>The term "corporate body" refers to the legal identity of the Assembly, but is commonly used to describe the construction of the Assembly as a single body.

<sup>6</sup>Oral evidence of the Presiding Officer and Deputy Presiding Officer of the National Assembly for Wales, 5 December 2002.

<sup>7</sup>*Assembly Review of Procedure: Final Report* (Cardiff: National Assembly for Wales, February 2002).

<sup>8</sup>*House of Commons Debates*, 2 February 1998, col. 751.

<sup>9</sup>*Ibid*. col. 748.

<sup>10</sup>Welsh Office, *Local Voices: Modernising Local Government in Wales*, Cm 4028 (London: The Stationery Office, July 1998).

<sup>11</sup>Government of Wales Act 1998 c.38, section 62.

<sup>12</sup>Oral evidence of Mari James, 25 October 2002.

- <sup>13</sup>Oral evidence of the Permanent Secretary of the National Assembly for Wales, 13 December 2002.
- <sup>14</sup>Oral evidence of the Rt Hon Ron Davies AM, 26 September 2002.
- <sup>15</sup>Written evidence of the Counsel General to the National Assembly for Wales, December 2002.
- <sup>16</sup>Government of Wales Act 1998 c.38, section 62(5).
- <sup>17</sup>*Ibid.*, section 63.
- <sup>18</sup>Up to two members of the Cabinet may have no such accountability: *ibid.*, section 56(4) and National Assembly for Wales Standing Order 2.5.
- <sup>19</sup>The National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672.
- <sup>20</sup>The 1998 Act also requires the Assembly to establish a local government partnership council, which is discussed in Chapter 5.
- <sup>21</sup>Government of Wales Act 1998 c.38, section 53 and Standing Order 2.5.
- <sup>22</sup>Government of Wales Act 1998 c.38, section 57(3-4).
- <sup>23</sup>*Ibid.*, section 57(5).
- <sup>24</sup>*Ibid.*, section 57(4).
- <sup>25</sup>*Ibid.*, sections 60 and 102.
- <sup>26</sup>*Ibid.*, sections 58 and 59.
- <sup>27</sup>*Ibid.*, sections 59 and 60.
- <sup>28</sup>Oral evidence of the Minister for the Environment, 21 November 2002 and oral evidence of the Chair of the Environment, Planning and Transport Committee, 5 December 2002.
- <sup>29</sup>Standing Order 9.
- <sup>30</sup>Data provided by the Presiding Office Members Research and Committee Services, October 2003.
- <sup>31</sup>National Assembly for Wales Culture Committee and Education and Lifelong Learning Committee, *Ein Hiaith - Ei Dyfodol/Our Language - Its Future* (Cardiff: National Assembly for Wales, 2002).
- <sup>32</sup>The Lord Elis-Thomas AM, oral evidence of the Presiding Officer and Deputy Presiding Officer of the National Assembly for Wales, 5 December 2002.
- <sup>33</sup>*Ibid.*
- <sup>34</sup>Oral evidence of the Association of National Park Authorities, the National Trust, RSPB Cymru and the Forestry Commission, 8 May 2003.
- <sup>35</sup>Oral evidence of the Chair of the Health and Social Services Committee, 5 December 2002.
- <sup>36</sup>For example, see oral evidence of the Chair of the Economic Development Committee, 10 April 2003.
- <sup>37</sup>Oral evidence of the Chair of the Agriculture and Rural Development Committee, 27 February 2003.
- <sup>38</sup>Government of Wales Act 1998 c.38, section 57(4).
- <sup>39</sup>Oral evidence of the Chair of the Health and Social Services Committee, 5 December 2002.
- <sup>40</sup>*Assembly Review of Procedure: Final Report* (February 2002), 25.
- <sup>41</sup>See, for example, oral evidence of the Minister for Economic Development, 7 November 2002.
- <sup>42</sup>Oral evidence of the Chair of the Environment, Planning and Transport Committee, 5 December 2002.
- <sup>43</sup>Government of Wales Act 1998 c.38, section 61.
- <sup>44</sup>*Assembly Review of Procedure Final Report* (February 2002), 30.

- <sup>45</sup>Oral evidence of the Chair of the European and External Affairs Committee, 27 March 2003.
- <sup>46</sup>Malcolm Thomas, oral evidence of Wales Young Farmers Clubs, Country Land and Business Association, National Farmers' Union Cymru, Farmers' Union of Wales, Urdd Gobaith Cymru, Royal Welsh Agriculture Show and Meat Promotion Wales, 8 May 2003.
- <sup>47</sup>Welsh Office, *A Voice for Wales*, Cm 3718 (July 1997), 8.
- <sup>48</sup>*Assembly Review of Procedure: Final Report* (February 2002), 5.
- <sup>49</sup>Data provided by the Presiding Office Chamber Secretariat, September 2003.
- <sup>50</sup>Government of Wales Act 1998 c.38, sections 64-68.
- <sup>51</sup>Subordinate legislation that is a statutory instrument made solely by the Assembly.
- <sup>52</sup>Standing Order 22.
- <sup>53</sup>Written evidence of the Counsel General to the National Assembly for Wales, December 2002.
- <sup>54</sup>*Ibid.*
- <sup>55</sup>Written Assembly Question 26569, *National Assembly for Wales Written Questions Answered between 26 June-3 July 2003*, 2.
- <sup>56</sup>Data provided by the Presiding Office Members Research and Committee Services.
- <sup>57</sup>The Seeds (National List of Varieties) Regulations 2000 were rejected on 19 October 2000.
- <sup>58</sup>Christine Gwyther AM's Motion agreed on 6 March 2001 resulted in the Town and Country Planning (Use Classes) (Amendment) (Wales) Order 2002; Brian Hancock AM's Motion agreed on 18 April 2000 resulted in the Education (Extension of Careers Education) (Wales) Regulations 2001.
- <sup>59</sup>Ieuan Wyn Jones AM, oral evidence of Plaid Cymru Party of Wales, 27 February 2003.
- <sup>60</sup>Jocelyn Davies AM, *ibid.*
- <sup>61</sup>Oral evidence of the Chair of the Agriculture and Rural Development Committee, 27 February 2003.
- <sup>62</sup>Oral evidence of the Chair of the Subordinate Legislation Committee, 6 December 2002.
- <sup>63</sup>*House of Commons Debates*, 8 December 1997, cols. 675-76.
- <sup>64</sup>Written submission of the Assembly Panel of Subject Committee Chairs, November 2002.
- <sup>65</sup>See paragraph 32 of this chapter.
- <sup>66</sup>Written submission of the Assembly Panel of Subject Committee Chairs, November 2002.
- <sup>67</sup>Oral evidence of the Chair of the Culture Committee, 12 December 2002.
- <sup>68</sup>National Assembly Advisory Group, *Report to the Secretary of State for Wales* (Cardiff: Welsh Office, August 1998), 7.
- <sup>69</sup>*Ibid.*, 43.
- <sup>70</sup>National Assembly for Wales, *Code of Protocol on Conduct in the Chamber: Presiding Officer's Protocol on Conduct in the Chamber/Rules of Debate* (April 2000).
- <sup>71</sup>Data provided by the Presiding Office Chamber Secretariat.
- <sup>72</sup>Data provided by the Scottish Parliament Information Centre.
- <sup>73</sup>This figure includes time on Tuesday morning (9.00 to 10.30) for Business and Legislation Committees.
- <sup>74</sup>*Assembly Review of Procedure: Final Report* (February 2002), 6.

<sup>75</sup>Although, on occasion, overlapping membership of the Committees prevented any additional slots being included in the timetable: e.g. the Autumn Term of 2002.

<sup>76</sup>Statement of the Business Minister to Plenary, *National Assembly for Wales Record of Proceedings*, 17 June 2003.

<sup>77</sup>Oral evidence of the Chair of the Education and Lifelong Learning Committee, 12 December 2002.

<sup>78</sup>Government of Wales Act 1998 c.38. The requirement applies to Subject Committees (section 57(8)), the Legislation Committee (section 59(2)), the Audit Committee (section 60(3)) and any other committee established by the Assembly unless it exists 'solely to provide advice' (section 54(2)(b)).

<sup>79</sup>120 seats on the seven Subject Committees and five Standing Committees (excluding the House and Business Committees), less seven Minister seats on Subject Committees and the First Minister and three other party leader seats on the European and External Affairs Committee.

<sup>80</sup>Sixty AMs less the Cabinet (nine AMs), the three other party leaders, the Presiding Officer and the Deputy Presiding Officer.

<sup>81</sup>Scottish Parliamentary Corporate Body, *Scottish Parliament Statistics 2002*, SP Paper 8, Session 2 (The Stationery Office Ltd, 2003).

<sup>82</sup>For example, oral evidence of Delyth Evans, 11 July 2003; written response to consultation, John Griffiths AM.

<sup>83</sup>Oral evidence of the Chair of the Environment, Planning and Transport Committee, 5 December 2002.

<sup>84</sup>Including the Scottish Parliament, the Houses of the Oireachtas (Parliament of Ireland) and the European Parliament.

<sup>85</sup>Information provided by the Presiding Office Members Research and Committee Service.

<sup>86</sup>Figures provided by the Clerk to the National Assembly for Wales, January 2004.

<sup>87</sup>Rhodri Morgan MP, *House of Commons Debates*, 25 March 1998, col.563.

<sup>88</sup>House Committee, *Assembly Members' Services 2002-2003* (Cardiff: National Assembly for Wales, October 2003). Available at [http://assembly/committees/house/annual-reports/HC\\_Annual\\_report.pdf](http://assembly/committees/house/annual-reports/HC_Annual_report.pdf) (accessed 2 February 2004).

<sup>89</sup>Oral evidence of the Presiding Officer, Deputy Presiding Officer and Clerk of the Scottish Parliament, 13 February 2003.

<sup>90</sup>Oral evidence of the Leader of the Scottish National Party and Shadow First Minister of the Scottish Parliament and Fiona Hyslop MSP, Member of the Parliamentary Bureau, 13 February 2003.

<sup>91</sup>Adapted from 'How Does the Scottish Parliament Make Laws?', *The Scottish Parliament* [website], <http://www.scottish.parliament.uk/visitor/faq.html#12>, accessed 20 January 2004.

<sup>92</sup>Oral evidence of the Committee Conveners of the Scottish Parliament, 13 February 2003.

<sup>93</sup>Oral evidence of the Presiding Officer, Deputy Presiding Officer and Clerk of the Scottish Parliament, 13 February 2003.

<sup>94</sup>Collated from editions of *WHISP (What's Happening in the Scottish Parliament)*, 1-149 (Edinburgh: The Scottish Parliament, May 1999-March 2003).

<sup>95</sup>Collated from Scottish Parliamentary Corporate Body, op. cit.



# The scope and adequacy of the devolved powers

This chapter reviews the devolution settlement from a constitutional and a practical perspective, looking at both the legal nature of the powers conferred on the Assembly and how they have been used in practice.

2. The chapter aims to address the following questions:
  - what does the 1998 devolution settlement allow the Welsh Assembly Government to do?
  - to what extent have the limits of the executive powers in themselves provided a brake on the actions or ambitions of the Welsh Assembly Government?
  - what are the strengths and weaknesses of the present arrangements?
3. The chapter starts by describing the main features of the settlement and why it was adopted for Wales. It then summarises the evidence provided by the Ministers of the Welsh Assembly Government about the way they have used the powers available to them.<sup>1</sup> It also draws on the views of Assembly committees and those affected by the actions of the Government.
4. This very detailed evidence on each portfolio has been most helpful to us in identifying the issues, although it has not been possible to summarise all of this material here. The chapter aims to pull out the key examples that are most relevant to our terms of reference in demonstrating both the potential and the limits of the existing settlement and its consequences for accountability to the people of Wales.
5. We return to some of the themes emerging from this evidence on the use of the powers later in the report. This chapter concludes by examining one of the main criticisms made of the devolution settlement – that it is particularly complex to understand and to operate.

## Summary of the main features of executive devolution in Wales

6. The structure of devolution in Wales has two features which, taken together, make it unique among national or regional elected bodies worldwide.
7. First, Westminster has transferred to the Assembly the power of executive competence only – the power to make primary legislation in all fields affecting Wales is reserved to Westminster. The power of executive competence refers to the specific powers conferred by individual Acts of Parliament on Secretaries of State to make orders or regulations or take other steps that give detailed effect to the intention of the Act itself. For example, the level of prescription charges and categories for exemption from charges, the standards to be applied in care homes for the elderly and bus travel concessions are all implemented through secondary legislation.



8. Second, there is an important difference in the way in which executive functions were transferred in the Government of Wales Act and the Scotland Act. Although it is widely appreciated that the Scottish Parliament has primary law-making powers and the National Assembly for Wales does not, it is not so well recognised that the scope of the executive powers transferred in respect of Wales is much more limited than in respect of Scotland. The Scotland Act 1998 transferred to the Scottish Executive all executive powers previously conferred on a Secretary of State by any Act of Parliament, unless specifically excepted.<sup>2</sup> By and large, the exceptions in respect of executive powers mirror those for primary legislative powers.
9. This means that it is possible to assume that, where a Minister in England has a power to act in a particular devolved area of policy, the Scottish Executive will have the same power unless it is specifically reserved by the Act. For post-devolution executive powers, Parliament uses the device of deeming the legislation to have been passed pre-1999 so that the powers can, under the Scotland Act, be conferred on the Scottish Executive.
10. The approach taken in Wales was quite different. The Government of Wales Act includes in Schedule 2<sup>3</sup> a list of fields in which functions had to be considered for inclusion in the first Order that transferred functions to the Assembly. However, it is not possible to assume that all existing or future

powers in those fields that are delegated to Ministers by an Act of Parliament have been, or will be, transferred. Instead, the 1999 Transfer of Functions Order (TFO) by and large transferred only the powers then exercised by the Secretary of State for Wales, as explained by Professor David Miers, Professor of Law at Cardiff Law School:

*With hindsight, it appears that the expectations that were raised in A Voice for Wales, namely that there would be transfers by subject area – generic, in education, in health, agriculture and so on – have been not realised. On the contrary, the mode of transfer both in the 1999 Order and subsequently is by means of discrete transfer of specific functions within specific sections or sometimes subsections of Acts of Parliament. These are listed in the 1999 TFO, some 350 I think of them, and are listed chronologically rather than by any form of subject coherence.*

*I think it is worth stressing that this mode of transfer was not obligatory under the Government of Wales Act. Sections 21 and 22 merely provide that functions may be transferred to the Assembly; they do not specify the mode of transfer in the sense of the degree of specificity. There is nothing in those sections which would preclude, it seems to me, the United Kingdom Parliament from transferring to the Assembly functions broadly drawn in education, but subject to exceptions no doubt.<sup>4</sup>*

11. Ron Davies AM, who as Secretary of State for Wales was instrumental in developing the devolution arrangements, explained that the approach of transferring only the existing functions of the Secretary of State for Wales was adopted largely for pragmatic reasons – to get his proposals agreed by the Cabinet as quickly as possible with minimum argument. He said that, had it been necessary to negotiate with all the relevant Departments which powers should be delegated to the Assembly, this would have been a huge task with great potential for delay. He felt the priority was to get the legislation through and establish the principle of devolution, leaving the detail to be sorted out later:

*I knew that was going to form a very, very ragged edge in the powers – as we have seen time after time since. But had I argued then – let's take the case of DEFRA, for example – that on this issue of animal health we really need to have a serious look at the extent to which we can devolve some powers and we need to tidy up this ragged edge, we'd still be talking today.*

*...Certainly the tactic [in Government discussions on devolution] was just to tuck behind Scotland – let the Scots handle the big issues and for us to benefit.<sup>5</sup>*

12. Nevertheless, the evidence suggests that the approach to transferring functions that was adopted for Wales seems to have had a number of

consequences that might not have been fully appreciated at the time.

13. First, it affects the development of devolution because it conditions the way Whitehall views the potential transfer of existing and new powers to the Assembly. Before the creation of the Assembly, legislation simply specified that powers were delegated to “the Secretary of State” – whether this meant the Secretary of State for Wales or another Minister was a matter for administrative decision and was often sorted out by agreement between officials some time after the Act was passed. Now, the distribution of powers between Whitehall and Cardiff must be negotiated and specified in each new Bill. We discuss this process further in Chapter 7 on the Wales-Whitehall relationship.

14. Second, the complexity of the boundaries between devolved and non-devolved powers creates problems for politicians, organisations that deal with the Assembly and the general public. We return to this issue later in this chapter (paragraph 121), after reviewing how the Assembly has used its powers.

### Scope and use of the Assembly's powers in the First Assembly

15. This section examines how the Assembly's powers have been used in practice. Although there are some recurring themes, we felt it was important to review the powers available across all the Assembly's policy responsibilities. The paragraphs below therefore provide a synopsis of

the powers in each Ministerial portfolio and what has, and has not, been possible in using these powers. We have used the division of portfolios that existed during the First Assembly because this is the basis on which the evidence was given to us.

16. Each Minister has to work within a very detailed set of powers comprising:

- powers conferred by the Government of Wales Act itself;
- powers previously exercised by the Secretary of State that were transferred to the Assembly by the Transfer of Functions orders;
- powers conferred on the Assembly by laws passed since July 1999.

17. Overall, the message of the evidence from Welsh Assembly Government Ministers was that the powers have given them sufficient scope to deliver a distinctive policy agenda for Wales – albeit with some specific constraints, which were more significant in some portfolios than others. The First Minister, the Rt Hon Rhodri Morgan AM, summed up his approach to the task of governing with the Assembly's powers:

*I enjoy trying to find a way of delivering something that does not involve knocking down the walls of the system but involves operating within the system, with a lot of creative effort and thought. That is what I think I am good at, and that is what I think has been the characteristic of the Assembly, to find a way around the problems, and by and large we have.<sup>6</sup>*

18. In his concluding evidence, he added that, in his view:

*If, at some stage in the future, the Assembly was to acquire greater powers, it would be because it had earned them and not because the present powers are not working.<sup>7</sup>*

### Education and lifelong learning

19. The education portfolio is one where the Welsh Assembly Government has very extensive powers under the present settlement. The Minister for Education and Lifelong Learning, Jane Davidson AM, told us:

*I think we have been able to deliver a very imaginative, Welsh agenda within existing powers.*

*...The majority of my agenda does not require primary legislation; it requires delivery, not least because so few powers are actually retained centrally, and most of the powers are devolved to Wales. There are very few areas on which I would actively need to seek primary legislation.<sup>8</sup>*

20. To some extent, this position reflects the Assembly Government's success in obtaining what primary legislation it has needed to implement its policies. Thus the Minister explained that:

- the Education Act 2002 had provided her with an early, significant opportunity for primary legislation – with 185 of 217 sections relating to Wales, including a number of Wales-only measures required in order to deliver her policy priorities;

- in relation to post-16 education and training (the Learning and Skills Act 2000), she was working with provisions which had been designed with devolution in mind and conferred significant new powers on the Assembly;
- the one power that she felt was still lacking was the power of last resort in respect of planning relevant to higher education.

21. In her evidence, the Minister made a number of points that illustrate aspects of the primary legislative process for Wales since the advent of the Assembly:<sup>9</sup>

- because the Assembly Government had already set out its policy proposals in *The Learning Country*, it was in a position to instruct in-house lawyers and subsequently to draft instructions for Parliamentary Counsel on the basis of a position on which there was a broad consensus;
- this also enabled the Subject Committee to have a role – it received reports from the Wales Office Minister responsible for taking the clauses affecting Wales through Parliament;
- the UK Government was content with the divergent Welsh policies contained in the Education Act 2002 because these were seen as differences in delivery mechanisms alone:

*What we did have in this Bill was the same philosophy, but different strategic action, as it were, on how to delivery a philosophy. That was about ensuring all children achieve to the best of their ability...*<sup>10</sup>

22. Defining the overall aims in this very broad way did allow the same legislative framework to deliver very significant differences in approach in England and Wales:

*We were not going to support specialist schools in Wales. We wanted to maintain the comprehensive agenda, for example; we wanted our schools to be community resources.*<sup>11</sup>

23. One important feature of the present devolution settlement is the effect when primary legislation provides a permissive power, enabling the Assembly to do something but not requiring it to do so. This provides an opportunity for the Assembly Government to decide not to follow the policy direction set in Whitehall. The Minister's evidence demonstrates that, in the 2002 Education Act, the delegated powers were defined in this way in recognition of the role of the Assembly:

*Where in the past clauses might have been instituted on a mandatory basis – you must, you shall – the decision was taken that, for Wales, the powers would be crafted on a permissive basis for England and Wales. So Wales clauses are Wales only; where it is England and Wales, rather than 'you must, you shall' ...it was, by agreement, 'the Assembly may.'*<sup>12</sup>

24. On the legislative process itself, the Minister commented that the ability to take advantage of the legislative time and drafting resources committed to the Education Act 2002 by Whitehall was extremely valuable in terms of getting her legislative proposals enacted:

*I have no doubt at this point in time that we had the best of both worlds in this piece of legislation...It was hard for us to find a couple of officials to dedicate...solely to doing the work. ...The vast majority of clauses were England and Wales related...We are not in an administrative (or) legislative position at this point in the Assembly where we could take on that sort of effort ourselves.<sup>13</sup>*

25. Overall, the Minister felt that, in relation to schools, the powers she needed were, largely, already devolved to the Assembly, with the presumption of Wales doing its own thing well established in relations with Whitehall. For example, the provisions in the 2002 Act for admission forums (since enacted through regulations) would help to ensure allocation of school places on a more co-operative basis. In relation to the 2003-04 legislative programme, the Minister sought further primary legislative opportunity to reinforce some delivery measures in *The Learning Country*.
26. This view of the boundaries of the Assembly's powers in relation to schools was challenged in Plaid Cymru's evidence to the Commission. Cynog Dafis AM argued that the England and Wales legislation on schools funding and admissions had put in place a market-driven approach, which would constrain a future Welsh Assembly Government that wished to strengthen the comprehensive community school model:

*Let us say we were keen to return to a system...where schools were in a system of co-operation rather than competition and you did want to introduce changes in the funding structures to schools, so that you were funding schools on the basis of need... That would require primary legislation and then you would immediately hit very important barriers that could be vital in the development of the sort of educational system that we would be keen to establish here in Wales.<sup>14</sup>*

(Translated from the original spoken in Welsh)

27. Powers over the curriculum in Wales are an example of the extent of, and constraints upon, delegated powers. The Minister said:

*The National Curriculum is now totally in the hands of Wales, which is where it should be.<sup>15</sup>*

28. However she recognised that, if the Assembly Government wanted to amend the basic curriculum so that it no longer included religious education and sex education, it would need primary legislation to do that. It would also need primary legislation to abolish the National Curriculum altogether. Similarly, primary legislative powers were needed to introduce the foundation curriculum for 3-7 year olds.
29. In relation to post-16 education, the Learning and Skills Act 2000

empowered the Assembly to deliver the major reforms in the structure of further education and training recommended by the Education and Training Action Group (ETAG) established by the Secretary of State in 1998.<sup>16</sup> The Act put in place a legislative framework that took account of devolution and that implemented a policy position which was widely seen as settled following the work of ETAG and the Post-16 Education and Training Committee.<sup>17</sup>

30. The proposal to transfer student support powers to the Assembly is discussed in Chapter 9.

### *Teachers' pay and conditions*

31. The relationship between teacher appraisal (performance management), which is devolved, and teachers' pay and conditions, not devolved, became a matter of debate early in the life of the Assembly. It also established the principle that committees could seek legal advice independently from Ministers (see Box 5.1).
32. To expand the powers of the Assembly and create a more self-contained set of powers in relation to teachers would involve the transfer to the Assembly of the powers to determine teachers' pay and conditions (and, probably, teachers' pensions), putting Wales in a similar position to Scotland and Northern Ireland. The Minister told us that she did not wish to go down this route, pointing out that the devolved powers already allowed the adoption of a different approach to teachers'

performance management in Wales. UCAC (the only teachers' representative body that gave evidence to us), which represents many Welsh medium teachers, argued for this change, but conditional on the Assembly acquiring tax-varying powers.<sup>18</sup>

33. The split between policy and responsibility for pay and conditions arises in a number of other devolved areas, notably the NHS and local government staff. It would also arise if certain Home Office powers were transferred (see Chapter 9).



### Box 5.1: Teachers' performance pay

The issue of teachers' performance pay was an early test of the relationship between closely related devolved and non-devolved powers. It also provoked one of the first moves towards the recognition of separate identities for the Assembly Government and the wider National Assembly, in that it established the right of Subject Committees to obtain their own legal advice.

Powers in respect of the performance management of teachers in Wales are devolved to the Assembly, but powers relating to teachers' pay and conditions rest with the UK Government. In 1999, the Department for Education and Employment proposed to introduce new pay arrangements for classroom teachers. Progress through the lower pay range would continue to be essentially incremental; but crossing the threshold to the higher range would be subject to a specific performance assessment.

The Assembly inherited these proposals for implementation in Wales. The Pre-16 Education, Schools and Early Learning Committee welcomed the Assembly Secretary's plans for the performance management system. However, some members were very concerned about the proposals for the pay threshold assessments (which would apply across England and Wales) and how these would interact with the Assembly's scheme.

The Assembly Secretary, Rosemary Butler AM, argued that the Assembly had no powers to determine arrangements for the pay threshold assessment, but refused to show the Committee the legal advice that supported this view. Since the new pay threshold standards were based on an assessment of teachers' performance, the Committee was not certain that the Assembly had no power to act; and it therefore decided to obtain its own legal opinion.<sup>19</sup>

Two weeks later, the Assembly Secretary supplied the Committee with a statement of further legal advice that she had obtained on the issue from leading counsel, which confirmed the advice already given and concluded that:

*The National Assembly for Wales lacks power to set legally binding criteria against which teachers in Wales will be assessed if they wish to qualify for the proposed new pay point.*<sup>20</sup>

She undertook to ensure that, in future, the Committee would have a full statement of the factual and legal background to an issue where this would assist, and that a representative of the Assembly's legal office would attend committee meetings.



**Box 5.1: Teachers' performance pay (continued)**

Nevertheless, the Committee decided that it still wished to obtain its own legal advice.<sup>21</sup> This subsequently confirmed that the Assembly had no powers to specify the criteria for teachers' performance-related pay – but it also advised that the Secretary of State could determine teachers' pay in Wales by reference to the system of teacher appraisal set out in the Assembly's own regulations.<sup>22</sup> The Department of Education and Employment rejected the Committee's subsequent request to this end; and the Committee then decided to postpone further action pending the outcome of a judicial review being pursued by the teaching unions.<sup>23</sup> In the event, the matter was not pursued.

**Health and social services (including the voluntary sector)**

34. The health and social services portfolio is the largest in expenditure terms, covering about one third of the Assembly's budget. The Minister, Jane Hutt AM, gave an insight into many facets of the devolution settlement, including:

- extensive experience of Westminster legislation post-1999 to implement the policies of the Welsh Assembly Government;
- use of secondary legislation powers to tailor England and Wales policies to Welsh needs;
- collaboration with non-devolved services;
- use of new Government of Wales Act powers in relation to the voluntary sector;
- the importance of cross-border considerations, including in respect of NHS services and the pay and retention of staff;
- financial constraints on the use of powers;

- continuity of pre-1999 executive powers for performance management through targets and strategies.

35. Some of these are discussed in more detail below.

36. The Minister's experience of the primary legislative process had been constructive. She had put forward two sets of Wales-only provisions in England and Wales Bills and two Wales-only Bills. In both cases, it had been necessary to legislate for urgent measures by slotting them into England and Wales measures already in the Government's programme, and then follow these with subsequent Wales-only Bills to implement less urgent matters.

37. The first such measure was the Children's Commissioner for Wales Bill – powers to establish the office were provided in the England and Wales Care Standards Act 2000, and broader powers were conferred subsequently by the Wales-only Children's Commissioner for Wales Act 2001. Here, the origin of the

- measure in a joint Ministerial response to the Waterhouse report,<sup>24</sup> and the wide consensus in support of the proposal, meant that this could be a 'fast track' piece of legislation. The Department of Health presented no objections to the Welsh proposal, viewing it as a potential pilot for considering a similar proposal for England. In the following legislative session (2000-01), further powers were conferred on the Commissioner, including the power to make representations to the Assembly in respect of non-devolved services.
38. The Minister's proposals for NHS reform<sup>25</sup> that required primary legislation were also passed through Westminster in two stages. Proposals regarded as urgent by the Welsh Assembly Government were included in the NHS Reform etc. and Health Care Professions Bill, with the other provisions (dealing with Community Health Councils, the Wales Centre for Health and Health Professions Wales) appearing in the NHS (Wales) Bill in the following session. Again, the Department of Health accepted proposals that diverged significantly from England.
39. Some witnesses<sup>26</sup> saw this two-stage approach as evidence of incoherence brought about by the need for the Assembly Government to fit in with the timetable of Whitehall and Westminster. In contrast, the Minister's evidence explained that the phasing was driven by practicalities and did deliver the Assembly Government's requirements.<sup>27</sup>
40. Nor did the Minister see any problems with the scrutiny of such measures. She acknowledged that the timetable for the Parliamentary consideration of the Wales-only clauses in the NHS Reform and Health Care Professions Bill (dealing with the abolition of health authorities and the establishment of local health boards) had meant that the consultation in Wales and the legislative scrutiny took place in a very compressed timetable; but she argued that Members of Parliament were familiar with the issues. Subsequent evidence from MPs did, however, raise concerns about the scrutiny process in relation to these measures (Chapter 8).
41. The Minister highlighted the potential trade-off between arguments of policy coherence, which might point to Wales-only legislation, and the need to consider cross-border issues, which might be better done in an England and Wales Bill:
- It might have been more comfortable to have a Welsh Bill which could have collected all of our particular reforms together... [but] there is an issue about the England and Wales crossover, which is also a very powerful argument for having Welsh clauses in an England and Wales Bill.*<sup>28</sup>
42. As did many other witnesses, she mentioned the pre-legislative scrutiny of the (uncontroversial) Health (Wales) Bill as a model in terms of process, involving the Assembly

Health and Social Services Committee, the Welsh Affairs Select Committee, the Welsh Grand Committee and Peers.

43. The Minister did not believe that the Assembly had the capacity at that point to take on the full load of primary legislation – ‘we have been flat out’<sup>29</sup> – but she observed that Wales was developing in a different policy direction from England (for example on capital funding, on partnerships with local government, with the voluntary sector and on patient advocacy through Community Health Councils). She also mentioned mental health as an area where policy divergence might point to separate legislation in future.
44. As an example of using delegated powers to tailor legislation to meet Welsh needs, the Minister referred to the regulation of care homes, where a different approach was adopted in both Wales and Scotland to the issue of minimum standards, following consultation with the sector.
45. Within her broad responsibility for children and young people, the Minister explained the arrangements that have been established for collaboration with an England and Wales body, the Youth Justice Board, to ensure a holistic approach to services for young people, including those in custody.
46. The evidence of Mark Perfect, chief executive of the Youth Justice Board, described the impact of devolved policy-making on an England and Wales body.<sup>30</sup> The Board is accountable to the Home Office, but its responsibilities overlap with those of the Assembly (in relation to children and young people’s services) and it has needed to adapt to the different policy and organisational environment in Wales.
47. In his evidence, Mark Perfect pointed to policy differences between Wales and England (for example, England has placed more emphasis on targeting young people who are at most risk of offending). He saw the Board’s role as being to help the Assembly Government deliver its policy objectives, but also to seek to influence Ministers and services in Wales to adopt what it saw as the most effective approaches. He also pointed to the expertise of the Board in monitoring standards and promoting good practice in a relatively specialist field, and the potential advantages to Wales of having access to this.
48. In contrast to the Youth Justice Board, some England and Wales bodies in this portfolio are accountable both to the Assembly Ministers and Ministers in England – such as the National Institute for Clinical Excellence, the Commission for Health Improvement and the Food Standards Agency.
49. The question of charging for services for older people illustrated the interaction between the devolved financial arrangements and the scope for policy divergence. The Minister told us that, while the Assembly

supported the proposal of the Sutherland Commission<sup>31</sup> that personal (as opposed to nursing) care services for elderly people should not be subject to charging, the change would require primary legislation and could not be pursued in Wales unilaterally because of the cost implications:

*The advisory group asked us as the Welsh Assembly Government to make representations to the United Kingdom Government on this matter...because they felt this should be seen in the context of United Kingdom taxation, benefits and inheritance policy, as the Royal Commission had intended.*<sup>32</sup>

50. By abolishing charging for personal care in Scotland, the Scottish Executive incurred not only the direct costs of the policy, but also the cost of offsetting the loss of the entitlement to Attendance Allowance, a benefit administered by the Department of Work and Pensions.<sup>33</sup>
51. The Minister felt that her powers to influence the performance of the NHS, including through the relationship with NHS Trusts, were adequate:

*I think the most important thing, which is not related to legislation, is the leverage we have through performance management. We do have the power to direct a single NHS Trust, or indeed all of them,*

*through the 1999 Health Act, but it is really this framework of accountability in terms of expenditure and delivery of services.*<sup>34</sup>

### **The voluntary sector**

52. In addition to her specific policy responsibilities, the Minister also has a cross-cutting responsibility for the Assembly's relationship with the voluntary sector. Uniquely within the UK, the Assembly has a statutory obligation to make a scheme 'setting out how it proposes, in the exercise of its functions, to promote the interests of relevant voluntary organisations.'<sup>35</sup>
53. The Wales Council for Voluntary Action (WCVA) felt that these arrangements had benefited the sector, citing the establishment of a Criminal Records Bureau registered body exclusively for the voluntary sector in Wales as an example of how the Assembly has been able to use its powers to support voluntary organisations.<sup>36</sup> It highlighted a potential gap in that, unlike the UK Government, the Assembly lacks a general power to make payments to voluntary organisations and community groups (instead, all payments must be tied to the exercise of a specific Assembly statutory function).
54. The WCVA's main concern was about the complexity of the Assembly's powers. It argued that, because the settlement is not easy to understand,

some voluntary organisations are discouraged from contributing to policy development. A great deal of time is spent getting to grips with the current state of legislation in Wales, finding out whether initiatives announced by Whitehall apply to Wales as well as England, and lobbying both London and Cardiff on the same issues.<sup>37</sup>

55. For example, despite examining the issue of irrecoverable VAT for registered charities (a non-devolved matter), the Treasury Cross Cutting Review into the Role of the Voluntary and Community Sector in Service Delivery extended only to England. Its limited scope also excluded consideration of the role of the voluntary sector in Wales in the planning and delivery of services relating to non-devolved functions.<sup>38</sup>

### Culture, the Welsh language and sport

56. Culture is the portfolio that provides the Minister with the widest powers, owing to the breadth of the powers conferred by section 32 of the Government of Wales Act. In summary, this provision allows the Assembly to 'do anything it considers appropriate' to support the arts, museums, heritage, culture, sport, recreation and the Welsh language (although it cannot override the requirements of primary legislation). Rhodri Glyn Thomas AM, Chair of the Culture Committee, summed up the significance of these broad powers:

*I would argue that the Minister for Culture, Welsh Language and Sport is probably the best job in the Cabinet, because you can make a difference. You are not confined in any way by the constitutional settlement, whereas you would be in other portfolios, and you can make a real difference, as is happening, I think, in terms of culture in Wales.*<sup>39</sup>

57. Nevertheless, we received evidence on the limitations of this Minister's powers in three main areas: the Welsh language, the National Lottery and broadcasting. In the first two cases, the Minister wanted additional powers; in the third, the issue was more one of how the Welsh Assembly Government is able to influence the UK Government to take account of Wales' interests.

### *The Welsh language*

58. The evidence we received highlighted some problems with the scope of the Welsh Language Act 1993.
59. First, Crown bodies, including government departments and agencies, are excluded from many provisions of the 1993 Act because the indivisibility of the Crown prevented the Secretary of State for Wales being given powers over other Crown bodies. The effect of the different application of the Act to Crown bodies is to exclude them from the Assembly's specific powers to enforce the Act's requirements.<sup>40</sup>

60. The arrangements for Crown bodies therefore largely rely on voluntary compliance and persuasion, which has produced mixed results.<sup>41</sup> On average, Crown bodies have taken twice as long as other public bodies to agree a scheme with the Board. The Criminal Records Bureau agreed to provide bilingual registration forms only after a public campaign and official representations by the Assembly Government to the Home Office. Further primary legislation would be required to bring the Welsh language scheme requirements for Crown bodies into line with those applying to other public bodies.<sup>42</sup>

61. Second, both the Welsh Language Society and the Welsh Language Board highlighted that the Act's requirements apply only to named organisations and to any other public bodies that fall within the Act's definition of that term.<sup>43</sup> Consequently, private and voluntary sector organisations are generally excluded. The Assembly Government intends to use the scope under current legislation to extend the application of the Act in relation to certain utility companies exercising functions of a public nature in Wales; but any large-scale extension of the Act's application to the private or voluntary sectors would require primary legislation.<sup>44</sup>

### ***The National Lottery***

62. In relation to the Lottery, which is largely not devolved, the problems raised in evidence concerned the Assembly's ability to influence the

overall direction of Lottery funding programmes in Wales. While the Assembly has some powers to shape the funding policies of the various distributors, the Assembly Minister, Jenny Randerson AM, explained that, in practice:

*The broad outlines are set by the Department for Culture, Media and Sport, the strategic policy is set by them, and we have the power more or less to tinker around the edges. In practice that means that announcements are made very often by the UK Government which do not fit us.*<sup>45</sup>

63. This argument was reinforced by Peter Tyndall, chief executive of the Arts Council of Wales, one of the five Lottery distributors covering Wales:

*The New Opportunities Fund has had a series of programme that are UK-wide and which reflect UK Government proposals...it works with Welsh partners; but the programmes are programmes that are devised outside of Wales, and they might not be the same priorities that a Welsh government would choose.*

*In the case of the arts, it is more subtle in some ways...[Influence over individual grants] is not the issue. But there are issues around standardisation...the funding now has to be top-sliced to create a single body to publicise the Lottery. In our judgement, that will struggle to reflect the issues of Wales, not*



*least language but also the nuances.*<sup>46</sup>

64. Mr Tyndall also highlighted some uncertainties about the lines of accountability for Lottery funding – the Arts Council of Wales was accountable to the Department for Culture, Media and Sport for this expenditure, but the grant of Lottery funding to an organisation that subsequently closed down had been scrutinised by the Assembly's Audit Committee.
65. To tackle these problems, the Minister wanted additional powers to determine the Lottery funding policies for Wales, while retaining the overall UK Lottery framework:

*There is a lot to be gained by the cross-border links and in particular, for example, with the Heritage Lottery Fund we have benefited greatly in Wales from being able to tap into the central funding there for the UK as a whole. Money, for example, for the refurbishment of Cardiff Castle would be well beyond any one year's Welsh pot of money from the Heritage Lottery Fund.*<sup>47</sup>

66. Since we took evidence from the Minister in autumn 2002, the UK Government has published a Lottery White Paper,<sup>48</sup> which states that the devolved administrations should have more influence in setting specific priorities and strategies for their countries. No details are given of what this will entail, but there is a commitment to legislate if necessary.

### **Broadcasting**

67. In relation to broadcasting, few suggested that the relevant powers should transfer to the Assembly. Instead, the issue raised illustrated a wider problem that we encountered regularly during our enquiry – namely, how the Assembly is able to influence and hold to account public bodies working in non-devolved areas that impact on the responsibilities of the Assembly in Wales.
68. The Communications Act 2003 introduces a new regulatory regime for the broadcasting and communications sector to be overseen by a new regulatory body, Ofcom. At the end of 2002, the Minister was concerned that Wales's interests were not being properly addressed:

*Overall...it has proved very difficult to get the UK Government to take account of Assembly Government policy interests, and to get these reflected in the Bill. The Assembly Government has found itself in the position of having to lobby hard to ensure that Wales secures the same degree of representation within the new regulatory body as it currently has on the existing regulatory broadcasting bodies.*<sup>49</sup>

69. Eventually, the Assembly Government persuaded DCMS to include a statutory requirement for an Ofcom Office in Wales and a National Advisory Committee – but it did not secure the right to appoint a member of the Ofcom Board or a statutory



duty on Ofcom to consult the Assembly. The Minister attributed the difficulties of influencing the UK Government on this issue to a conflict of priorities rather than to any intention to hinder devolution:

*If I give you what I see as DCMS's general thrust, which is freeing up broadcasting, as little regulation as possible, and here we come along saying 'We want this more precise.'... To them that appears to be going against the flow of what they want to do. From our point of view, this is a guardianship of devolution and it is an important matter of principle, because actually we are going to have fewer guarantees than we have under the current set up.<sup>50</sup>*

70. Finally, we received evidence on this portfolio that illustrated the difficulties that can be created when issues span the boundary between devolved and non-devolved matters. The National Botanic Garden of Wales (NBGW) told us that they had been unable to identify which part of government was responsible for considering their request for funding to support systematic biology research.<sup>51</sup> The Assembly Government had advised that science was not a devolved responsibility; but the relevant Whitehall departments had decided that biodiversity (and, therefore, research on biodiversity) was the Assembly's responsibility. At the time of giving evidence, the NBGW still did not know where the responsibility lay.

## Economic development

71. As the Minister's written evidence noted, 'Economic development powers in UK primary legislation are usually drawn in broad terms and authorise a range of administrative activity, although they rarely confer subordinate order-making powers.'<sup>52</sup> Most of these executive powers have transferred to the Assembly and are mainly used for assistance to and promotion of business in Wales.
72. The Economic Development Minister also has a particular interest in the impact of regulation on the economy in Wales. The Assembly has a specific duty under section 115 of the Government of Wales Act to consult with representatives of business and other organisations where the exercise of the Assembly's functions impacts on their interests. One way in which the Assembly Government aims to build good relationships with business and trade union organisations is through the Business Partnership Council, which is chaired by the First Minister.<sup>53</sup>
73. The Minister was satisfied that the powers available to the Assembly and its agencies are sufficient to address Wales's economic challenges<sup>54</sup> – a view that was shared by CBI Wales in relation to the business environment.<sup>55</sup> Overall, the picture he described was of using a range of funding and partnership levers rather than legislation to change the economic environment in Wales. Examples include: grants and financing schemes for small and

medium-sized enterprises; the launch of WalesTrade International to promote Welsh exporting and international trade links; and *Broadband Wales*, the largest UK public sector funded project for enhanced broadband connectivity and access for business and consumers.

Department for Trade and Industry retains responsibility for power stations with a generating capacity of over 50 megawatts in Wales (but not Scotland). The Assembly Government has requested the transfer of these specific energy powers to Wales (see Chapter 9).

74. The boundary between devolved and non-devolved issues did not appear to pose a problem, with the Assembly Government seeking to work with and influence Whitehall and businesses on non-devolved issues such as energy and telecommunications. The Minister argued that the main practical constraint derives from the fact that all support to industry has to comply with relevant UK legislation and EU guidance on state aid.<sup>56</sup>
75. Beyond EU legislation, the Minister identified two specific areas in which the Assembly Government's objectives had been constrained:
- the proposal to create a statutory tourism accommodation registration scheme has been the subject of an Assembly bid for Westminster primary legislation (see Box 5.2), but did not appear in the 2003 Queen's Speech. There are unlikely to be many opportunities for this proposal to "piggy-back" onto an England and Wales Bill, because it is a relatively small measure in an area that is not regularly subject to legislation;
  - although the Assembly can regulate the development of small power stations (including wind farms), the

Box 5.2: Statutory registration of tourist accommodation in Wales

The Wales Tourist Board (WTB) first put forward the idea of a statutory registration scheme for tourism accommodation in Wales in 2000, as part of its strategy to improve the quality of the Wales tourism offer.<sup>57</sup> The WTB thought<sup>58</sup> that the scheme could be introduced under existing legislation by an Order in Council,<sup>59</sup> which would have to be taken forward by the UK Department of Culture, Media and Sport (DCMS) on behalf of the Assembly.

However, the Assembly Government identified that the existing legislation, which provides for registration by the tourist boards of England, Scotland and Wales of accommodation in Great Britain, might not allow a scheme to be operated by the Wales Tourist Board alone. An Order could come into force at *different times* in relation to England, Scotland and Wales, but would have to provide for statutory registration eventually to be implemented across all of Great Britain. Moreover, if the Order allowed accommodation to be graded, the criteria for this would have to be determined by the British Tourist Authority after consultation with the three tourist boards.

DCMS was not willing to sign up to a GB scheme, because it had already decided to take a different approach to improving the quality of accommodation in England through better enforcement of existing standards. When the Assembly Government confirmed that the only means of introducing a scheme in Wales would therefore be to amend the 1969 Act,<sup>60</sup> the Economic Development Committee commented:

*The need for primary legislation is a considerable hurdle but we note your comment at EDC last week that you were confident there would be no difficulty in obtaining the necessary legislation.*<sup>61</sup>

In March 2003, the Assembly approved a bid for new primary legislation to introduce a Wales-only scheme – although the proposal did not draw unanimous support, with some Assembly Members arguing that compulsory registration was opposed by many in the industry and would drive small providers out of business.<sup>62</sup>

The 2003-04 Queen's Speech did not promise any legislation on the scheme in the current session. A small measure like this is unlikely to be the subject of a Bill on its own; but if the proposals prove to be controversial, Whitehall may be reluctant to include them in a larger England and Wales Bill because of the potential difficulties in handling the legislation in Parliament.

### Agriculture and rural development

76. The main characteristic of this portfolio is the strong influence of European legislation and finance in shaping agricultural policy. This does not entirely rule out policy divergence; for example, the Assembly Government has developed distinctive policies such as Tir Gofal, Tir Mynydd, Farming Connect and the Agri-Food Strategy under the EU Rural Development Regulation and taken some independent steps on genetically modified organisms. But overall, the Director of Agriculture in the Assembly Government, Huw Brodie, told us that:

*The fact that the Scots have got primary legislative powers does not make a substantial difference to how their core agriculture brief works.<sup>63</sup>*

77. The extent of European regulation in this portfolio has sometimes constrained the Assembly in fulfilling its policy objectives, particularly in its early days as the institution got to grips with the scope of its powers. Box 5.3 describes two high profile examples of this – the calf processing scheme and dairy hygiene charges.

78. Most executive powers in agriculture, food, fisheries, forestry and rural development have been transferred to the Assembly – but a notable exception came to light with the outbreak of foot and mouth disease in 2001. The farming unions felt that the Assembly's limited powers had exacerbated the impact of the disease in Wales, as described by Malcolm

Thomas of the National Farmers' Union Cymru:

*We were having to wait for two or three weeks to implement exactly the same decision, a decision that we had all agreed on two or three weeks before. And, you know, two or three weeks during a period of spreading disease inevitably led to probably tens of thousands of animals being slaughtered in Wales unnecessarily.<sup>64</sup>*

79. The foot and mouth disease outbreak also provided a stark example of what has been presented as a wider feature of devolution to Wales – namely, the difficulty for the public in determining where accountability lies. The Minister at the time, Carwyn Jones AM, explained:

*We saw the Minister in Cardiff being responsible for what was taking place in Wales, although there was no legal power in force. The Minister could not stand back and say, 'This is nothing to do with me. It is to do with London.' For example, it is possible at present that if foot and mouth disease were to come back, the Minister in Cardiff could tell the DEFRA Minister, 'You can't use the Assembly staff at all.'... This is an anomaly.<sup>65</sup>*

80. In the light of this experience, the Assembly Government is negotiating with DEFRA for the transfer of wider executive powers in animal health (Chapter 9).

81. In contrast to the animal health case, in which the constraint arises from the breadth of powers transferred to the Assembly, some other constraints in this portfolio arise from the need for new primary legislation to implement the Assembly Government's objectives. For example:

- the Assembly Government would like to reform the legislation governing the management of Wales' inshore fisheries and, specifically, the Sea Fisheries Committees. The Minister told us that the existing arrangements are preventing the appropriate sustainable management of important inshore fisheries. However:

*Despite regular requests over many years by the Assembly Government and by DEFRA for amendments to be made to the [1966 Sea Fisheries Regulation] Act, our attempts have been thwarted by a lack of parliamentary time.<sup>66</sup>*

- DEFRA and the Assembly Government are now working together on comprehensive proposals for an England and Wales Bill to reform common land management, after the Assembly first submitted its own bid for primary legislation on the specific issue of statutory commons management associations. DEFRA has promised to seek a legislative slot for the Bill in 2004-05;<sup>67</sup>
- the Minister told us that the Assembly Government would like to establish a separate Hill Farming Advisory Committee for Wales 'with a membership that reflects the broader interests relating to farming in the more

marginal agricultural area of Wales', but needs primary legislation to do so;<sup>68</sup>

- the Assembly can enter into agreements with other bodies in the public sector to carry out functions on its behalf, but does not have equivalent powers in relation to the voluntary sector.<sup>69</sup> This constraint delayed implementation of the Rural Stress Scheme under the post-foot and mouth Rural Recovery Plan.<sup>70</sup>

**Box 5.3: The influence of Europe: the calf processing aid scheme and dairy hygiene charges**

One of the first tests of the Assembly's powers was the proposal to extend the calf processing scheme in Wales. This UK-wide scheme, which provided EU-financed aid to farmers for male calves born into dairy herds, had been introduced in the wake of the BSE crisis to help farmers adjust to the loss of markets. The UK scheme was due to end on 31 July 1999 and, under EU rules, had to finish before 31 December 1999.

After the UK scheme closed, the then Assembly Secretary for Agriculture and Rural Development, Christine Gwyther AM, set out her support for a Wales-only scheme, but warned that the decision would not rest with the Assembly alone:

*I have also made it clear that, if my colleagues in the other territories won't agree to an UK-wide scheme, I will have to secure their agreement on a Wales-only scheme. The Assembly does not have the power to implement a scheme unilaterally...The proposed payment reduction and the proposal that it would operate in Wales alone would also require approval by the European Commission.<sup>71</sup>*

Not long after informing the Agriculture and Rural Development (ARD) Committee that the scheme would proceed on a Wales-only basis,<sup>72</sup> the Minister had to report that discussions with the European Commission had run into problems:

*The calf processing aid scheme is a measure for Member States to adopt, and discussions so far have not found a way in which it would be legally possible to operate it in part of a Member State so that calves from elsewhere in that State could be excluded...<sup>73</sup>*

It soon became clear that the European Commission would not approve the scheme. The Assembly was not alone in facing difficulties with EU state aid rules; an attempt by the Scottish Executive to obtain approval for a cull ewe scheme had also failed.<sup>74</sup> Nevertheless, some Assembly Members claimed that the Agriculture Secretary had misled the Assembly and the dairy industry as to the likely chances of securing a Wales-only scheme, and she was subsequently censured by the Assembly.<sup>75</sup>

**Box 5.3: The influence of Europe: the calf processing aid scheme and dairy hygiene charges (continued)**

Attention then turned to how to use the £750,000 originally allocated for the calf processing scheme in a way that would benefit agriculture. It was agreed that the money should be directed into the dairy sector as far as possible, so the ARD Committee proposed that £180,000 should be allocated to funding dairy hygiene inspection charges in Wales for one year.<sup>76</sup>

The Cabinet subsequently decided in principle to lift the charges permanently in Wales, but could not make a firm decision to do so because it could constitute a state aid, which would require approval by the European Commission.<sup>77</sup> Moreover, although the Assembly had the necessary statutory powers, the Commission was unlikely to approve lifting the charges on a Wales-only basis because it would be seen as discriminating against English farmers.

However, 'these difficulties would not arise if any application went forward on an England and Wales basis, since this would bring practice in those two countries into line with existing charging policies in the rest of the UK.'<sup>78</sup> After Assembly pressure, the UK Ministry's announcement on 30 March 2000 that it would abolish dairy hygiene charges in England finally cleared the way for the Assembly to lift charges in Wales.

**Environment, planning and transport**

82. This portfolio covers three broad policy fields that differ somewhat in their nature and source of authority – environment is strongly influenced by Europe, most planning and historic environment powers are devolved to the Assembly, while the UK Government retains many functions relating to transport. The portfolio also encompasses lead responsibility for one of the Assembly's overarching themes – sustainable development.<sup>79</sup>

83. The Minister for Environment, Sue Essex AM, told us that she had not

found this variation to be a constraint in managing an integrated brief – although she indicated that this might alter if the obligations emerging from Europe and the UK were not in line with the Assembly's policy approach. In her view,

*[The portfolio] has not evolved so much, in my experience, around issues like powers, although that is important; it is very much the style of trying to develop policy and deliver on the ground which I think has been the hallmark of the last couple of years.<sup>80</sup>*



84. Where the Assembly lacked powers, the Minister told us that she had been able to secure primary legislation in England and Wales Bills for some policy objectives (for example, on development plans, the Wales Spatial Plan and local authority municipal waste strategies).<sup>81</sup> The Assembly Government had also been able to influence decisions on major non-devolved matters such as the decision to allow a non-profit making company, Glas Cymru, to acquire Dŵr Cymru). Overall, the only area where she had felt constrained by the Assembly's powers was transport.
85. By and large, evidence from the Assembly's partners in Wales did not contradict this assessment, except in relation to sustainable development. While praising the open and imaginative way that the Assembly Government had taken forward this statutory duty, several organisations felt that the Assembly's ability to promote sustainable development in Wales has been limited by its lack of primary legislative and/or executive powers in areas such as the marine environment, building standards, energy and transport.<sup>82</sup>
87. The Transport Act 2000, which created the statutory basis for implementing the UK Government's integrated transport policy framework,<sup>83</sup> enhanced the Assembly's functions in relation to public transport and traffic management, including responsibility for quality bus partnerships and travel concessions. The Assembly Government has used its powers to require local authorities to guarantee free travel on local buses for people aged 60 or over and disabled people.
88. However, powers to regulate public transport services in Wales have not been devolved to the Assembly, and it is only a statutory consultee in strategic and operational matters affecting railways in Wales.
89. The Minister told us that, to achieve an integrated transport system, the Assembly needs stronger powers to set transport priorities and to work in partnership with local authorities and the private sector to deliver them. She is therefore seeking powers 'similar to those available to the Mayor of London'<sup>84</sup> to develop and implement policies for the promotion and encouragement of integrated transport facilities.

### *Transport*

86. The Assembly currently has only a limited set of powers with which to fulfil its aspirations for an integrated and sustainable transport system. The powers inherited from the Secretary of State for Wales primarily concern the motorway and trunk road network in Wales.
90. These powers have been the subject of a formal bid from the Assembly for a Transport (Wales) Bill, which would give the Assembly powers to establish joint authorities on the lines of Passenger Transport Authorities and supporting Executives (PTA/PTEs). There are already some voluntary regional transport consortia in Wales,

but both the Minister and the Environment, Planning and Transport Committee<sup>85</sup> have argued that the Assembly should have available the power to apply statutory pressure to strengthen delivery if needed. The Minister explained:

*The issue is, will those voluntary collaborations achieve the outcomes and integration we want to see. Should we wish to – and I want to make it clear I am not saying we wish to – strengthen that because we feel the outcomes are not being achieved, ...I think it is right and proper as a strategic government that we have the power to try and help that along.*<sup>86</sup>

91. The Minister is also seeking powers in primary legislation to strengthen the Assembly's influence over rail transport. This issue illustrates an important distinction between the legislative and executive components of the Scottish devolution settlement. Under an agreement made during the passage of the Scotland Act 1998,<sup>87</sup> the Scottish Executive has been given executive powers that extend beyond the Parliament's legislative competence<sup>88</sup> – and that are stronger than those held by the Assembly in relation to Wales. Thus Scottish Ministers' powers include:

- responsibility for issuing binding directions and guidance to the Strategic Rail Authority (SRA) in relation to services that start and finish in Scotland (the ScotRail franchise) and for the associated

funding. The SRA would not need to comply if Scottish Ministers did not provide the required funding or the measures would adversely affect any rail services outside Scotland;

- a statutory right to issue non-binding advice to the SRA in respect of passenger rail services that cross the border into Scotland.

92. In contrast, the Transport Act 2000 only gave the Assembly a right to be consulted by the SRA on its strategies. The Assembly Government is now seeking powers of guidance and direction over the SRA similar to those of the Scottish Executive, and a further power to appoint a member of the SRA directly.<sup>89</sup> Professor Stuart Cole of the Wales Transport Research Centre at the University of Glamorgan explained why he believed that stronger powers for the Assembly to influence the SRA's strategy would lead to better rail services in Wales:

*The SRA's primary objective is to look at mass transport of people ...that means that, to the SRA, the Welsh railway services are at the edge of their primary agenda...*

*[In relation to investment in service improvements], 'currently the decision is made by the SRA within its whole range of priorities. Now that decision would subsequently be made by the Assembly Government in terms of directing the SRA...but at the same time agreeing with the SRA a funding amount to carry out that work.'*<sup>90</sup>

93. Thus the new powers would enable the Assembly to require certain rail service improvements in Wales, but delivery would still be dependent on the funding being in place. In Scotland, the UK Government has transferred funds to the Scottish Executive to fund the SRA for existing commitments relating to the ScotRail franchise – the money for any extra service improvements will have to be found from within the Scottish Block.
94. Until recently, the UK Government has resisted transferring additional powers in relation to railways and PTA/PTEs, arguing that the Welsh railway network has a much greater degree of interdependence with the English network than is the case for Scotland and that existing legislation for transport partnerships is adequate.<sup>91</sup> However, the UK Secretary of State for Transport has recently announced that he will consider how more decisions on public transport can be devolved.<sup>92</sup>
- Finance, local government and communities**
95. Much of the Minister's evidence on this portfolio dealt with finance, which is examined in Chapter 10.
96. Across her other responsibilities, the Minister, Edwina Hart AM, emphasised how she has been able to take forward a distinctive Welsh agenda. Despite the cross-cutting nature of social inclusion and community safety issues, the Minister's evidence suggested that the Assembly Government has had sufficient scope to develop its own approach in Wales, using a combination of specific statutory powers and partnership working with local and UK Government bodies. Examples include the Communities First regeneration programme and the Assembly Government's Crime Reduction Unit, which supports local Crime Reduction Partnerships under a service level agreement with the Home Office.
97. Nevertheless, she identified some specific constraints on her powers – some relating to primary legislation and others arising from the UK Government's retention of specific delegated powers – which are discussed below.
98. The Welsh devolution arrangements set out to establish 'a new partnership between central and local government founded on mutual respect.'<sup>93</sup> Accordingly, the Government of Wales Act requires the Assembly to make a scheme setting out how it will sustain and promote local government in Wales and to set up an advisory Partnership Council<sup>94</sup> – arrangements that are not replicated in Northern Ireland or Scotland.
99. The Welsh Local Government Association (WLGA) told us that these arrangements are working well and that the opportunity to develop a distinctive local government agenda in Wales had been beneficial – for example, in the development of the Wales Programme for Improvement under Best Value legislation.<sup>95</sup>

100. The majority (but not unanimous) view of the WLGA was that the Assembly's existing powers are generally sufficient to shape policy and delivery to meet Wales' needs. However, it argued that, in some areas, greater scope is needed in the delegated powers conferred on the Assembly to ensure that policy reforms in non-devolved areas, such as licensing, are compatible with the Assembly Government's objectives on devolved matters.<sup>96</sup>
101. There has been a regular programme of primary legislation on local government since the Assembly was established. Although this is a field in which functions have been devolved, the Minister's evidence pointed to examples in the Local Government Acts of 1999 and 2000 where the UK Government has retained delegated powers rather than transferring them to the Assembly, because they affect non-devolved matters or would enable the Assembly to amend primary legislation. The Minister argued that this has created delay or barriers to delivery: for example, in reducing the regulatory burden on local authorities. She went on to explain how the Assembly Government had learnt from that experience:

*We are [now] much more proactive in getting our messages across. We have had a lot more discussions at official level and the new Local Government Act<sup>97</sup> that is coming in reflects a lot of what we want in Wales.<sup>98</sup>*

102. This local government legislation is discussed further in Chapter 7, which looks at how Whitehall decides which of the new powers proposed in Bills on devolved areas should be given to the Assembly.

103. In relation to housing, the evidence<sup>99</sup> highlighted the need for primary legislation to introduce a social housing ombudsman service in Wales. Provision for this has since been included in the Housing Bill that is currently before Parliament. The Welsh Overseas Agencies Group argued that the Assembly's housing responsibilities should be broadened to cover arrangements for housing asylum seekers in Wales. The Assembly Government itself is not seeking these powers, but it has successfully made representations to the UK Government on specific cases.<sup>100</sup>

104. Finally, the Minister put the case for devolving broader powers to the Assembly in relation to the fire service and police funding. These issues are covered in Chapter 9.

### **Open government and equal opportunities**

105. At the time we took evidence from Ministers, the Business Minister, Carwyn Jones AM, also had lead responsibility for a range of policy matters. The main issue that emerged from this portfolio was the jagged edge that exists between the responsibilities of the Assembly and the UK Government in relation to equal opportunities.

106. The Government of Wales Act places a specific duty on the National Assembly to make 'appropriate arrangements with a view to securing that its functions are exercised with due regard to the principle that there should be equality of opportunity for all people'.<sup>101</sup> There is an equivalent obligation on the Assembly in respect of its conduct of its business.<sup>102</sup> The Assembly Standing Committee on Equality of Opportunity monitors arrangements for fulfilling these duties.

107. In response to a query raised in evidence,<sup>103</sup> the Assembly Government has confirmed that the duty under section 120 allows the Assembly to promote equality of opportunity in the exercise of its functions. However, it does not create new powers in fields that are otherwise outside the Assembly's remit, such as employment law.<sup>104</sup> Beyond the two statutory duties, equal opportunities is not a devolved policy matter – for example, Secretary of State functions under equal opportunities legislation have not been transferred to the Assembly in relation to Wales.

108. Overall, the evidence indicates that the Assembly has been able to make a difference on equal opportunities with the powers it has.<sup>105</sup> Nevertheless, the Commission for Racial Equality argued that more progress has been made in Scotland because it has been possible to build equal opportunities principles into primary legislation in areas such as housing and education.<sup>106</sup>

109. We also heard that the shared responsibility for equal opportunities with the UK Government has created some problems:

- because equal opportunities policy spans devolved and non-devolved responsibilities, it can be difficult to identify whether it is the Assembly or the UK Government that is responsible for policies and funding on any particular issue – with the risk that some important issues fall between the two stools. This problem – which we also encountered in other policy areas – was illustrated by Naz Malik, Director of the All Wales Ethnic Minority Association:

*The [Home Office Connected Communities Grant] funding was coming to an end and what we were told was, 'You proved your worth, the Assembly should now be funding you.' So we went to the Assembly and the Assembly said, 'It is not our purpose, you really need to go to the Home Office.' ... It took some serious representations to be made for that funding to be extended.<sup>107</sup>*

- there are no formal statutory advice and accountability links between the UK/GB statutory equality bodies<sup>108</sup> and the Assembly. The UK Government approves the strategic work plans for these bodies and the Assembly has no formal input. In practice, informal arrangements have worked well, with representatives attending meetings of the Assembly Equality of Opportunity Committee and taking on extra work for the Assembly Government, sometimes with the

funding alongside. Nevertheless, Kate Bennett, Director of the Equal Opportunities Commission in Wales, told us that:

*We would like to see those kind of links more formalised. We are not obliged to [advise the Committee] and they are not obliged to listen. It seems to me that that is a gap.*<sup>109</sup>

110. The UK Government's decision to create a new single Commission for Equality and Human Rights<sup>110</sup> potentially offers an opportunity to review the relationship between the statutory advisors and the Assembly.

111. At the time of writing, legislation is proposed on two other policies that were raised in the Minister's evidence:

- a Regulatory Reform Order is being drawn up to remove the bar to the posts of Ombudsman for Housing, Local Government and Public Administration all being held by the same individual – but new primary legislation is still needed to allow the Assembly Government to implement its policy of joining these posts to create a single Ombudsman for Wales;
- the Civil Contingencies Bill will require the UK Government to consult the Assembly on emergency planning arrangements for Wales.

### European and external relations

112. International relations are not devolved to any part of the UK, but the devolved governments have an important role in the implementation and negotiation of EU and other international obligations. Like its counterparts in Northern

Ireland, Scotland and elsewhere in Europe, the Assembly cannot pass legislation that is incompatible with EU law nor breach any international obligations.

113. Two concordats (which are not legally binding) between the UK Government and the devolved administrations cover practical working arrangements on EU policy and wider international relations.<sup>111</sup> Among other things, these agreements provide that the UK Government will take account of the Assembly Government's views in formulating the UK's negotiating position in Europe – but the Assembly Government must subsequently follow the UK's line.

114. Although wider international relations are important to the Assembly Government's policy agenda, it is the EU that has the most direct and far-reaching impact on the Assembly's powers. EU legislation places significant limits on the discretion of the Assembly in fields such as agriculture, fisheries, the environment and the internal market. For example, in relation to the calf processing scheme, primary legislative powers would have made no difference to the Assembly's ability to act, because the constraints arose from European state aid rules.

115. In his evidence, Michael German OBE AM, the Deputy First Minister and Minister for Rural Development and Wales Abroad, illustrated how the Assembly Government was working to promote Wales' interests and raise the profile of Wales on the international



stage. He likened the process of influencing EU policy to ‘three-dimensional chess’<sup>112</sup> – holding discussions in a co-ordinated way with both the UK Government and the European Commission (either directly or through regional networks) in order to achieve Wales’s desired position without undermining the UK’s line. While he was keen to extend the Assembly’s influence, he did not have cause for complaint about the arrangements.

116. The Chair of the Assembly’s European and External Affairs Committee, Tom Middlehurst AM, told us that the Committee scrutinises the Welsh Assembly Government’s input into EU and international matters, but does not have enough time to review in detail the impact on Wales of individual EU policies.<sup>113</sup> Sir David Steel MSP (as Presiding Officer of the Scottish Parliament) suggested that the scrutiny of EU legislation is one of a number of areas in which there is scope for greater sharing of expertise between the various legislative bodies in the UK.<sup>114</sup>

117. The evidence suggests that the main practical constraint on Assembly action in this portfolio is the way in which the Assembly is given powers to implement EU legislation. While the Scottish Executive has a general power to implement new EU legislation in its areas of devolved competence,<sup>115</sup> the Assemblies of both Wales and Northern Ireland must negotiate with the UK Government on a case-by-case basis for the necessary powers.<sup>116</sup>

118. The Minister told us that this process is resource intensive and often subject to uncertainty and delay, because Whitehall’s agreement must be obtained to both the principle and the precise form of the new powers:

*It is always frustrating because the natural instinct [in Whitehall] is not to change until such time as you can demonstrate there is a need to change, and that is what takes the time and energy.<sup>117</sup>*

119. As discussed in Chapter 2, the European Convention has recently drafted a treaty that would establish a European Constitution.<sup>118</sup> The draft Constitution recognises for the first time the part played by regional governments within Member States of the EU,<sup>119</sup> but does not, as was proposed at an earlier stage, distinguish between regions on the basis of the extent of their legislative powers.

120. Jill Evans MEP and Eurig Wyn MEP told us that the regions with stronger legislative powers have more influence in Europe and that these regions continue to show interest in differentiating themselves from regions with purely executive powers, including organisationally in representations to the European Commission.<sup>120</sup> Nevertheless, the evidence overall shows that the amount of effort invested in European representation is at least as important in this respect – and experience suggests that it will continue to be the largest and most economically important regions that exert the greatest influence.



### Complexity of the settlement

121. We conclude this chapter on the executive devolution settlement by returning to the issue of its complexity. Are the boundaries between devolved and non-devolved issues particularly difficult to understand in this model of executive devolution and with what consequences?

122. The complexity issue was raised in the evidence of John Osmond, Director of the Institute of Welsh Affairs and Professor Keith Patchett, Emeritus Professor of Law, University of Wales, and was reinforced by many subsequent witnesses. John Osmond noted that:

*If you look at the Transfer of Functions Order – it's a big document – you have to go through hundreds of Acts of Parliaments. There have been many incidents when the Assembly has been trying to do something and then has had to ask itself whether it can do it. There have been a number of occasions when there have been differing views.*<sup>121</sup>

123. Examples of this confusion in the early days of the Assembly discussed above include the calf processing scheme and dairy hygiene charges, the handling of the foot and mouth disease outbreak in 2001 and performance pay for teachers.

124. Keith Patchett likened the Wales devolution settlement to 'a jigsaw of ever changing pieces where there are no straight edges' and suggested that the picture is made even more

complex by the lack of consistency in the way in which powers are conferred on the Assembly:

*The problem is compounded by the overlapping arrangements that sometimes exist...It's not only the powers that have been conferred; sometimes they are conferred subject to limitations. It may be that the power is conferred but you have to exercise it with someone else. Sometimes it's joint action that has to be taken. Instead of getting a clear picture, you have to look around to find clarity as to the exact nature of the power. Unfortunately, these things change day by day as new powers are conferred and altered.*<sup>122</sup>

125. While accepting that the Scotland settlement has its own complexities, he argued that it is easier for the public to understand because broad subject areas are wholly devolved to the Scottish Parliament.<sup>123</sup>

126. This evidence illustrates one aspect of the complexity argument – the claim that it is difficult to know whether or not responsibility for a particular function rests with the Assembly in Wales. We discussed this in detail with the Counsel General to the Assembly, Winston Roddick QC and his colleagues, who advise the Assembly Government day to day on the interpretation and application of the powers devolved to them.

127. The Counsel General argued that the complexity argument can be overstated:

*In practice, I have dealt with problems of law and statutes that were infinitely more complex than the settlement which we have had to deal with here. That is why I can say with some confidence, reflecting on the experience of my colleagues, that we have not encountered unusual uncertainties or complexities some witnesses claim to exist.*<sup>124</sup>

128. Looking at the teachers' performance pay issue, he pointed out that, although the Committee sought legal advice on the Assembly's powers, the original advice of the Assembly education lawyer was eventually upheld. It was also the case that, in some other examples cited (genetically modified crops, the calf processing scheme and dairy hygiene charges), the problem was not the boundaries of the Assembly's powers vis-à-vis those delegated to English Ministers, but the limitations placed by European competence.

129. Moreover, the Counsel General and his colleagues argued that the boundaries between devolved and non-devolved powers in the Scottish settlement also contain areas of complexity, and that English Ministers as well frequently need legal advice to establish whether the powers available to them are sufficient to allow them to act in a certain way. Overall, he concluded that:

*If a decision is to be made as to whether Wales should have a different kind of devolution settlement, that is a decision which*

*needs to be made by reference to matters of principle or considerations other than the alleged complexity and uncertainty of the existing settlement.*<sup>125</sup>

130. While the Counsel General was clear that the settlement does not present unusual legal challenges to Assembly lawyers, others argued that the public, legal practitioners and organisations outside the Assembly do find it difficult to know what the Assembly's responsibilities are, and how they relate to those of the UK Government.<sup>126</sup> Therefore, the nature of the settlement has implications for public accountability and participation in policy development.

131. The other aspect of complexity in the current settlement that was raised in evidence is the claim that it is now more difficult to ascertain the state of the law in Wales on a particular subject at a particular date. Professor David Miers explained why this is not just a technical matter:

*It is a standard requirement of any constitution that those affected by the law should be able to ascertain clearly, accurately and in an up-to-date format what their legal rights and duties are. To the extent that these differ and are beginning to differ and will no doubt widen in extent from those rights and duties that are applied across the border, it is in our judgement not an easy task, without overstating the matter, for individuals to ascertain them.*<sup>127</sup>

132. On this issue, the Counsel General argued that the problem existed in Wales before devolution, but acknowledged that the devolution settlement could make it more complicated. He explained how the Assembly has a collection of powers given to it piecemeal in a number of Acts and transfer of functions orders, which is continually changing as more legislation is made. This is supplemented by the growing body of secondary legislation made by the Assembly. All these elements must be identified and considered in order to find out what the law is on a specific issue in Wales at a particular time.<sup>128</sup>

### Options for addressing complexity

133. It is possible both to accept the Counsel General's argument that the settlement is clear in legal terms and does not present unusual problems for those whose job it is to operate it, but at the same time recognise the force of lay and academic evidence that the complexity of the boundary between devolved and non-devolved matters is a problem.

134. The issue of the complexity of the settlement is distinct from the wider question of whether the Assembly should have the power to pass primary legislation. The weight of evidence does reflect an aspiration that, within the framework of executive devolution, there should be a simpler boundary than currently exists between devolved and non-devolved powers. This would mean that it would be possible to say: "For the fields set out in Schedule 2 of

the Government of Wales Act – all executive functions in these fields, created by any Act of Parliament, are exercisable by the National Assembly for Wales, except in the following areas".

135. The Commission explored the scope for recasting the existing settlement in this way.<sup>129</sup> This seems to be impracticable for a number of reasons:

- it would involve re-transferring functions already transferred to the Assembly;
- it would require a major joint exercise by officials of the Assembly and Whitehall to trawl through all Ministerial powers in the relevant fields to identify those which should be excepted from a presumption in favour of transfer – which would tie up significant staff resources;
- the Counsel General's view was that an Order under section 22 of the Government of Wales Act 1998 would have to specify the functions to be transferred, and could only transfer functions vested in Ministers at the time of its making.<sup>130</sup>

136. The Commission would not see such a retrospective exercise as a priority because it would not remove many of the present jagged edges which are there for policy reasons.

137. Another means of simplifying the settlement would be to use future legislation to confer broad new delegated powers on the Assembly that effectively create a presumption of delegation to the Assembly in broad fields. This would have meant, for

example, including in the Animal Health Act 2002 a broad provision to the effect that the Assembly might make “any regulations as might seem to it appropriate in order to promote the purposes of this Act ie animal health” (with whatever provisions as might be needed in respect of agreement with the UK Government to take account of cross-border issues).

138. This approach would extend the powers of the Assembly by giving it broad scope to regulate within the fields of the Act. It challenges the prevailing distinction between primary legislation (which fixes the key principles of a policy) and secondary legislation (by which government or the Assembly determines how to implement these principles). We consider that aspect further in Chapter 7, which examines how the delegated powers in Bills are negotiated between Whitehall and the Assembly Government.

139. Although they would help, neither of these options alone would fully address the problem of being able to ascertain the state of law on a particular issue, because this also requires a knowledge of how the Assembly has exercised its powers in subordinate legislation. There are commercial databases that legal practitioners can use to extract this information; and, with grant funding from the Arts and Humanities Research Board, the Cardiff Law School has set up *Wales Legislation On-line*, a free database that provides information on the Assembly's functions and subordinate legislation by subject.<sup>131</sup>

## Findings

Our findings on the evidence in this chapter are summarised below:

### Context

- the review of the Ministerial portfolios in this chapter shows the Assembly Government working creatively, and in partnership with the UK Government, within the delegated powers;
- these formal powers need to be seen in the context of the other substantial powers available to the Assembly Government:
  - its leadership role deriving from its democratic mandate;
  - its control of the £10 billion budget delegated to the Assembly;
  - its role as convenor of statutory partnerships with local government, business and the voluntary sector;
  - its policy initiating role deriving from analysis and evidence – as well as responding to policy ideas generated by other stakeholders;

### Adequacy of the powers

- policies are designed to address real life problems, which rarely fit neatly into the delegated powers framework – as a consequence, the Assembly Government has been pushing out the boundaries of devolution, by seeking further powers and by working in collaboration with non-devolved agencies;

- there are many examples where the Assembly Government has been able to deliver policies designed for Wales using its delegated powers and the other policy levers available;
- the Assembly Government has been successful in obtaining the primary legislation required for its most urgent priorities – but there are frustrations about the time needed to deliver change;
- the experience of the first four years of devolution and the increased policy development capacity of the Assembly have changed the context for debating the powers: in 1999, the Assembly Government was getting to grips with its new powers and responsibilities; in 2004, it is recognised as the initiator of policy on devolved matters and as a major stakeholder, deriving from its democratic mandate, on non-devolved issues as well;
- the evidence also shows the boundaries of the devolution settlement constantly changing in response to changes in the structure of the delivery or regulation of public and private services in the UK;
- in many cases, the relationship between the Assembly and UK or England and Wales bodies that impact on its responsibilities is unclear and lacks a statutory basis – and the picture is becoming more complex as new bodies are created each year;

#### *External constraints*

- in some policy areas, notably agriculture, industrial aid and environmental protection, European legislation is as much, if not more, of a constraint on the options available to the Welsh Assembly Government as the UK legislation – in these areas, the scope for distinctive action is often equally limited in Scotland and Northern Ireland;

#### *Style of governance*

- as well as developing new policy content, the Assembly is promoting greater participation in the policy-making process, which is widely welcomed – although some also highlighted the difficulties for business and the voluntary sector of keeping pace with the Assembly's consultations;

#### *The UK framework*

- in all portfolios there are jagged edges, where policy objectives span both devolved and non-devolved areas – some are unique to the Welsh settlement, some exist in the settlements for Scotland and Northern Ireland as well;

#### *Complexity*

- in most portfolios, clarity and lack of certainty about the scope of the Assembly's powers was an issue during the First Assembly – for those operating the settlement the problem seems to be diminishing with experience, but this remains a central issue for accountability to, and engagement with, the people of Wales;

- **clarity and accountability would be improved greatly if the devolved powers could be more clearly drawn around areas of policy responsibility, rather than the detail of specific powers – but re-defining the Assembly’s existing powers in this way seems impracticable and would not remove many of the present jagged edges.**

## Notes

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<sup>1</sup>The majority of this evidence was provided by the Ministers in post in November-December 2002.

<sup>2</sup>Scotland Act 1998, c.46, sections 53-57 and schedule 4, part III.

<sup>3</sup>Listed in Chapter 4, Box 4.1.

<sup>4</sup>Oral evidence of Professor David Miers and David Lambert, 28 February 2003.

<sup>5</sup>Oral evidence of the Rt Hon Ron Davies AM, 26 September 2002.

<sup>6</sup>Oral evidence of the First Minister, 12 December 2002.

<sup>7</sup>Oral evidence of the First Minister, 26 July 2003.

<sup>8</sup>Oral evidence of the Minister for Education and Lifelong Learning, 24 October 2002.

<sup>9</sup>This is discussed in more detail in Chapters 7 and 8 on Wales’ relationship with Whitehall and with Westminster.

<sup>10</sup>Oral evidence of the Minister for Education and Lifelong Learning, 24 October 2002.

<sup>11</sup>Ibid.

<sup>12</sup>Ibid. Richard Davies.

<sup>13</sup>Ibid.

<sup>14</sup>Oral evidence of Plaid Cymru The Party of Wales, 27 February 2003.

<sup>15</sup>Oral evidence of the Minister for Education and Lifelong Learning, 24 October 2002.

<sup>16</sup>The Education and Training Action Group for Wales, *The Education and Training Action Plan for Wales* (Cardiff: Welsh Office, March 1999).

<sup>17</sup>Post-16 Education and Training Committee, *Taking Forward the Recommendations of the Education and Training Action Group* (Cardiff: National Assembly for Wales, December 1999).

<sup>18</sup>Oral evidence of Undeb Cenedlaethol Athrawon Cymru, 26 June 2003.

<sup>19</sup>Minutes of the Pre 16 Education, Schools and Early Learning Committee, 1 March 2000, PRE 16-03-00(min).

<sup>20</sup>Annex 1 to the Minutes of the Pre 16 Education, Schools and Early Learning Committee, 15 March 2000, PRE 16-04-00(min).

<sup>21</sup>Pre 16 Education, Schools and Early Learning Committee, 12 April 2000, Paper PRE 16-06-00(p.4).

<sup>22</sup>The Education (School Teacher Appraisal) (Wales) Regulations 1999, SI 1999/2888 (W.25).

<sup>23</sup>Letter from Estelle Morris MP to William Graham AM, 25 May 2000.

<sup>24</sup>*Lost in Care: Report of the Tribunal of Inquiry into the abuse of children in care in the former county council areas of Gwynedd and Clwyd since 1974*, HC 201 of 1999-2000 (London: The Stationery Office, February 2000).

<sup>25</sup>National Assembly for Wales, *Improving Health in Wales: A Plan for the NHS with its Partners* (Cardiff: National Assembly for Wales, January 2001).



- <sup>26</sup>Oral evidence of John Osmond, Director of the Institute of Welsh Affairs and Professor Keith Patchett, University of Wales, 26 September 2002.
- <sup>27</sup>Details of the provisions and their handling are set out in Simon McCann, 'Permissive Powers are Good for the Health: The Health Reforms in Wales', *Wales Law Journal*, 1 (2003), 176-186.
- <sup>28</sup>Oral evidence of the Minister for Health and Social Services, 7 November 2002.
- <sup>29</sup>Ibid.
- <sup>30</sup>Oral evidence of the Chief Executive and Sue Williams, the Youth Justice Board, 14 March 2003.
- <sup>31</sup>The Royal Commission on Long Term Care, *With Respect to Old Age: Long Term Care - Rights and Responsibilities*, Cm 4192 (London: The Stationery Office, March 1999).
- <sup>32</sup>Oral evidence of the Minister for Health and Social Services, 7 November 2002.
- <sup>33</sup>Oral evidence of Professor David Bell, Stirling University, 12 February 2003.
- <sup>34</sup>Oral evidence of the Minister for Health and Social Services, 7 November 2002.
- <sup>35</sup>Government of Wales Act 1998 c.38, section 114.
- <sup>36</sup>Written evidence of the Wales Council for Voluntary Action, June 2003; see also the oral evidence of the Inter Faith Council for Wales, 22 May 2003.
- <sup>37</sup>See also the discussion on lobbying Whitehall in Chapter 7 on the Wales-Whitehall relationship.
- <sup>38</sup>Written evidence of the Wales Council for Voluntary Action, June 2003.
- <sup>39</sup>Oral evidence of the Chair of the Culture Committee, 12 December 2002.
- <sup>40</sup>For example, to set and enforce the timetable for preparing a scheme; and to decide the terms of the scheme. See the supplementary written evidence of the Counsel General, June 2003, for more details.
- <sup>41</sup>Written evidence of the Welsh Language Board, March 2003.
- <sup>42</sup>The supplementary written evidence of the Minister for Culture, Welsh Language and Sport, 26 August 2003, and of the Counsel General, 26 June 2003, confirm that the Assembly could be granted powers to direct other Crown bodies to take certain steps in relation to the Welsh language.
- <sup>43</sup>Written and oral evidence of the Welsh Language Society, April 2003, and of the Welsh Language Board, 28 March 2003.
- <sup>44</sup>Supplementary written evidence of the Minister for Culture, Welsh Language and Sport, 26 August 2003, and of the Counsel General, June 2003.
- <sup>45</sup>Oral evidence of the Minister for Culture, Sport and the Welsh Language, 21 November 2002.
- <sup>46</sup>Oral evidence of the Chief Executive of the Arts Council of Wales, 10 April 2003.
- <sup>47</sup>Oral evidence of the Minister for Culture, Sport and the Welsh Language, 21 November 2002.
- <sup>48</sup>Department for Culture, Media and Sport, *National Lottery Funding: Decision Document* (London: DCMS, July 2003).
- <sup>49</sup>Written evidence of the Minister for Culture, Sport and the Welsh Language, November 2002.
- <sup>50</sup>Oral evidence of the Minister for Culture, Sport and the Welsh Language, 21 November 2002.
- <sup>51</sup>Oral evidence of the Chairman and Interim Director of the National Botanic Garden of Wales, 13 June 2003.
- <sup>52</sup>Written evidence of the Minister for Economic Development, October 2002.
- <sup>53</sup>Membership of the Business Partnership Council includes eleven AMs from across all the parties.
- <sup>54</sup>Oral evidence of Minister for Economic Development, 7 November 2002.
- <sup>55</sup>Oral evidence of the Chair and Director of CBI Wales, 28 March 2003.



- <sup>56</sup>Oral evidence of Minister for Economic Development, 7 November 2002.
- <sup>57</sup>Wales Tourist Board, *Achieving Our Potential - A Tourism Strategy for Wales*, (Cardiff: Wales Tourist Board, 2000).
- <sup>58</sup>Wales Tourist Board, *Statutory Registration of Tourist Accommodation in Wales*, (Cardiff: Wales Tourist Board, July 2002).
- <sup>59</sup>Development of Tourism Act 1969, section 17.
- <sup>60</sup>Economic Development Committee, 16 January 2003, Paper EDC 01-03 (p.1): Annex A.
- <sup>61</sup>Letter from the Chair of the Economic Development Committee to the Minister for Economic Development, 21 January 2003.
- <sup>62</sup>*National Assembly for Wales Record of Proceedings*, 12 March 2003.
- <sup>63</sup>Oral evidence of the Deputy First Minister and Minister for Rural Development and Wales Abroad, 8 November 2002.
- <sup>64</sup>Oral evidence of Malcolm Thomas, National Farmers' Union Cymru and other agriculture organisations, 8 May 2003.
- <sup>65</sup>Oral evidence of the Minister for Open Government, 22 November 2002.
- <sup>66</sup>Supplementary written evidence of the Minister for Environment, Planning and Countryside, July 2003.
- <sup>67</sup>*Ibid.*
- <sup>68</sup>Written evidence of the Deputy First Minister and Minister for Rural Development and Wales Abroad, November 2002.
- <sup>69</sup>Government of Wales Act 1998 c.38, section 41.
- <sup>70</sup>Written evidence of the Deputy First Minister and Minister for Rural Development and Wales Abroad, November 2002.
- <sup>71</sup>*National Assembly for Wales Record of Proceedings*, 15 September 1999.
- <sup>72</sup>Minutes of the Agriculture and Rural Development Committee, 21 September 1999, ARD 11-99 (min).
- <sup>73</sup>*National Assembly for Wales Record of Proceedings*, 7 October 1999.
- <sup>74</sup>*National Assembly for Wales Record of Proceedings*, 12 October 1999.
- <sup>75</sup>*National Assembly for Wales Record of Proceedings*, 19 October 1999.
- <sup>76</sup>Agriculture and Rural Development Committee, 3 November 1999, ARD 14-99 (p.2) and minutes ARD 14-99 (min).
- <sup>77</sup>Oral Question to the Agriculture and Rural Development Secretary, *National Assembly for Wales Record of Proceedings*, 8 December 1999.
- <sup>78</sup>Agriculture and Rural Development Committee, 26 January 2000, ARD 01-00(p.3).
- <sup>79</sup>Section 121 of the Government of Wales Act 1998, c.38 places a duty on the Assembly to prepare a scheme setting out how it will exercise its functions so as to promote sustainable development.
- <sup>80</sup>Oral evidence of the Minister for Environment, 21 November 2002.
- <sup>81</sup>Since giving evidence, the Assembly Government has also secured provisions in the Water Act 2003 that will allow changes to the current flood defence committee funding and structural arrangements in Wales.
- <sup>82</sup>Oral evidence of the Countryside Council for Wales, 10 April 2003; Environment Agency Wales, 27 March 2003; RSPB Wales and the Association of National Park Authorities, 8 May 2003.
- <sup>83</sup>Department for the Environment, Transport and the Regions, *A New Deal for Transport: Better for Everyone*, Cm 3950, (London: Department for the Environment, Transport and the Regions, July 1998).

- <sup>84</sup>Written evidence of the Minister for Environment, November 2002.
- <sup>85</sup>Environment, Planning and Transport Committee, *Policy Review of Public Transport – Final Report*, (Cardiff: National Assembly for Wales, December 2001).
- <sup>86</sup>Oral evidence of the Minister for Environment, 21 November 2002.
- <sup>87</sup>The “McLeish Settlement”, which was implemented through provisions in the Transport Act 2000 and Orders made under Sections 30 and 63 of the Scotland Act 1998.
- <sup>88</sup>The Scottish Parliament has legislative competence over the promotion and construction of new railways, grants for passenger rail services and rail responsibilities of certain transport bodies in Scotland.
- <sup>89</sup>At present, all members of the SRA are appointed by the Secretary of State for Transport, who must consult the Assembly about one member of the Board and have regard to the desirability of appointing a person who is familiar with the special requirements and circumstances of Wales.
- <sup>90</sup>Oral evidence of Professor Stuart Cole, Wales Transport Research Centre, 13 June 2003.
- <sup>91</sup>*Transport in Wales: Response of the Government to the 2nd Report of the Welsh Affairs Select Committee*, HC 580 of 2002-03.
- <sup>92</sup>*House of Commons Debates*, 19 January 2004, cols. 1076-77.
- <sup>93</sup>Welsh Office, *A Voice for Wales*, Cm 3718, 15.
- <sup>94</sup>Government of Wales Act 1998 c.38, section 113.
- <sup>95</sup>Oral evidence of the Welsh Local Government Association, 10 July 2003.
- <sup>96</sup>*Ibid.*
- <sup>97</sup>Local Government Act 2003 c.26.
- <sup>98</sup>Oral evidence of the Minister for Finance, Local Government and Communities, 5 December 2002.
- <sup>99</sup>Written evidence of the Minister for Finance, Local Government and Communities, December 2002; oral evidence of the Chartered Institute of Housing Cymru, 25 July 2003.
- <sup>100</sup>See oral evidence of the Welsh Overseas Agencies Group, 11 July 2003 and of the Inter Faith Council for Wales, 22 May 2003.
- <sup>101</sup>Government of Wales Act 1998 c.38, section 120.
- <sup>102</sup>*Ibid.*, section 48.
- <sup>103</sup>Oral evidence of the All Wales Ethnic Minority Association, 11 April 2003; written evidence of Stonewall Cymru, May 2003.
- <sup>104</sup>Minute from the Welsh Assembly Government to the Richard Commission Secretariat, 8 October 2003.
- <sup>105</sup>Paul Chaney and Ralph Fevre, *An Absolute Duty: Equal Opportunities and the National Assembly for Wales*, (Cardiff: Institute of Welsh Affairs, June 2002); oral evidence of the Director of the Equal Opportunities Commission for Wales and Director of the Disability Rights Commission (Wales), 23 May 2003.
- <sup>106</sup>Oral evidence of the acting Director of the Regions of the Commission for Racial Equality, 25 July 2003.
- <sup>107</sup>Oral evidence of the Director of the All Wales Ethnic Minority Association, 11 April 2003.
- <sup>108</sup>The Equal Opportunities Commission, the Disability Rights Commission and the Commission for Racial Equality.
- <sup>109</sup>Oral evidence of the Director of the Equal Opportunities Commission Wales, 23 May 2003.
- <sup>110</sup>*House of Commons Debates*, 30 October 2003, cols. 17-19WS.
- <sup>111</sup>Concordat on the Co-ordination of European Union Policy Issues and Concordat on International Relations, published in *Memorandum of Understanding and Supplementary Agreements*, Cm 5240 (December 2001).

<sup>112</sup>Oral evidence of the Deputy First Minister and Minister for Rural Development and Wales Abroad, 8 November 2002.

<sup>113</sup>Oral evidence of the Chair of the European and External Affairs Committee, 27 March 2003.

<sup>114</sup>Oral evidence of the Presiding Officer, Deputy Presiding Officer and Clerk of the Scottish Parliament, 13 February 2003.

<sup>115</sup>Scotland Act 1998 c.46, section 53.

<sup>116</sup>Powers are conferred on the Assembly by Orders in Council; see supplementary written evidence of the Deputy First Minister and Minister for Rural Development and Wales Abroad, 2 April 2003.

<sup>117</sup>Oral evidence of the Deputy First Minister and Minister for Rural Development and Wales Abroad, 8 November 2002.

<sup>118</sup>*Draft Treaty Establishing a Constitution for Europe*, CONV850/03, 18 July 2003.

<sup>119</sup>For example, Article 9 recognises the regional tier in relation to the principle of subsidiarity.

<sup>120</sup>Oral evidence of Jill Evans MEP and Eurig Wyn MEP, 11 July 2003.

<sup>121</sup>Oral evidence of John Osmond, Director of the Institute of Welsh Affairs and Professor Keith Patchett, University of Wales, 26 September 2002.

<sup>122</sup>*Ibid.*

<sup>123</sup>*Ibid.*; see also oral evidence of Professor David Miers and David Lambert, 28 February 2003.

<sup>124</sup>Oral evidence of the Counsel General, 13 December 2002.

<sup>125</sup>*Ibid.*

<sup>126</sup>For example, see the oral evidence of the Inter Faith Council for Wales, 22 May 2003; the Wales Council for Voluntary Action, 26 June 2003; Plaid Cymru the Party of Wales, 27 February 2003; and the Chair of the Wales Women's National Coalition, 22 May 2003; written evidence of the Welsh Local Government Association, July 2003.

<sup>127</sup>Oral evidence of Professor David Miers and David Lambert, 28 February 2003.

<sup>128</sup>Written evidence of the Counsel General, December 2002.

<sup>129</sup>See oral evidence of Professor David Miers and David Lambert, 28 February 2003 and of the Counsel General, 13 December 2002.

<sup>130</sup>Oral evidence of the Counsel General, 13 December 2002.

<sup>131</sup>Oral evidence of Professor David Miers and David Lambert, 28 February 2003.



# The scrutiny of unelected public bodies

This chapter looks at the Assembly's powers to ensure the effective accountability and scrutiny of "quangos" (quasi-autonomous non-governmental bodies), particularly the Assembly Sponsored Public Bodies.

2. The chapter addresses the following questions:
  - how has the relationship between devolved government and quangos changed since the creation of the Assembly?
  - what are the levers for accountability and scrutiny and how are they operating in practice?
  - are the Assembly's size and powers in relation to quangos adequate?
3. "Quango" is a loosely defined term covering a wide range of non-elected public bodies that provide services, advise government or serve judicial functions. There are several different types of quango, which differ in their governance and accountability arrangements. The most significant that fall within the Assembly's remit are:
  - *Assembly Sponsored Public Bodies* (ASPBs), which receive direct funding from the Assembly, but are not formally part of the same organisation and therefore operate to a greater or lesser extent at "arm's length" under their own legal powers. There are currently fifteen executive and eighteen advisory ASPBs, and five tribunals;<sup>1</sup>
  - *NHS bodies*, including twenty-two Local Health Boards, the fourteen NHS Trusts<sup>2</sup> responsible for delivering health services in Wales and the Community Health Councils.
4. The executive ASPBs play a major role in delivering the policies of the Welsh Assembly Government (see Table 6.1). The political authority of the Assembly, together with its roles in appointing many ASPB board members and providing the bulk of their funding, are the most powerful levers in securing their participation in delivering the Assembly Government's priorities.
5. The chief executive of each executive ASPB is directly accountable to the Permanent Secretary or the Assembly Government's Director of NHS Wales for the regularity, propriety and value for money of expenditure from the budget allocation received from the Assembly Government. As well as using its formal statutory powers, the Assembly Government monitors and influences the work of ASPBs through administrative tools, including:
  - approval of corporate and business plans;
  - "remit letters" that set out the Assembly's future priorities and targets for the body concerned;
  - requirements to report in-year on progress against targets;
  - requirements for the Assembly's specific approval of certain types of expenditure, or expenditure above a specified limit.

**Table 6.1: Executive Assembly Sponsored Public Bodies (at December 2003)<sup>a</sup>**

Arts Council of Wales	National Museums and Galleries of Wales
Care Council for Wales	Qualification, Curriculum and Assessment Authority for Wales (ACCAC)
Countryside Council for Wales	Royal Commission for Ancient and Historical Monuments of Wales
Environment Agency Wales <sup>b</sup>	Sports Council for Wales
Higher Education Funding Council for Wales	Wales Tourist Board
The National Council for Education and Training for Wales	Welsh Development Agency
Local Government Boundary Commission <sup>c</sup>	Welsh Language Board
National Library of Wales	
<b>Notes</b>	
a. In addition, Health Professions Wales will be established as an executive ASPB from 1 April 2004 and the Wales Centre for Health from 1 April 2005.	
b. Environment Agency Wales is part of the Environment Agency for England and Wales that is sponsored by the UK Department for the Environment, Food and Rural Affairs.	
c. Set up as an advisory body, but treated as an executive ASPB because it has some executive functions.	

6. There is a direct relationship between the Assembly and NHS Trusts and Local Health Boards, including performance management and support through the Assembly's three NHS regional offices. The Minister appoints NHS Trust and Local Health Board chairs, and the accounting officers of these organisations are formally accountable for their expenditure to the Director of NHS Wales, who is in turn accountable to the Minister. The Assembly Government sets standards, targets and policies for the NHS, and each health community's performance is regularly monitored against an

annual service and financial framework agreed with the Assembly Government – the Minister, Jane Hutt AM, viewed this system as 'absolutely critical to improved delivery.'<sup>3</sup>

### The importance of quangos in devolution

7. Concerns about the number of quangos in Wales and their accountability played a major role in the pre-devolution debate. Between 1979 and 1997, the number of quangos in Wales more than doubled<sup>4</sup> as the process of devolving

administrative functions to Wales accelerated and functions were transferred out of local government. Some well-publicised incidents of financial mismanagement, and disquiet about the apparent use of the appointments system as a form of political patronage, also contributed to the growing pressure for reform.

8. As a result, the argument that devolution would make the quangos more directly accountable to the people of Wales, and the promise of a “bonfire of the quangos”, proved to be important factors in securing support for the proposals. Professor Kevin Morgan from the Department of Planning at Cardiff University told us that:

*With respect to the Labour Party, I think there is no doubt that the issue which resonated most for both the party officials and for members was the issue of democratising the Welsh Office and holding quangos to account. Nothing really compared with the forcefulness of that issue.*<sup>5</sup>

9. *A Voice for Wales* promised action before devolution to tackle these problems by reducing the number of quangos and improving their accountability and effectiveness. Thereafter:

*The Assembly will be given new powers to make changes to many of the bodies that remain, and to ensure that all of them are made fully accountable to the people of Wales. These radical proposals will*

*dramatically alter the delivery of public services in Wales. Unelected bodies will be reduced in number and brought under fuller democratic control and scrutiny. Rationalisation will reduce wasteful duplication and save administrative costs.*<sup>6</sup>

10. The importance of this issue can be seen in the strength of the powers given to the Assembly to reform quangos. The Government of Wales Act 1998 itself made provision for the wind-up of the Development Board for Rural Wales, the Land Authority for Wales and Tai Cymru. It also gave the Assembly powers to amend primary legislation by Order so as to:
- transfer functions from Welsh health authorities to the Assembly, or abolish them entirely;
  - restructure certain ASPBs by transferring functions to other quangos, local government or the Assembly, or by abolishing functions or whole quangos.<sup>7</sup>
11. However, there are limits to the powers to reform ASPBs. The Assembly cannot reduce or abolish entirely the functions of bodies that:
- operate at arm’s length from government ‘specially to guarantee the independence of their decisions’,<sup>8</sup> such as the Higher Education Funding Council for Wales and the Countryside Council for Wales;
  - exercise judicial or quasi-judicial functions affecting the rights of individuals (such as the Valuation Tribunals);



- were created by Royal Charter or Royal Warrant, which can only be amended with Her Majesty's agreement.<sup>9</sup>
12. As a result, the Government of Wales Act conferred on the Assembly the powers to restructure or abolish thirteen individual sponsored bodies, agricultural dwelling-house advisory committees and agricultural wages committees. Powers under the 1998 Act have also been used in conjunction with other Assembly functions to set up new advisory ASPBs (e.g. the Advisory Panel on Substance Misuse).
  13. Many other public bodies operate in both Wales and England (and sometimes across the whole of Britain or the UK), which prevents the Assembly from unilaterally changing their remit in Wales. The powers under the Government of Wales Act do not allow the Assembly to set up a new executive ASPB, for which primary legislation in Westminster is still required.

### Use of the Assembly's powers to reform ASPBs

14. The Assembly has used its powers to reform two advisory ASPBs – abolishing the Environment Agency Advisory Committee for Wales and the Library and Information Services Council (Wales) (the latter's functions are being transferred to a new joint body, CyMAL, within the Assembly).
15. The Assembly Government's *Plan for Wales 2001* promised to review all

the major executive ASPBs by 2003-04 'to ensure that they are necessary, effective and efficient'.<sup>10</sup> Each of these "quinquennial" or "strategic" reviews considers whether there is a continuing need for the function and, if so, whether a sponsored body is the best means of delivery. The review is undertaken by Assembly Government officials or an independent contractor, but includes a self-assessment by the body concerned. Subject Committees are given the opportunity to comment on the terms of reference for the review and the draft report.

16. At the time of writing, all but two of these reviews had been completed.<sup>11</sup> All have recommended a number of changes to improve the effectiveness, governance or accountability of the bodies concerned. However, no review so far has recommended using the Assembly's powers to transfer or abolish functions or whole ASPBs.
17. Significant organisational changes have taken place in the field of health. Here, the Assembly has abolished the five local health authorities in Wales and transferred their functions either to the NHS Directorate within the Welsh Assembly Government, to new national organisations or to the twenty-two Local Health Boards established using powers granted under new primary legislation for Wales.<sup>12</sup> Together with the Health (Wales) Act 2003, this legislation also allowed the Assembly to retain and enhance the role of Community Health Councils (when they were

being disbanded in England) and to establish two new health organisations.<sup>13</sup>

18. The expectation of a “bonfire of the quangos” has, so far, not been fulfilled. We examined the issue from the perspective of the Assembly’s powers – does the Assembly have adequate powers to reform quangos and hold them to account for the people of Wales?
19. The evidence shows that legislation from Westminster is still needed for many changes to the structure or functions of public bodies – even where the intention is simply to improve the delivery of existing policy objectives or services. Examples include the proposals to:
  - create a single Ombudsman’s office for Wales;
  - merge the National Audit Office and the Audit Commission – now the subject of the Public Audit (Wales) Bill currently before Parliament;
  - allow employees of the Council for Education and Training in Wales and of the Higher Education Funding Council for Wales to carry out work for the other organisation.
20. These, and other examples cited in evidence, suggest that the Assembly is likely to be able to secure the primary legislation it needs to achieve this kind of structural reform, but the process can take several years.
21. In other respects, the evidence suggests that the extent of the

Assembly’s powers has not been a practical constraint on reform. The First Minister explained why the Assembly Government has not carried out extensive change so far:

*For us, over the past four years, the question was how much institutional churn do you introduce? How much of it would require primary legislation? Is this a priority for the first term and the early years of the Assembly? We took the decision about the limit, about the institutional churn that Wales could cope with, and those were the decisions that were made but without any commitment for the long-term future... We continue to study the quangos and make comparisons with quangos elsewhere in the general direction of making sure that transparency and accountability is maximised.<sup>14</sup>*

### Public appointments

22. Professor Kevin Morgan suggested that the appointments process was crucial to the reform of ASPBs.<sup>15</sup> Since 1999, the Assembly has implemented a range of measures to improve the diversity of Assembly appointments to ASPBs and other quangos in Wales. These changes have taken place against a backdrop of change across the whole UK that was prompted by the recommendations of the Committee on Standards in Public Life<sup>16</sup> (the Nolan Committee) and reinforced by the 1997 incoming Government’s manifesto commitment to extend the “Nolan Principles” to all public appointments.

23. All Assembly appointments to quangos are made on merit through open competition and involve independent assessors throughout the appointment process. The statutory powers of appointment rest with Ministers, but each Subject Committee nominates two representatives to oversee appointments in their policy areas. The Commissioner for Public Appointments also monitors, reports and advises on the Assembly's public appointments.

### Accountability and scrutiny

24. The evidence shows that the advent of the Assembly has changed the framework of accountability and scrutiny for quangos:
- there is now greater transparency and accountability to Ministers. The Commission received evidence from most of the bodies in Table 6.1 and the message was that each is subject to extensive consultation and scrutiny by the Welsh Assembly Government. In this process, the key levers were budget and target driven and formal powers were rarely mentioned;
  - the Assembly's Standing Orders require Subject Committees to keep the work of quangos under review; and the Audit Committee scrutinises public bodies on the back of National Audit Office reports on their use of resources (see paragraphs 28-29 below);
  - Ministers and committees accountable to the Assembly are increasingly involved in determining the priorities and actions of ASPBs.

25. We consider these changes in more detail below.

### Committee scrutiny

26. Subject Committees have typically carried out their oversight role by examining some stages of the ASPB planning cycle (e.g. ASPB annual reports, funding bids and remit letters) and by feeding into the quinquennial reviews. Practice has varied between the committees: for example, some have considered and commented on draft remit letters, whereas others have not seen the letters at all.<sup>17</sup> This reflects the uncertainty that exists about the respective roles of committees and Ministers in ensuring the accountability of the ASPBs (see paragraph 31 below).
27. Unlike the executive ASPBs, other quangos have not been subject to such regular review by the Subject Committees.
28. The Assembly's Audit Committee has a similar role to that of the Public Accounts Committee in Westminster – it can examine the “economy, efficiency and effectiveness” with which health quangos and ASPBs have used their resources, but does not question the policies themselves. It calls in witnesses – usually the accounting officers of the bodies concerned and the Assembly itself – for questioning on the basis of a report prepared by the National Audit Office. The Audit Committee then makes its own report to Ministers, to which there is a formal Government response.

29. Expenditure by health bodies has featured strongly in the Audit Committee's work because it comprises a large proportion (around a third) of the Assembly's total budget.<sup>18</sup> Across all his work (including audits of the Assembly), the Auditor General for Wales estimates that he has identified potential savings of up to £90 million since the Assembly was created.<sup>19</sup>

difficulties, Gareth Jones AM, the Committee's chair, responded:

*It is a question of time really, because we agree to scrutinise a body, let us say, once a year. I think with ELWa... it should be scrutinised far more often.*<sup>22</sup>

(Translated from the original spoken in Welsh)

30. Despite regular appearances before the Assembly's committees, the evidence from our public meetings suggests that people are sceptical about whether the Assembly has really made quangos more accountable to the public. More generally, the evidence from ASPBs<sup>20</sup> and committee chairs pointed to the following weaknesses in committee scrutiny of quangos:

- AMs have not developed a sufficiently detailed understanding of the work of quangos to be able to examine their work effectively. For example, Roger Thomas, chief executive of the Countryside Council for Wales, suggested:

*I suppose the point we are trying to make there is that the members sometimes are not as well briefed... I think the back-up facilities they have sometimes may, therefore, be deficient in terms of being able to access information... I know that researchers are being put in place for committees to help that process, and that from our perspective is a very welcome point.*<sup>23</sup>

- Subject Committees have not focused on their quango scrutiny function. For example, Kirsty Williams AM, chair of the Health and Social Services Committee, explained in respect of NHS bodies that:

*I think collectively the Committee has not seen it as a huge priority. The organisations we have looked at have been as a result of what was perceived as some problem within that organisation or some things which were going on and causing concern to the members.*<sup>21</sup>

- some committee chairs argued that the turnover of committee membership and the pressure of committee work on individual AMs both serve to limit the development of in-depth subject expertise.<sup>24</sup> For example, Dafydd Wigley AM, chair of the Audit Committee, told us:
- insufficient time is allocated to carry out effective scrutiny. For example, when asked why the Education and Lifelong Learning Committee had not examined ELWa's management

*I am on three major committees and I am on three others, six committees in all. On some of those committees you could have 300, 400, 500 pages of background material to read once a fortnight and usually there are more informal meetings more frequently. The pressure on the individual members of the Audit Committee is substantial and does beg the question whether the Assembly is the appropriate size and whether we do need more Members in order to allow Members to give the time necessary to all the functions.<sup>25</sup>*

(Translated from the original spoken in Welsh)

- as we identified in Chapter 4, the Assembly has not yet developed a strong culture of scrutiny. As Dafydd Wigley AM commented in relation to the Audit Committee:

*I hope there is some effective scrutiny then but that depends, of course, on the Members' willingness and ability to carry out that work...<sup>26</sup>*

(Translated from the original spoken in Welsh)

- Finally, some witnesses pointed to a potential weakness in the committees' powers to summon witnesses and documents. Committees can summon any person who is a member, or a member of staff, of many public bodies – but they have no powers to call in former members of staff, or other organisations or individuals not specified in the Act.<sup>27</sup>

31. The evidence also revealed some differences of opinion and practice on the respective roles of Ministers and Subject Committees in determining policy for the ASPBs and holding them to account – a situation that may be compounded by Ministers' membership of those committees. Some ASPBs suggested that it should be for Ministers alone to set their policy direction; committees should then scrutinise ASPBs on how they deliver those policies, and scrutinise Ministers on the policy content.<sup>28</sup> However, Rhodri Glyn Thomas AM, chair of the Culture Committee, suggested that the committees can influence the policy direction as well.<sup>29</sup>

### Box 6.1: ELWa – a case study in scrutiny

The Learning & Skills Act 2000 created Wales's largest quango, the National Council for Education and Training for Wales-ELWa, with a current budget of some £520 million.

In March 2002, concerns about possible control failures in procurement within ELWa surfaced. The Chair of the National Council-ELWa notified the Minister for Education and Lifelong Learning. ELWa appointed consultants, and the Minister informed the Assembly's Education and Lifelong Learning (ELL) Committee in May 2002 that an Assembly Government official, Mr Adam Peat, would also conduct an internal enquiry.<sup>30</sup>

Mr Peat's report was put before the Committee in June 2002, and the Committee was informed in July that a further review into the joint arrangements for senior executive support to the National Council-ELWa and the Higher Education Funding Council for Wales (HEFCW) would be carried out by an Assembly Government official, Dr Hugh Rawlings. His report, a copy of which accompanied the Minister's monthly report to the Committee in November 2002, recommended separate executive teams for both organisations.<sup>31</sup>

However, other auditing and procurement concerns attracted the critical scrutiny of the Auditor General for Wales and, subsequently, the Assembly's Audit Committee. Growing criticism and publicity led to a number of Assembly Questions, Ministerial statements and plenary debates relating to the National Council-ELWa during 2003. The remit letter from the Minister in April 2003 required the National Council-ELWa to review its key business systems. In July 2003, Ministers commissioned the consultants Price Waterhouse Coopers to provide an independent assessment of the National Council-ELWa's progress in implementing its action plan to deal with procurement failures. Their report was the subject of plenary debate in November 2003.<sup>32</sup>

When the Chair of the ELL Committee gave evidence to us in December 2002, he explained that the Committee had not, to that date, felt it necessary to pursue the issues, being content that the matter was being taken forward by the Minister.<sup>33</sup> He was uncertain whether the committee had power to summon Dr Rawlings, author of one of the reports.



Box 6.1: ELWa – a case study in scrutiny (continued)

Dr Rawlings' report was produced at the request of the Minister in support of her Ministerial functions. Accordingly, the appropriate procedure would have been for scrutiny of the report to be answered by the Minister (who could then have chosen to be accompanied by Dr Rawlings to answer questions on any matters of detail).

During the course of the crisis surrounding Wales' largest ASPB over the last eighteen months, there has been a high degree of accountability of the organisation to the Minister; and, in turn, the Minister has regularly informed both the Assembly plenary and the Subject Committee of the various enquiries and reports. The Audit Committee also fulfilled its duty of scrutiny – and the Assembly Government's response to the Audit Committee's report promised changes in its sponsorship relationship with quangos generally (such as a "probation" period of more rigorous scrutiny for new quangos).<sup>34</sup> The Subject Committee chose a more reactive scrutiny role. This particular case has not revealed any deficiency in the Assembly's formal powers to scrutinise quangos.

**The Assembly Government–ASPB relationship**

32. The creation of the Assembly has brought a new dimension in Wales to the relationship between a sponsored body and the Minister. Gareth Davies, chair of the Sports Council for Wales, summarised the difference:

*We are an arm's length body, although those arms are getting shorter and we are aware of that as well and it's a challenge for us to manage...the number of people we were in contact with [in the Welsh Office] were very few and far between.*<sup>35</sup>

33. The evidence brought out the complexity of this new relationship from the ASPB perspective. For

example, Enid Rowlands, the chair of the National Council for Education and Training for Wales-ELWa, emphasised not only the direct line of accountability for education and training to the lead Minister, but also the expectation that the Council will deliver services necessary to implement the Assembly Government's strategies in other areas including culture, the Welsh language and in relation to older people. The issue therefore was not about policy direction, but about the practicalities of delivery, including funding issues:

*I am very clear about the discussions that I need to have with the Minister because that surely has to be part of the process of us being judged as to whether we are delivering on behalf of the National Assembly.*



*There have been significant numbers of policy developments...The direction of travel is absolutely right. Both my Council and the Executive support that. We think the direction we're going in in Wales is leading edge. In fact, there is a lot of interest from Scotland and England, so we have no issue about the direction. My issue, if I have one, is about the speed of travel and the ability to deliver. It is about where the responsibility lies to not just set the direction, but also to enable a realistic process of delivery.*<sup>36</sup>

34. This evidence session also highlighted the balance to be struck between the degree of control over ASPBs needed to secure accountability, and the freedom that allows the board members and staff of the bodies to feel a sense of ownership and responsibility for delivery:

*So it's not so much a matter of legislation but it's about the perception of how things operate...You ask these people [members of the National Council] to take on a role of responsibility of ensuring the delivery against a set of criteria...Where does the civil service function then come in when you set up this kind of body?... If you think somebody is going to check your work, your ownership of it really does change...*

*The ASPB system brings in this profound knowledge and expertise from outside and is a very rich mix. It can be made to work. Equally, a departmental structure... would also be made to work. Neither will work unless people are absolutely clear about who takes decisions on what and what they are accountable for.*<sup>37</sup>

35. As a past chair of a health authority, Enid Rowlands drew a contrast with her previous experience:

*But the health authorities were much more hands off...We had considerably less contact with the Minister, a lot less contact certainly at the chair and board level with the civil servants... You had to decide which priorities you were going to address...It was quite different to the very, very ongoing dialogue that...the National Council have.*<sup>38</sup>

36. In the case of the Royal Charter bodies, the balance between their previous independence and increasing accountability to the Assembly Government was raised in evidence. Gareth Davies, chair of the Sports Council for Wales, was clear in his accountability to the Minister in the Welsh Assembly Government:

*In terms of the Sports Council's funding, we get direct grant aid from the National Assembly. The chairman (myself) is appointed by the Minister, and obviously I'm accountable to him or her for the work of the Council and its achievements.*<sup>39</sup>

37. The relationship was complicated by the dual accountability for funding arising from the substantial share of the Sports Council budget that comes from the National Lottery via the Department for Culture, Media and Sport.

38. The Council's evidence highlighted the question of the balance to be struck in the sponsorship relationship with ASPBs between scrutiny and interference in detailed policy implementation, as expressed by the Chief Executive, Huw Jones:

*Policies in relation to social deprivation, education, clearly it's right and proper we should follow those particular policies. I think the issues and challenges come when the discussions lead to a lower level than that about involvement in programmes or particular schemes or particular initiatives and I think that's where the potential conflict can arise in relation to what is our role as distinct from what is the Assembly's role.<sup>40</sup>*

39. This theme ran through the evidence of all the ASPBs. As one of those affected by the work of an ASPB, the University of Wales College, Newport commented that:

*Under current arrangements, the Assembly rather than the Higher Education Funding Council for Wales sets and oversees higher education policy in much greater detail than... Government... does for England.<sup>41</sup>*

40. Unelected public bodies are created as separate entities from government for a variety of reasons – for example, to allow judgements in certain areas to be made independently of political involvement, to undertake entrepreneurial activities not suited to government, or to engage specialist expertise in public management. The challenge of finding the right balance for the relationship between government and these arm's length bodies is not unique to the Assembly. It is likely that the management of this relationship will always be a careful balancing act for all those involved, irrespective of whether or not more legislative powers are devolved to the Assembly.

#### England and Wales, GB and UK quangos

41. The primary formal accountability of Wales and England, GB or UK quangos that impact on the Assembly's responsibilities is to UK Ministers and, ultimately, the UK Parliament. However, provision was made in the Government of Wales Act to give certain quangos some accountability to the new elected body for Wales, by creating powers for Assembly committees (but not the Cabinet) to summon people and papers from these bodies.<sup>42</sup>

42. Some less formal arrangements to enhance accountability to the Assembly have also developed, including:

- concordat undertakings by the UK Government to consult the Assembly Government on certain Ministerial

- appointments to public bodies and quango policy matters;
- concordats or memorandums of understanding between the Assembly Government and bodies such as the Health and Safety Executive;
  - regular progress and strategy meetings with Assembly Government Ministers, officials and other partners in Wales;
  - occasional appearances by bodies in front of the Assembly's Committees to give evidence for policy reviews or on issues of current concern.
43. Mark Perfect, chief executive of the Youth Justice Board, illustrated how such arrangements work in practice. The Home Office sponsors this quango, which was set up to reform the youth justice system in England and Wales. One of its twelve board members has a particular responsibility for representing Welsh interests, and the Assembly Government was consulted on his appointment. The chief executive has regular meetings with officials in Cardiff and, through the Wales Youth Strategy Group, works with the Minister and other Welsh bodies involved in young people's services. At the time of giving evidence, the Board had not appeared before an Assembly committee, although it was willing in principle to do so.
44. Since July 1999, a number of new England and Wales quangos have been created through primary legislation. Guidance for Whitehall officials on making provision for new public bodies in primary legislation suggests that such bodies should be

subject to the Assembly's powers of summons where 'there is reasonable common ground between the body's responsibilities and those of the Assembly'.<sup>43</sup>

45. However, the guidance does not address the issue of how accountability to the Assembly should be delivered through governing body appointments. Here, the Assembly Government has pursued its objective of ensuring effective representation of Welsh interests through negotiation as, for example, in the cases of Ofcom and the Strategic Rail Authority.<sup>44</sup>

### Findings

In the light of the evidence in this chapter our findings are as follows:

- public concern about the accountability of a growing number of quangos played a significant part in public support for devolution – our public meetings revealed that such concerns remain;
- apart from the specific limitations on the Assembly committees' powers to summon witnesses, we received no evidence to suggest that the present formal powers are a constraint upon the Assembly's ability to hold to account the quangos that it sponsors;
- there is evidence of weaknesses in the committees' capacity to scrutinise quangos effectively: the current role and working patterns of committees do not help AMs to develop the depth of expertise necessary for effective scrutiny, nor do they promote a culture of scrutiny and challenge;

- some confusion surrounds the relationship between the quangos, Ministers and the Subject Committees, particularly over the roles of Ministers and committees in holding quangos to account – clarification of these roles would be beneficial;
- so far the Assembly Government has made only limited use of its powers to re-structure ASPBs, so that public expectations on the reduction of quangos have not been met – this is a policy choice, which it is not our role to evaluate;
- where ASPBs are established by separate Acts of Parliament, the Assembly's powers to carry out major restructuring would be constrained by the existing settlement, but no such proposals were put to us;
- devolution has changed radically the nature of the arm's length relationship between the Assembly and its sponsored bodies, by bringing a closer involvement in the detailed policies and actions of ASPBs;
- whether or not the Assembly's formal powers are changed, it will need to evaluate rigorously the case for the arm's length relationship, in order to ensure the right balance between proper accountability and the discretion needed for effective delivery;
- accountability to the Assembly should be strengthened for quangos in non-devolved policy areas that impact on the Assembly's responsibilities – current arrangements are variable and rest on goodwill and co-operation.

### Notes

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<sup>1</sup>The six Agricultural Dwelling House Advisory Committees are counted as one advisory ASPB and the four Valuation Tribunals as one tribunal.

<sup>2</sup>Bodies such as the Welsh Blood Service, National Public Health Service and Breast Test Wales have an independent existence on a day-to-day basis, but are formally part of an NHS Trust.

<sup>3</sup>Oral evidence of the Minister for Health and Social Services, 7 November 2002.

<sup>4</sup>Kevin Morgan and Geoff Mungham, *Redesigning Democracy: The Making of the Welsh Assembly* (Bridgend: Seren, 2000).

<sup>5</sup>Oral evidence of Professor Kevin Morgan, 26 September 2002.

<sup>6</sup>Welsh Office, *A Voice for Wales* Cm 3718 (July 1997), 16.

<sup>7</sup>Government of Wales Act 1998 c.38, sections 27-28 and schedule 4.

<sup>8</sup>Welsh Office, *A Voice for Wales* Cm 3718 (July 1997), 18.

<sup>9</sup>The Arts Council of Wales, the National Library of Wales, the National Museums and Galleries of Wales, the Royal Commission on Ancient and Historical Monuments in Wales and the Sports Council for Wales.

<sup>10</sup>Welsh Assembly Government, *Plan for Wales 2001* (Cardiff: National Assembly for Wales, October 2001), 21.

<sup>11</sup>The ACCAC review is underway and the quinquennial review of the Arts Council of Wales was postponed pending implementation of an external management review.

- <sup>12</sup>NHS Reform and Health Professions Act 2002 c.17.
- <sup>13</sup>Health Professions Wales and the Wales Centre for Health.
- <sup>14</sup>Oral evidence of the First Minister, 25 July 2003.
- <sup>15</sup>Oral evidence of Professor Kevin Morgan, 26 September 2002.
- <sup>16</sup>The Committee on Standards in Public Life, *First Report*, Vol 1 – Report, Cm 2850-I (London: The Stationery Office, May 1995).
- <sup>17</sup>Guidance has recently been developed for the committees on scrutiny at various stages of the ASPB planning process.
- <sup>18</sup>Oral evidence of the Chair of the Audit Committee, 12 December 2002.
- <sup>19</sup>Paper AC(2) 03-04(p2) by the Auditor General for Wales to the Audit Committee, 23 October 2003.
- <sup>20</sup>For example, see written and oral evidence of the Countryside Council for Wales, 10 April 2003; oral evidence of the Sports Council for Wales, 27 June 2003; written and oral evidence of the Forestry Commission, 8 May 2003.
- <sup>21</sup>Oral evidence of the Chair of the Health and Social Services Committee, 5 December 2002.
- <sup>22</sup>Oral evidence of the Chair of the Education and Lifelong Learning Committee, 12 December 2002.
- <sup>23</sup>Oral evidence of the Chair and the Chief Executive of the Countryside Council for Wales, 10 April 2003.
- <sup>24</sup>See, for example, oral evidence of the Chair of the Health and Social Services Committee, and of the Chair of the Environment, Planning and Transport Committee, 5 December 2002.
- <sup>25</sup>Oral evidence of the Chair of the Audit Committee, 12 December 2002.
- <sup>26</sup>Ibid.
- <sup>27</sup>Government of Wales Act 1998 c.38, section 74 and schedule 5.
- <sup>28</sup>Oral evidence of the Chair and the Chief Executive of the Countryside Council for Wales, 10 April 2003; written evidence of the Chair of the National Council for Education and Training in Wales, 28 March 2003.
- <sup>29</sup>Oral evidence of the Chair of the Culture Committee, 12 December 2002.
- <sup>30</sup>Minutes of the Education and Lifelong Learning Committee, 22 May 2002, ELL 10-02(mins), Annex A.
- <sup>31</sup>Minister's Report to the Education and Lifelong Learning Committee, 21 November 2002, ELL 17-02(p.1), Annex B.
- <sup>32</sup>*National Assembly for Wales Record of Proceedings*, 12 November 2003.
- <sup>33</sup>Oral evidence of the Chair of the Education and Lifelong Learning Committee, 12 December 2002.
- <sup>34</sup>Welsh Assembly Government, *Response to the Audit Committee's Report on the National Council for Education and Training for Wales: Financial Management of Partnership and Innovation and Development Projects*, (Cardiff: Welsh Assembly Government, February 2004).
- <sup>35</sup>Oral evidence of the Chair and the Chief Executive of the Sports Council for Wales, 27 June 2003.
- <sup>36</sup>Oral evidence of Enid Rowlands, Chair of the National Council for Education and Training in Wales, 28 March 2003.
- <sup>37</sup>Ibid.
- <sup>38</sup>Ibid. Mrs Rowlands was Chair of the North Wales Health Authority both before and after the Assembly was established, her appointment ending in December 2000.
- <sup>39</sup>Oral evidence of the Chair and the Chief Executive of the Sports Council for Wales, 27 June 2003.

<sup>40</sup>Ibid. In this evidence, the Chair also described how the Council was not consulted by the Assembly Government in developing its sports strategy for Wales.

<sup>41</sup>Written submission of the University of Wales College, Newport.

<sup>42</sup>Government of Wales Act c.38, section 74 and schedule 5.

<sup>43</sup>Office of the Deputy Prime Minister, *Devolution Guidance Note 9: Post-devolution primary legislation affecting Wales*, (January 2003). Available at <http://www.dca.gov.uk/constitution/devolution/guidance/dgn09.pdf> (accessed 2 February 2004).

<sup>44</sup>See Chapter 5.

# The Wales–Whitehall relationship

This chapter reviews the relationship between the administrations in Cardiff and London since the advent of the Assembly.

2. It addresses the following questions:
  - what are the formal and informal arrangements governing the day to day workings at Ministerial and official level – and how do these work in practice?
  - what difference has the Assembly made to the relationship between the departments of Government in Cardiff and in London and to Whitehall's treatment of Wales, in relation to both devolved and non-devolved services?
  - what are the advantages and disadvantages of present arrangements, seen from Cardiff and from Whitehall, and how could they be improved?
  - what changes to the relationship between Wales and Whitehall would be likely as a result of changes to the formal powers of the National Assembly for Wales?
3. The key sources of evidence on these issues are the evidence of the Secretary of State for Wales, speaking on behalf of the UK Government, and of Ministers of the Welsh Assembly Government, as well as a number of external commentators.
4. Many of the dealings between Cardiff and Whitehall relate to the UK Government's proposals for legislation. The process of scrutinising and passing primary legislation affecting Wales is discussed in more detail in Chapter 8. The present chapter is concerned mainly with the inter-governmental negotiations on the UK Government's legislative programme and individual Bills, as well as with issues of inter-governmental discussion that do not involve legislation.

## UK inter-governmental relations under devolution

5. The Commission was fortunate in being able to begin its work by reading the extensive evidence<sup>1</sup> provided to the House of Lords Select Committee on the Constitution chaired by Lord Norton of Louth and, as indicated below, to draw on the Committee's report following that enquiry, published in December 2002.<sup>2</sup> That report highlights the complexity of relations with the UK Government and the imprecise boundaries that exist between devolved and non-devolved matters in relation to all three devolved administrations:



*A further characteristic of devolution is that it makes inter-governmental relations inevitable, and integral to the UK's system of government. The pattern of devolved and retained functions is an intricate one. It can be hard to see in practice (and sometimes in principle) where a devolved function stops and a retained one starts. Even if that were clear, many policies or initiatives of one level of government will require some degree of contact between the devolved administration and UK Government... Even if the devolution arrangements did not place the premium that they do on continued good relations between the various governments within the United Kingdom, necessity would compel a high degree of interaction.<sup>3</sup>*

6. The evidence received by the Commission reinforced this picture of complexity and extensive interaction with the UK Government that is common to all the devolved administrations. Although the Wales model of executive devolution seems to be the most complex set of arrangements, there exists also in Scotland and Northern Ireland a jagged boundary between devolved and non-devolved issues, which curtails the freedom of action of the devolved administrations in a number of areas. For all three devolved administrations, finance is a key area of overlap between the potential aspirations of the devolved administrations and powers that are reserved to the UK Government.<sup>4</sup>

### The formal structure for the Wales-Whitehall relationship

7. The arrangements for working relations between the UK Government and the devolved administrations operate on a non-statutory basis. The basis of the relationship is set out in the Memorandum of Understanding<sup>5</sup> between the Assembly Cabinet, Scottish Ministers and the UK Government. This commits the administrations concerned to abide by certain principles, such as co-operation where appropriate, timely communication, full exchange of scientific, technical and policy information, respect for confidentiality requirements, and the conduct of business through normal administrative channels wherever possible.
8. Accompanying the Memorandum are overarching agreements on European policy issues, international affairs, assistance to industry and statistics.
9. To provide 'central co-ordination of the overall relationship',<sup>6</sup> the administrations have established a Joint Ministerial Committee, or JMC, as a forum for consultation, mediation, discussion and dispute resolution. As well as a "plenary" meeting once a year attended by the Prime Minister, the First Ministers of each devolved administration and the territorial Secretaries of State, occasional "subject" JMC meetings have been held in areas such as health and the knowledge economy.

10. The JMC thus meets relatively infrequently and has no formal legal status underpinning its work. A Welsh Assembly Government official summed up his view of what the role of the JMC would be in settling disagreements:

*The JMC does not have any leverage systems at all. It certainly does not have any decision-making powers. It is a typical situation where "good chaps" sit round the table and come to a decision, a consensus. Ultimately, the power would lie where it lay. If it were a matter of the UK Government wanting to put legislation through, it could walk away and still do it.<sup>7</sup>*

11. Bilateral concordats have also been drawn up between the Assembly Government and individual Whitehall departments to govern the detailed administrative relationships, particularly on matters of mutual interest and where the institutions have executive functions that overlap or bear on each other. Largely procedural, the concordats establish the broad framework for day to day dealings between officials, but cannot be enforced in law.
12. To supplement the formal working agreements, Whitehall has prepared a series of Devolution Guidance Notes, which provide practical advice to UK Government officials on issues such as communication and consultation, handling primary legislation and correspondence between Ministers and the devolved administrations. Two of these Notes specifically address

arrangements for Wales, covering the role of the Secretary of State for Wales<sup>8</sup> and post-devolution primary legislation affecting Wales.<sup>9</sup>

### The role of the Secretary of State for Wales and the Wales Office

13. Although most day to day contact is between officials of the Welsh Assembly Government and the lead department in Whitehall, the Wales Office plays an important role in acting as the voice of Wales within the UK Government and Parliament. In particular, the Secretary of State for Wales and his department are responsible for:
- bidding for slots in the primary legislation programme for measures affecting Wales and taking these provisions through Parliament;
  - acting as guardian of the Wales devolution settlement – ensuring that Whitehall departments are properly consulting their Assembly counterparts and taking the lead in dispute resolution;
  - ensuring that the interests of Wales are fully taken into account in UK Government decisions.<sup>10</sup>
14. Membership of the relevant Cabinet committees helps the Secretary of State for Wales and his officials to keep an overview of the interactions between Whitehall and Cardiff across government and to intervene where necessary. The Secretary of State for Wales, the Rt Hon Peter Hain MP, described his starting point as being 'a friend and advocate of the Assembly's position in Cabinet':

*I start off with the presumption that I am negotiating and representing the Assembly to the extent that it does not represent itself, which of course it does to a considerable extent, both inter-ministerially and between officials with Whitehall. I start off with the presumption that I want to see the Assembly's wishes carried into practice. Then we seek to bear in mind what interests, objectives and policies there might be in the relevant Whitehall department that need to be adjusted to meet the Assembly's concerns. There is a bit of give-and-take in the negotiations...*<sup>11</sup>

15. However, he was keen to emphasise that his support would not be uncritical. In cases where the UK and Assembly Governments have different views, he would try to reconcile these through:

*a process of negotiation and discussion and testing of the arguments. What I do not do is, simply because the Assembly says 'I want something', I just say 'snap' and that is that.*<sup>12</sup>

16. The creation of the Department for Constitutional Affairs in June 2003 initially seemed to herald the demise of the Secretaries of State for Wales and Scotland, but it was later clarified that these roles and their respective Offices would remain. However, the present Secretary of State for Wales now combines this role with another Cabinet post – that of Leader of the House; and the Wales Office now

comes under the umbrella of the DCA for staffing and some other administrative purposes.

17. The Secretary of State for Wales explained the reasons for, and consequences of, the change to the House of Commons:

*One of its [devolution's] successes is that decisions in Scotland and Wales are being made closer to the people of Scotland and Wales, through the Scottish Parliament and the National Assembly for Wales. As a result there are fewer decisions and fewer duties for the Secretaries of State for Wales and for Scotland... It is thus a perfectly reasonable step to combine their duties with other Cabinet posts, as we have done...*

*As the Secretary of State for Wales, I am accountable to the House, as before, for Welsh business, and I represent Wales in Cabinet. My duties remain the same. My oversight of all primary legislation affecting Wales remains the same. The Wales Office remains open for business as usual and its staff serve me and my deputy... as before.*<sup>13</sup>

### How the arrangements work in practice

18. The nature of the relationship between the Welsh Assembly Government and the UK Government is complex because it involves contacts at every level between hundreds of civil servants in Cardiff, Whitehall, Brussels and other government offices. These contacts sometimes underpin

Ministerial exchanges, but often are conducted at relatively junior levels across the very wide range of devolved and non-devolved functions.

19. Working within the formal structure set out above, these informal relations are influenced by a number of factors, including:
- the particular policy/operational or regulatory framework;
  - the policy direction given by Ministers;
  - departmental culture and the history of relationships before 1999 and since;
  - timetable and other extraneous pressures.
20. The Commission was impressed by the informal briefing it received on the way in which the Wales Office works to facilitate good working relations between Cardiff and Whitehall and the operation of the devolution settlement.

### The view from Whitehall

21. The view of the UK Government as presented in evidence to the Commission is that the devolution arrangements are working well and are fulfilling the undertakings given in *A Voice for Wales*. The introduction to the Memorandum by the UK Government submitted to the Commission by the Wales Office and the Office of the Deputy Prime Minister in December 2002 says that:

*With the Assembly now nearing the completion of its first full term, the Government believes that devolution has been a great success. Devolution*

*has become a settled part of the political landscape and the National Assembly for Wales and Welsh Assembly Government have begun to make a real difference to the lives of the people of Wales, finding Welsh solutions to Welsh problems...*

*The Government believes that the current settlement does provide an adequate framework for integrated and consistent policy making in Wales...The UK Government has therefore been willing, where possible, to accommodate a separate Welsh agenda in primary legislation. This has resulted in a number of Acts that contain significant Welsh provisions, as well as Wales-only legislation.<sup>14</sup>*

22. Overall the view of the Secretary of State was a very positive one – that the system is robust and delivers the Welsh Assembly’s legislative requirements as well as, if not better than, those of most Whitehall departments. He acknowledged that problems arise, partly because Whitehall is on a steep learning curve; but these are solved by the departments whose job it is to deliver the UK Government’s commitment to devolution.<sup>15</sup>
23. The Secretary of State’s evidence also included a positive view of the approach taken by Whitehall departments to the question of extending the powers of the Assembly. On the example of powers in relation to student finance he said:

*As the White Paper on higher education was being finalised on the issue of fees, he [Charles Clarke, Secretary of State for Education and Skills] called me and said, 'I'm inclined to suggest to the Assembly that this is transferred under the normal transfer of functions procedure, what do you think?'*<sup>16</sup>

24. This had followed an initial approach by the Assembly Minister and was followed by detailed negotiations on the financial aspects.<sup>17</sup> The Commission put to the Secretary of State that the evidence from the Assembly Finance Minister seemed to present a different picture in respect of relations with the Home Office. He responded that these problems related mainly to the complexities of police funding:

*There have been difficulties over police funding and I think that the Finance Minister was really talking about that...that has a lot to do with differences of timing, the Welsh Assembly Budget being set on a different cycle and at a different time from when the Home Office sets its budget, and the fact that police funding is...50/50 in terms of Home Office and Welsh Assembly funding...So there are a number of complexities there...[But in relation to police and the legal system more widely] I am not aware of any major logjams or policy difficulties.*<sup>18</sup>

### The view from Cardiff

25. The evidence of Ministers and officials of the Welsh Assembly Government presented a picture of extensive contact across the range of devolved and non-devolved issues – with examples of both collaboration and obstruction.<sup>19</sup> Huw Brodie, director of the Agriculture and Rural Affairs Department of the Assembly Government, emphasised the challenges presented to Whitehall by the varying contours of devolution:

*My impression is that it is rather complicated for civil servants in London to understand the complexities of the differences of the devolution settlement between Wales and Scotland...the flow very much from London is seeing Wales and Scotland and Northern Ireland as being three parallel and equivalent settlements.*<sup>20</sup>

26. Whitehall departments have varied in the ease with which they have adapted to devolution, as Michael German AM, speaking as the then Deputy First Minister, explained:

*There are differences, and they are manifest, about the way in which they [Whitehall departments] understand or have in their mindset devolution as an issue...Clearly, like all processes, you have to understand the agendas and positions in order to achieve what you think the right position is to take.*<sup>21</sup>



27. The evidence suggests that, unsurprisingly, these differences are particularly marked between departments with a long history of interacting with the Welsh Office (e.g. education, health) and departments like the Home Office, where the inception of the Assembly has introduced a major new dimension to policy areas hitherto largely undisturbed by the pre-1999 Welsh Secretaries of State. The First Minister also highlighted how the relationship is more complicated in areas where functions are split between Whitehall and the Assembly, such as transport or police funding.<sup>22</sup>

28. Overall, the Assembly Government's evidence suggested that, while the relationship continues to present challenges, Whitehall is becoming more familiar with the requirements of devolution, as the Minister for Culture, Sport and the Welsh Language, Jenny Randerson AM, explained:

*Experience shows me that achieving my policy objectives with Whitehall is far from easy. I would not attribute this, from my experience, to ill will, simply that devolution and the devolved administrations seem to be some way down Whitehall's agenda... I think it is fair to say, also, that the number of times we register on the radar screens is improving rather than getting worse.<sup>23</sup>*

29. Other organisations told us that, in some ways, their relationship with Whitehall has become more complex

since the Assembly was established. Even in relation to non-devolved issues or proposals for primary legislation, Whitehall will sometimes assume that it no longer has to deal with Wales – or simply forget that it should be doing so.<sup>24</sup> For example, in relation to the proposals for the draft Charities Bill, Graham Benfield, chief executive of the Wales Council for Voluntary Action, explained that:

*The Home Office at the moment has made it fairly clear they're operating on this from an English perspective, so then we get to the question of who should we be liaising with from a Welsh point of view, and that is by no means clear.*

*...[In dealing with Whitehall on non-devolved issues], you often get the reply, 'Well, isn't that a matter for the Assembly?' or, 'If you have a view, can you not communicate that through the Assembly?'... There is sometimes confusion – either genuine confusion or, sometimes, really a lack of thinking about why that relationship is necessary because of devolution.<sup>25</sup>*

30. A recurring theme in the evidence from Cardiff on working with Whitehall was the length of time needed to secure agreement or action from Government departments. Examples discussed elsewhere in the report include the process of obtaining powers to implement EU legislation<sup>26</sup> and negotiations on the transfer of additional powers.<sup>27</sup>

Equally, the Secretary of State emphasised that Whitehall has had to learn to allow more time for decisions that need the Assembly's approval.<sup>28</sup>

### Working with Whitehall on primary legislation affecting Wales

31. A critical area of the relationship between Whitehall and the Assembly Government is the development of new primary legislation affecting Wales. Key issues here include:
- how Whitehall's plans for new legislation (relating to both devolved and non-devolved matters) will impact on the Assembly's obligations, powers, policies and budget – and the extent to which the Assembly Government can influence those proposals;
  - the nature and scope of the powers conferred on the Assembly by new legislation – how much discretion will the Assembly have to tailor delivery to meet the needs of Wales?
  - the extent to which the Assembly Government is able to secure the new primary legislation it needs to deliver its policies.
32. Devolution Guidance Note (DGN) 9 includes the following guidelines for Whitehall officials working on Bills:
- Whitehall should always consult the Welsh Assembly Government from an early stage on legislative proposals that confer new functions on the Assembly, alter its existing functions or otherwise affect the Assembly's responsibilities (including implementation in Wales of non-devolved policy matters);
  - Whitehall's consent is needed before the Assembly Government can circulate or refer to Bill material in

discussions with the Assembly's committees or its partners;

- new functions created by Bills should normally be conferred on the Assembly where it already exercises similar functions in that policy area;
- powers to bring legislation into force should normally apply on equal terms to England Ministers and the Assembly;
- Bills should not normally require Ministerial consent for Assembly actions;
- disagreements should be resolved wherever possible before a Bill is introduced or published in draft.<sup>29</sup>

### Legislating for Wales: local government

33. Local government is a striking example of how all these arrangements work in practice because there is a regular programme of legislation, with three Bills presented since the inception of the Assembly, in 1999, 2000 and 2003.
34. Here, the impression is that, although the Whitehall Department (Office of the Deputy Prime Minister (ODPM) since 2002) recognises that the Assembly is in the lead in setting policy for local government in Wales, there is no presumption that the Assembly will get the legislation, including the subordinate powers, that it wants. What happens is a negotiation between Whitehall and the Assembly Government, with the Assembly Minister bidding for a number of modifications to the proposed legislation and getting some of them. This can be a relatively open process, with the Minister reporting on bids and their outcome to the Subject



- Committee, but without giving details of the respective departments' positions.
35. In some cases, Whitehall is content with the Assembly Government's proposition, but not with the means of achieving it. For example, in relation to the 2003 Local Government Bill, the Assembly Government did not want the UK Government's proposals to introduce precepting arrangements for Fire Authorities and suggested that the Welsh Assembly Government be given the commencement power for the relevant provisions so that they could decide when, and if, to introduce them. There were concerns about the proprieties of this mode of not implementing a policy, so the agreed alternative was to give the Welsh Assembly Government a specific delegated power to enable it to amend the primary legislation to acquire the power at a later stage.
  36. More generally, the impression from Cardiff is that Whitehall requires it to justify different provisions for Wales – sometimes for Parliamentary management reasons and sometimes to satisfy Whitehall that the Welsh proposals are robust. Nevertheless, there are many recent examples of Whitehall acceding to Cardiff's requests:
    - in order to resolve the problems with the timing of the police funding settlement mentioned above, the Welsh Assembly Government sought the power to split the local government finance report to enable the police settlement for Wales to be announced after the main local government revenue settlement;
    - ODPM agreed to the Assembly's request for the power (mirroring that of the Secretary of State) to change the dates for local government elections;
    - following pressure from both the Assembly and the Local Government Association, the proposal to empower local authorities to prepare community strategies was converted into the more prescriptive duty contained in the 2000 Act.
  37. In respect of business rates, however, the Assembly Government did not get what it wanted in the 2003 Bill. The Assembly manages the non-domestic rates pool for Wales and has related secondary legislation powers that allow it, for example, to set distinctive rural rate relief and transitional rate relief arrangements. The Assembly Government sought the power to return business rates to local government in Wales at some point in future – a policy supported by local government in both Wales and England.
  38. However, ODPM and the Treasury resisted the change. On this issue, there were conflicting principles at stake:
    - some functions within local government finance are devolved to the Assembly (and it is a devolved policy area for Scotland);
    - but fiscal policy generally is not devolved and the level of non-domestic rates in Wales is currently tied to the level in England.
  39. The issues illustrated above are typical of the kinds of negotiation that take place across the primary legislative programme, as shown in the following examples:

- **the Animal Health Act 2002** – belated recognition in Whitehall that the Bill's growing content would impact on Assembly responsibilities created problems for agreeing policy between the UK and Assembly Governments, and the Assembly Government was able to influence policy on only a few aspects.<sup>30</sup>
- **the Homelessness Act 2002** – the Assembly Government was involved at a relatively late stage in discussions on policy for the homelessness and allocations provisions of the Bill. This constrained the Assembly Government's ability to shape the detailed drafting, although it supported the Bill's general principles.<sup>31</sup>
- at the request of the Welsh Assembly Government, provisions on foundation hospitals in **the Health and Social Care (Community Health and Standards) Act 2003** refer to England only, but the Act includes Wales-only provisions for the review and investigation of social care services and certain health care services.<sup>32</sup>

### Whitehall's approach to delegated powers

40. Prior to 1999, legislation simply specified that powers were delegated to "the Secretary of State". Whether the powers were in practice exercised by the Secretary of State for Wales or another Minister was a matter for administrative decision (see Chapter 5).
41. Since the advent of the Assembly, negotiations must take place, for each Bill affecting devolved policy issues, on the nature and scope of the executive and legislative powers that the new legislation will confer on the Assembly.

Reflecting the importance of these negotiations, it has been suggested that each new Westminster Bill is in effect a "devolution bill".

42. There are no statutory or other formal agreements to guide this process. Whitehall's approach in practice has broadly followed the guidance in DGN 9, which was summed up by David Lambert, Research Fellow in Public Law at Cardiff Law School:

*The test seems to have been, 'Would these have been powers which would have been exercised by the Secretary of State whilst still in the Welsh Office? – and if the answer was no, then the Assembly would exercise no functions.'*<sup>33</sup>

43. However, as the Counsel General pointed out to us, the scope of the powers given to the Assembly also depends on the way in which they are drafted in the legislation approved by Parliament; and:

*Although the [Whitehall] guidance is clear on the need for consultation, it is silent as to the question of how new functions are to be conferred on the Assembly.*<sup>34</sup>

44. Following the Assembly Review of Procedure, the Assembly has endorsed<sup>35</sup> a set of general principles to be used in determining the functions that should be given to the Assembly in any new Bills affecting devolved matters (often termed "the Rawlings Principles" – see Box 7.1).

**Box 7.1: *Assembly Review of Procedure* principles to be adopted in Government Bills affecting the Assembly (the Rawlings Principles)<sup>36</sup>**

The following principles for the drafting of Government Bills affecting the Assembly were adapted from the evidence of Professor Richard Rawlings, Professor of Law at the London School of Economics and Political Science, to the *Assembly Review of Procedure*. As part of the *Assembly Review of Procedure* report, the Principles were endorsed by the Assembly in February 2002, but they have not been accepted by the UK Government.

1. The Assembly should acquire any and all new powers in a Bill where these relate to its existing responsibilities.
2. Bills should only give a UK Minister powers which cover Wales if it is intended that the policy concerned is to be conducted on a single England and Wales / GB / UK basis.
3. Bills should not confer functions specifically on the Secretary of State for Wales. Where functions need to be exercised separately in Wales, they should be conferred on the Assembly.
4. A Bill should not reduce the Assembly's functions by giving concurrent functions to a UK Minister, imposing a requirement on the Assembly to act jointly or with UK Government / Parliamentary consent, or dealing with matters which were previously the subject of Assembly subordinate legislation.
5. Where a Bill gives the Assembly new functions, this should be in broad enough terms to allow the Assembly to develop its own policies flexibly. This may mean, where appropriate, giving the Assembly "enabling" subordinate legislative powers, different from those given to a Minister for exercise in England, and/or which proceed by reference to the subject-matter of the Bill.
6. It should be permissible for a Bill to give the Assembly so-called "Henry VIII" powers (i.e. powers to amend primary legislation by subordinate legislation, or apply it differently) for defined purposes, the test being whether the particular powers are justified for the purpose of the effective implementation of the relevant policy. Where such powers are to be vested in a UK Minister for exercise in England, they should be vested in the Assembly for exercise in Wales.
7. Assembly to have power to bring into force (or "commence") all Bills or parts of Bills which relate to its responsibilities. Where the Minister is to have commencement powers in respect of England the Assembly should have the same powers in respect of Wales.

45. The UK Government has resisted endorsing the Rawlings Principles, arguing that general principles of this kind are not appropriate and that each Bill must be drafted in the light of the policy decisions made in that particular case.<sup>37</sup> Nevertheless, the Government has agreed that ‘greater consistency is desirable in the way in which legislation for Wales is framed’ and has promised to ‘consider whether it would be appropriate to expand the advice in Devolution Guidance Note 9’.<sup>38</sup>
46. The evidence does suggest that the extent of powers delegated to the Assembly in primary legislation is influenced by the view of UK Government Ministers and officials at the time, as much as by established principles. As their experience of devolution grows, Whitehall officials are becoming more knowledgeable about the kinds of powers that should be conferred on the Assembly – but decisions are taken on a case-by-case basis and differences between Bills still occur.
47. As a result, the Assembly Government has often had to prove the case for devolving a function to Wales. For example:
- **the Adoption and Children Act 2002** – the Assembly Government was able to influence policy decisions during the development of the Bill and secure powers to extend the Assembly’s role in adoption – but had to overcome Whitehall officials’ reluctance to devolve some functions to the Assembly because they felt a common England and Wales regime should be maintained.<sup>39</sup>
  - **the Community Care (Delayed Discharges etc) Act 2003** – this legislation allows the NHS to charge local authorities where people remain in hospital for social care reasons (Part 1) and provides for the removal of local authorities’ discretion to charge for certain care services, where their free provision could contribute to speedier discharge from hospital (Part 2). The Assembly Government readily obtained the power to decide when to implement these provisions and has decided at present not to introduce Part 1. Whitehall was initially reluctant to give the Assembly separate powers to determine the range of free care services in Wales, possibly because it feared that the Assembly would use them to introduce free personal care at home for the elderly. The relevant powers were later introduced into the Bill, but limited free provision to a maximum of six weeks in both England and Wales.
  - **local government legislation** – in the Local Government Act 1999, some important executive powers are retained by the Secretary of State (for exercise after consultation with the Assembly), including the power to reduce the number of different plans required from local authorities in Wales. However, by 2003, ODPM were prepared to give greater scope for the Assembly to determine implementation.
  - **the Pollution Prevention and Control Act 1999** – this Act, which was passed in the early days of the Assembly, provides for the implementation of a new pollution control regime. Until recently,

Whitehall refused to agree the transfer of powers to the Assembly even though this had been approved in principle by Parliament, apparently because it was concerned that the Assembly would thereby gain “Henry VIII” powers that would give it unduly wide discretion to amend primary legislation (see Box 7.2).

48. However, there are also examples where Whitehall has supported relatively broad powers for the Assembly, which will allow it to develop its own approach in Wales:

- **the NHS Reform and Health Care Professions Act 2002** allows the Assembly to determine the number and geographical coverage of the new Local Health Boards and to confer on them virtually any of its functions concerning health. It also has powers to set the framework for the content and preparation of Health and Well-Being Strategies, which are intended to govern the delivery of health and social care services. During the House of Commons debates on the Bill, the UK Government resisted requests to see how the Assembly would use its powers in draft regulations, arguing that this would unduly restrict the Assembly’s discretion to use the powers as it wished;<sup>40</sup>
- similarly, the Assembly’s powers in respect of Health Promotion Wales under **the Health (Wales) Act 2003** are broadly drawn, with the intention that ‘the Assembly should not have to return to Westminster for more legislation, and should have discretion to make such arrangements as are necessary for the health service in Wales’;<sup>41</sup>

- **the Education Act 2002** gives the Assembly the power to specify by order the foundation stage of the curriculum and its areas of learning, whereas they are specified on the face of the Act for England;<sup>42</sup>

- **the Waste and Emissions Trading Act 2003** – this UK-wide legislation sets out the policy framework for a scheme of landfill targets for municipal waste, but leaves most of the details of the scheme to be specified in regulations by each of the four UK administrations. This approach was taken to allow the devolved bodies to decide how to meet the targets, while achieving a consistent approach across the UK in terms of the type of legislation to be used. In effect, the limits on the Assembly’s legislative powers prompted the UK Government to propose wider than usual delegated powers – but Parliament voiced concerns about so many matters being left to Ministerial discretion.<sup>43</sup>

49. These examples illustrate the fifth Rawlings Principle – that new functions given to the Assembly should be drafted in sufficiently broad terms to allow the Assembly to develop its own policies flexibly. Writing about the NHS Reform etc. Bill, Simon McCann, who at the time was a member of the Assembly’s Office of the Counsel General, concluded that:

*A precedent appears to have been established that when primary legislation confers new powers on the Assembly, it may often be appropriate to draw those powers as widely as possible, leaving it to the democratic mechanisms in Cardiff to exercise the*

*proper checks and balances over the use of the new powers. This is a format which is likely to be followed in future Bills where appropriate, thus expanding the legislative powers of the Assembly and conferring greater freedom on it to exercise those powers as the needs of Wales require.*<sup>44</sup>

50. The evidence suggests that there are some difficulties with this principle:
- the Counsel General has argued that broadly drafted delegated powers would create legal uncertainty as to the extent of the Assembly's powers.<sup>45</sup> However, the Scotland Act 1998 provides a precedent for Parliament handing on powers (in this case, to make primary legislation) that are phrased in general terms;
  - the model of executive devolution regards Ministers in England and the Assembly in Wales as analogues – and the evidence suggests that Parliament continues to see them in this way when

it is considering the appropriateness of delegated powers in proposed legislation.<sup>46</sup> The debates on the Waste and Emissions Trading Act 2003 and the Pollution Prevention and Control Act 1999 illustrate that Parliament is generally cautious about approving “framework” legislation that confers broad powers – although it has done so on several occasions;

- because the secondary legislation powers to be delegated by Parliament to Secretaries of State are, by convention, tightly defined, England and Wales Bills would require separate provisions relating to Wales in order to confer broader powers on the Assembly. This would make Bills longer and more complicated, which the UK Government usually tries to avoid.
51. The scope for conferring broader delegated powers on the Assembly is discussed further in Chapter 13 on developing devolution.



## Box 7.2: The Pollution Prevention and Control Act 1999

The Pollution Prevention and Control Act 1999 implements the EU Integrated Pollution Prevention and Control Directive (96/61/EC) by enabling a single, coherent pollution control system to be set up by secondary legislation. This regime will apply to installations previously regulated under the Environmental Protection Act 1990 (functions under which have transferred to the Assembly). Regulations made under the 1999 Act can also cover a range of other matters connected with the prevention or control of pollution.

The House of Lords Committee that polices the use of delegated powers in primary legislation was scathing about the broad regulation-making powers that were at first proposed in the Bill:

*Our fundamental concern is as to whether it can ever be right to legislate on a topic of such importance, which provides for widespread controls and affects activities carried on both on a commercial and private basis, leaving everything of substance to be determined either by or under the regulations. So far as we can judge there is no specific issue of policy which the provisions of the Bill seek to decide...as at present drafted, this is a 'skeleton' bill and so is an inappropriate delegation of secondary powers.<sup>47</sup>*

The UK Government responded to these concerns by tabling amendments to circumscribe and provide criteria for the delegated powers. These were sufficient to secure the successful passage of the Bill, although the House of Lords Delegated Powers and Regulatory Reform Committee maintained:

*The Committee would not wish this Bill to be regarded as a precedent for the future. It remains important that the purposes and ambit of legislation, together with any important governing criteria, should be clearly specified within the primary legislation and not simply left to the exercise of delegated powers.<sup>48</sup>*

Although the Act does not directly confer these regulation-making powers on the Assembly, Ministers confirmed to Parliament on several occasions that this was their intention.<sup>49</sup> However, once the Act was passed, DEFRA officials argued that the new powers should not be transferred to Cardiff because they would give the Assembly undue discretion to amend primary legislation – even though the Assembly has many powers relating to pollution control under other legislation. Only now – four years later – has DEFRA agreed in principle to their transfer to the Assembly. In contrast, the same powers were automatically exercisable by the Scottish Executive on Royal Assent in 1999.



### Delivering Assembly requests for primary legislation

52. As well as responding to opportunities created by Whitehall's plans for new Bills, the Assembly Government can formally submit its own proposals for new primary legislation, which are first approved by the Assembly in plenary.<sup>50</sup> These bids are sent to the Secretary of State for Wales, who then decides which bids he will support in UK Cabinet negotiations on the forthcoming legislative programme.
53. The outcome of the Assembly's bids so far is summarised in Table 7.1. This shows that the Assembly Government has been able to secure primary legislation for some, but not all, of its bids – usually on the back of Whitehall Bills rather than as separate Wales-only Bills. The Assembly Government has also developed distinctive Welsh policies in response to legislative opportunities created by Whitehall Bills. An example of this process at work is the Planning and Compulsory Purchase Bill (Box 7.3).
54. The evidence also illustrates how the Wales Office and other Whitehall departments have taken a practical and constructive approach to involving the Assembly Government in the process of drafting Wales-only provisions and briefing Ministers for the relevant Parliamentary debates.<sup>51</sup>
55. The main criticism of this process offered in evidence is that there is no guarantee that the Assembly Government will be able to secure the primary legislation it needs to deliver its policies. Evidence from a Glamorgan Policy Centre research study undertaken by Professor Martin Laffin and colleagues suggests that the Assembly Government often faces 'considerable difficulties' in getting Wales-only provisions included in Westminster Acts.<sup>52</sup>
56. Even though the UK Government may be willing in principle to legislate, the policy can be delayed because no suitable legislative opportunity is available. Finding the right legislative vehicle can be particularly difficult for smaller bids that do not constitute a Government bill on their own, such as the proposal to extend the remit of the housing ombudsman to social landlords (now included in the Housing Bill). Some larger "good governance" measures, such as the Assembly Government's proposals to reform inshore fisheries management,<sup>53</sup> have little chance of ever getting into the legislative programme because they are a low policy priority for the UK Government.
57. The Secretary of State for Wales rejected this criticism by arguing that the Assembly is no worse off than UK Government departments:

*There are lots of frustrated Secretaries of State around the Cabinet table who cannot get their bills in the Queen's Speech. There is always a big negotiation...as to what goes in and what there is legislative time for and so far we have a pretty good track record of Welsh legislation, Welsh-only legislation and Welsh clauses in*

*legislation...It does not follow that because you cannot get everything tomorrow, the fundamental settlement has to be altered in a substantial fashion.*<sup>54</sup>

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

**Table 7.1: Assembly bids for primary legislation submitted under Standing Order 31**

Bids submitted <sup>55</sup>	Outcome
<b>For 2001-02 session</b>	
<b>Health and Well-Being (Wales) Bill</b>	Successful. Provisions in National Health Service Reform and Health Care Professions Act 2002 and Health (Wales) Act 2003
<b>Education (Wales) Bill</b>	Partly successful. Some provisions included in the Education Act 2002
<b>St David's Day Bill</b>	Unsuccessful
<b>Census (Amendment) Wales Bill</b>	Unsuccessful, but administrative arrangements to enable the Assembly to influence census forms being made in concordat with the Office of National Statistics
<b>For 2002-03 session</b>	
<b>Common Land (Wales) Bill</b>	Bid not pursued because of DEFRA commitment to seek legislative time for England and Wales legislation in 2004-05
<b>Sunday Licensing (Wales) Bill</b>	Successful; provisions contained in Licensing Act 2003
<b>St David's Day Bill</b>	Unsuccessful
<b>Land Use Planning Bill</b>	Successful; separate provisions for Wales contained in Planning and Compulsory Purchase Bill
<b>Education Bill</b>	Partly successful; some provisions contained in the Education Act 2002; others unsuccessful

Table 7.1: Assembly bids for primary legislation submitted under Standing Order 31 (continued)

Bids submitted	Outcome
<b>For 2002-03 session (continued)</b>	
<b>Audit (Wales) Bill</b>	Successful; Public Audit (Wales) Bill currently before Parliament
<b>Housing Ombudsman (Wales) Bill</b>	Successful; separate provisions for Wales included in Housing Bill currently before Parliament
<b>Passenger Transport Bill</b>	Unsuccessful
<b>For 2003-04 session</b>	
<b>Education (Miscellaneous Provisions) (Wales) Bill</b>	So far unsuccessful in 2003-04
<b>Public Services Ombudsman (Wales) Bill</b>	Consultation completed on a draft Regulatory Reform Order on one proposal. Other proposals so far unsuccessful
<b>Tourism Accommodation (Registration) (Wales) Bill</b>	So far unsuccessful in 2003-04
<b>Transport (Wales) Bill</b>	So far unsuccessful in 2003-04
<b>Prohibition of Smoking in Public Places Bill<sup>a</sup></b>	So far unsuccessful in 2003-04; Private Member's Bill proposed in the House of Lords
<b>Note</b>	
a. This bid was proposed by four individual Assembly Members (led by Alun Pugh AM); all other bids were proposed by the Welsh Assembly Government.	

**Box 7.3: Legislating for Wales: the Planning and Compulsory Purchase Bill**

The Planning and Compulsory Purchase Bill<sup>56</sup> was among the first Bills to be drafted since the Assembly's adoption of the Rawlings Principles.

In July 2001, the UK Government announced plans for a radical overhaul of the planning system. In the autumn, the Assembly Minister for Environment decided to borrow some of the Whitehall proposals, but adopt a different approach to improving the development plan system, which would focus on changes to simplify and speed up the existing system rather than the more fundamental reform proposed for England.<sup>57</sup>

The Assembly Government had to firm up its own thinking quickly to keep up with the pace of developments in England and convince Whitehall officials to argue for separate Welsh provisions in the Bill in the UK Cabinet Legislative Programme Committee negotiations, even though this would mean extra work for them. Because of the constraints of Parliamentary time, there is pressure to keep Bills as small as possible. ODPM had to satisfy the Committee that it would be possible to legislate for a distinctive Welsh policy within the previously indicated size of the Bill by sharing clauses with England and requiring only a few Wales-only clauses.

Once agreement was in place, Assembly Government officials worked closely with ODPM and Parliamentary Counsel to draft the Wales clauses. There was no difficulty in securing Henry VIII powers for the Assembly equivalent to those of the Secretary of State in making regulations and orders. However, the Assembly was not given equivalent powers to commence the England and Wales provisions in Wales. This remains with the Secretary of State, who is obliged to consult the Assembly before the power is exercised – contrary to both the Rawlings Principles and Whitehall's own guidance in DGN9.

Having two different approaches to the same problem in one Bill did not make it easy for ODPM to manage the Bill in Parliament, as opposition MPs used the Assembly's plans to retain the development plan system to criticise England's alternative proposals. In June 2003, the UK Government secured Parliament's agreement to carry over this Bill to the next session in order to allow for greater scrutiny and to incorporate further amendments to the Bill.<sup>58</sup>

### Operating the devolution settlement when different parties rule in Cardiff and London

59. Many witnesses argued that the shared political outlook of the UK and Assembly Governments has played an important part in the Assembly's success in influencing the primary legislative programme and other Whitehall decisions. They felt that a sympathetic Government had created a favourable environment for the early years of the Assembly, and queried whether this success would continue when, at some future date, governments of different political hue are in power in Cardiff and London (sometimes termed political "co-habitation"). The House of Lords Select Committee on the Constitution has gone further to suggest that the Wales devolution settlement is ultimately unsustainable because of its dependence on goodwill between the Assembly and the UK Government.<sup>59</sup>

60. Another favourable factor in the first years of devolution has been the rising trend of public expenditure. Whatever parties are in power, the relationship between the Assembly and Whitehall will be placed under considerable strain when, at some future date, the funding coming from Westminster to the Assembly is reduced.

61. Overall, Professor Martin Laffin and colleagues argued that:

*If the parties in power in London and Cardiff were to change, the existing mechanisms for co-ordination and conflict management would face*

*enormous strains. These strains would be significantly reduced if the Assembly were to have primary powers but...the impact of any sharp shift in policy at Westminster would anyway be passed on through the Barnett Formula. Nonetheless, primary powers would remove the ability of the centre to ratchet back Welsh powers in a piecemeal way through legislation.<sup>60</sup>*

62. In contrast, the Secretary of State for Wales argued that the settlement is robust enough to adjust to co-habitation, because:

- there have already been periods of London co-habitation with coalition executives in both Wales and Scotland;
- policy disagreements occur between the current Assembly and UK Governments (for example, on foundation hospitals) without undermining the overall settlement;<sup>61</sup>
- the existing formal arrangements in the Memorandum of Understanding would sustain appropriate communication and co-operation between the two governments;
- there would be political limits to how much the UK Government could stand in the way of an elected Assembly or attempt to reverse devolution. The Secretary of State for Wales argued that, even if the two were diametrically opposed:

*The Secretary of State and the Government in London who was actively at war politically with the Assembly in Cardiff is actually going to find it very difficult to manage Wales*

*and is going to find it very difficult to have Wales effectively in revolt against London, as probably it came quite close to being under John Redwood. I think that the nature of British democracy in parliamentary politics means that in fact you will find that the system adjusts to cope with that situation.*<sup>62</sup>

63. The House of Lords Committee recommended that further use should be made now of the formal mechanisms for inter-governmental relations, arguing that they would become increasingly important as policy and political differences grow between the administrations.<sup>63</sup> While agreeing that the formal arrangements provide the overall framework for managing relationships, the UK Government replied that good informal contacts between Ministers and officials would continue to be important to the success of devolution, irrespective of the political persuasion of the administrations concerned.<sup>64</sup>

64. Whatever the nature of working relationships between the governments in Cardiff and London under co-habitation, it is likely that there would be greater policy differences between the two – and therefore fewer opportunities for the Assembly Government to piggy-back onto Whitehall Bills or to influence Whitehall policies affecting Wales.

### **The implications of a clearer break with Whitehall**

65. How the relationship between Wales and Whitehall would develop if the Assembly had primary legislative

powers would depend to some extent on where the boundaries of the settlement were drawn. Nevertheless, policy problems often cut across devolved and non-devolved issues – and the evidence from Scotland demonstrates that there would certainly need to continue to be extensive discussion and collaboration, as was underlined in the UK Government's evidence to the Commission:

*Even with a Scottish Parliament, operating the Scottish system has shown that, with primary legislative power, some things will have to be done in partnership with the Government of the United Kingdom. Scotland has not just been able to go off on its own, it has often had to do things by agreement.*<sup>65</sup>

66. Early experience of devolution has shown how the momentum of policy development in Whitehall continues to influence agendas in both Wales and Scotland. If the Assembly were to acquire the power to legislate in certain areas, the scope to make use of Whitehall legislation and be involved in central thinking and policy development would probably be reduced.

67. Nevertheless, the Assembly would still have the option of adopting Westminster legislation if it wished – as the Scottish Executive did when it borrowed capital finance proposals from the draft Bill for the Local Government Act 2003, which were passed in Edinburgh ahead of Westminster.



68. Thus, a clearer break from Whitehall would involve a potential reduction in information, analysis and leverage, which would need to be set against the potential advantages of greater autonomy in Wales.

69. The First Minister's evidence emphasised how, from a comparatively low base of experience under the Welsh Office, the Assembly civil service has built up its capacity in policy development:

*The Welsh Office that we inherited...was not a baby in 1999, but still much less innovative than the Scottish Office. Therefore, you say, 'Let us not try and develop policies when we haven't got the policy-making capability to do it.' So that is a fairly simple point, that you should not run before you have learned to walk, but I think certainly we are walking at a fast pace...<sup>66</sup>*

*In terms of the [civil service] machine, we are creating things that will be very different in 10 years' time. We have the whole generation of young civil servants coming in whose expectations are different to the old days.<sup>67</sup>*

70. Assembly Government officials are also gaining more experience of developing legislation through working on Assembly subordinate legislation and on Westminster Bills alongside their Whitehall colleagues. Although full primary legislative powers would require these skills to be considerably extended, the Permanent Secretary was in no doubt that his officials are

now capable of developing distinctive policies for Wales:

*The acquisition of further powers, including those of primary legislation, would represent a manageable progression, not a major step change, in terms of the demands that it would make on us.<sup>68</sup>*

71. Acquiring primary powers would increase the policy and legislative workload for Assembly Government officials, but it is very difficult to predict the scale of this impact. "Bill teams" would need to be established to manage each Bill through the legislative process; but the need for additional staff to implement the resulting legislation would depend on factors such as the nature of the Act's provisions and the capacity of the policy team that was in place beforehand.

72. Overall, the Permanent Secretary's view was that the additional work created for Assembly Government officials by primary legislative powers 'need not be unduly substantial'<sup>69</sup> in itself. However, his evidence noted that, if the size of the Assembly were to grow, this could significantly increase the workload for officials of supporting the scrutiny process.

### **Assembly officials and the Home Civil Service**

73. Some witnesses questioned whether Assembly officials should continue to be part of the UK Home Civil Service – the main concern being that Assembly staff might be unwilling to challenge



Whitehall because it could affect their career development prospects.

74. We did not receive any evidence to suggest that this has in fact occurred. It has been seen as appropriate in Scotland for executive officials to remain part of the Home Civil Service (although Northern Ireland has had its own civil service since 1921). In practice, most officials choose to develop their civil service careers within the Assembly, with only a few taking up the opportunity to work in Whitehall on loan arrangements.<sup>70</sup>
75. The Assembly is working with partners in the public sector in Wales on the Public Service Management Initiative, which aims to create a body of public servants with understanding and experience of different parts of the public sector. It is hoped that this will improve the joint delivery of public services and enhance and broaden career opportunities for public servants in Wales.<sup>71</sup>
76. A move to a separate executive and parliament (rather than corporate body) structure would strengthen the case for officials in the Presiding Office to be part of a separate “parliamentary” service. At present, they are Crown employees and members of the Home Civil Service, whereas the staff of the Scottish and Westminster Parliaments and the Northern Ireland Assembly are employed separately by those bodies. Such a legal separation would not prevent the continued collaboration and sharing of common services that is a feature of current arrangements. Nor would it preclude the possibility of

wider career development for staff of the Presiding Office – whether within the Welsh Assembly Government, the wider public service in Wales or in the parliamentary services of other UK legislatures.

### Findings

The evidence suggests the following observations on the Wales – Whitehall relationship under devolution:

- the Assembly Government benefits from close engagement with Whitehall in developing policy and drafting primary legislation affecting Wales;
- the arrangements by which the Welsh Assembly Government secures its legislative and other requirements from Whitehall depend heavily on goodwill and the ability to react quickly to Whitehall’s priorities;
- the need for good communication and co-operation has been more extensive than envisaged in *A Voice for Wales* – not only in respect of policy and legislation on devolved matters, but also in implementing non-devolved policies that affect the Assembly;
- there is no single Whitehall line – the Department for Constitutional Affairs and the Wales Office seek to promote consistency when issues come to their attention, but they are not able to police all the interaction that goes on at every level between the Assembly and Whitehall departments, which is influenced by history and personal contacts as well as by the formal structures and policy context;

- in any event, the constantly changing boundaries of government activity mean that the boundaries of devolution are inevitably changing and, with them, the relationship between the centre and the devolved administrations;
- the Assembly Government is the junior partner in the relationship with Whitehall – making different arrangements for Wales is a complication for hard pressed central departments and innate caution and other pressures can cause delay, even when there are no over-riding objections to giving the Assembly Government what it wants;
- because goodwill currently plays a significant part in making the Wales-Whitehall relationship work, formal arrangements are likely to become more important when the parties in power do not have a similar political outlook; but their efficacy is so far untested;
- we share the UK Government’s view that there should be greater consistency in the way in which legislation for Wales is framed – we welcome the intention to review the guidance for Whitehall and make specific proposals to create a new legislative partnership as part of our recommendations in the concluding chapter.

### Notes

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<sup>1</sup>House of Lords Select Committee on the Constitution, *Devolution: Inter-institutional Relations in the United Kingdom: Evidence Complete to 10 July 2002*, HL Paper 147 of 2001-02 (10 July 2002).

<sup>2</sup>House of Lords Select Committee on the Constitution, *Devolution: Inter-institutional Relations in the United Kingdom*, 2nd Report, HL Paper 28 of 2002-03 (17 December 2002).

<sup>3</sup>*Ibid.* paragraph 12.

<sup>4</sup>See Chapter 10 on the financing of devolved government and, for an example of this overlap, Chapter 5, which describe the consequences of the Scottish Executive’s decision to abolish charging for the personal care element of long term care for the elderly.

<sup>5</sup>*Memorandum of Understanding and supplementary agreements between the United Kingdom Government, Scottish Ministers and the Cabinet of the National Assembly for Wales*, Cm 5240 (December 2001).

<sup>6</sup>*Ibid.* paragraph 22.

<sup>7</sup>Steve Pomeroy, oral evidence of the First Minister, 12 December 2002.

<sup>8</sup>Wales Office, *Devolution Guidance Note 4: The Role of the Secretary of State for Wales* (January 2003). Available at <http://www.dca.gov.uk/constitution/devolution/guidance/dgn04.pdf> (accessed 2 February 2004).

<sup>9</sup>Office of the Deputy Prime Minister, *Devolution Guidance Note 9: Post-devolution primary legislation affecting Wales* (January 2003). Available at <http://www.dca.gov.uk/constitution/devolution/guidance/dgn09.pdf> (accessed 2 February 2004).

<sup>10</sup>Wales Office, *op. cit.*

<sup>11</sup>Oral evidence of the Secretary of State for Wales, 13 March 2003.

<sup>12</sup>*Ibid.*

<sup>13</sup>*House of Commons Debates*, 17 June 2003, col. 228.

- <sup>14</sup>Written evidence from the UK Government, December 2002.
- <sup>15</sup>For example, the Secretary of State for Wales intervened to promote a solution on the Assembly Learning Grant: see oral evidence of the Secretary of State for Wales, 13 March 2003.
- <sup>16</sup>Ibid.
- <sup>17</sup>See Chapter 9.
- <sup>18</sup>Oral evidence of the Secretary of State for Wales, 13 March 2003.
- <sup>19</sup>See, for example, the oral evidence of the Minister for Finance, Local Government and Communities, 5 December 2002.
- <sup>20</sup>Oral evidence of the Deputy First Minister and Minister for Rural Development and Wales Abroad, 8 November 2002.
- <sup>21</sup>Ibid.
- <sup>22</sup>Oral evidence of the First Minister, 12 December 2002.
- <sup>23</sup>Oral evidence of Minister for Culture, Sport and the Welsh Language, 21 November 2002.
- <sup>24</sup>See, for example, oral evidence of the Chief Executive of the Arts Council of Wales, 10 April 2003, on Lottery arrangements; written submission of University of Wales College, Newport, undated, referring to the 2003 Higher Education White Paper.
- <sup>25</sup>Oral evidence of the Wales Council for Voluntary Action, 26 June 2003.
- <sup>26</sup>See Chapter 5.
- <sup>27</sup>See Chapter 9.
- <sup>28</sup>Supplementary written evidence of the Secretary of State for Wales, 14 November 2003.
- <sup>29</sup>Office of the Deputy Prime Minister, *op. cit.*
- <sup>30</sup>Supplementary written evidence of the First Minister, 30 June 2003.
- <sup>31</sup>Ibid; and oral evidence of the Minister for Finance, Local Government and Communities, 5 December 2002.
- <sup>32</sup>Supplementary written evidence of the Minister for Health and Social Services, 16 July 2003.
- <sup>33</sup>Oral evidence of Professor David Miers and David Lambert, 28 February 2003.
- <sup>34</sup>Supplementary written evidence of the Counsel General, June 2003.
- <sup>35</sup>*National Assembly for Wales Record of Proceedings*, 14 February 2002.
- <sup>36</sup>*Assembly Review of Procedure: Final Report* (*op. cit.*).
- <sup>37</sup>*The Government Response to the Fourth Report of the Committee: The Primary Legislative Process as it Affects Wales*, HC 989 of 2002-03 (10 July 2003).
- <sup>38</sup>*The Government's Response to the Second Report of the Select Committee on the Constitution, Session 2002-03 (HL Paper 28): Devolution: Inter-institutional Relations in the United Kingdom*, Cm 5780 (March 2003), paragraph 21.
- <sup>39</sup>Supplementary written evidence of the First Minister, 30 June 2003.
- <sup>40</sup>Simon McCann, 'Permissive Powers are Good for the Health: The Health Reforms in Wales', *Wales Law Journal* 1 (2003): 176-186.
- <sup>41</sup>Ibid. 184-185.
- <sup>42</sup>Supplementary written evidence of the Counsel General, June 2003.

- <sup>43</sup>House of Lords Select Committee on Delegated Powers and Regulatory Reform, 1st Report, HL Paper 9 of 2002-03 (27 November 2002).
- <sup>44</sup>Simon McCann, *op. cit.*, 178.
- <sup>45</sup>Oral evidence of the Counsel General, 5 December 2002. See also Q129-130 of the evidence of Geoffrey Bowman CB, First Parliamentary Counsel, to the Welsh Affairs Select Committee for its report on *The Primary Legislative Process as it Affects Wales*, HC 79 of 2002-03 (19 March 2003).
- <sup>46</sup>The House of Lords Select Committee on Delegated Powers and Regulatory Reform, which carries out the job in Parliament of considering the appropriateness of delegated powers, has decided that it will apply to the Assembly the same criteria as those for UK Ministers – see House of Lords Select Committee on Delegated Powers and Deregulation, 18th Report, HL Paper 101 of 1997-98 (6 May 1998).
- <sup>47</sup>House of Lords Delegated Powers and Regulatory Reform Committee 3rd report, HL Paper 12 of 1998-99 (16 December 1998), paragraphs 5-6.
- <sup>48</sup>House of Lords Delegated Powers and Regulatory Reform Committee 9th report, HL Paper 40 of 1998-99 (10 March 1999), paragraph 8.
- <sup>49</sup>For example, see the Minister's introductory speech to the Commons Second Reading debate, *House of Commons Debates*, 8 June 1999 col. 497; the Memorandum submitted by the Department of the Environment, Transport and the Regions to the House of Lords Delegated Powers and Regulatory Reform Committee, reproduced as Annex 1 to HL Paper 12 of 1998-99; and *Pollution Prevention and Control Act 1999: Explanatory Notes* (London: The Stationery Office, 1999).
- <sup>50</sup>Following procedures set out in Standing Order 31.
- <sup>51</sup>For example, Assembly Government officials often provide Bill drafting instructions for the UK Government's Parliamentary Counsel.
- <sup>52</sup>See Martin Laffin et al, the Glamorgan Policy Centre, *Future Options: An Assessment of the Powers of the National Assembly for Wales* (University of Glamorgan, March 2003), 8.
- <sup>53</sup>Supplementary written evidence of the Minister for Environment, Planning and Countryside, July 2003.
- <sup>54</sup>Oral evidence of the Secretary of State for Wales, 13 March 2003.
- <sup>55</sup>In 1999 and 2000, there was no requirement to notify bids for primary legislation to plenary for approval.
- <sup>56</sup>Planning and Compulsory Purchase Bill, Bill 47 of 2002-03.
- <sup>57</sup>Welsh Assembly Government, *Planning: Delivering for Wales - Consultation Paper*, (Cardiff: Welsh Assembly Government, January 2002).
- <sup>58</sup>*House of Commons Debates*, 10 June 2003 cols. 543-607.
- <sup>59</sup>House of Lords Select Committee on the Constitution, *op. cit.*
- <sup>60</sup>Martin Laffin et al, *op. cit.*, 31.
- <sup>61</sup>See also the oral evidence of Nick Bourne AM, Leader of the Welsh Conservatives in the National Assembly for Wales, 28 February 2003.
- <sup>62</sup>Oral evidence of the Secretary of State for Wales, 13 March 2003.
- <sup>63</sup>House of Lords Select Committee on the Constitution, *op. cit.*
- <sup>64</sup>*The Government's Response to the Second Report of the Select Committee on the Constitution*, Session 2002-03, *op. cit.*
- <sup>65</sup>Oral evidence of the Secretary of State for Wales, 13 March 2003.
- <sup>66</sup>Oral evidence of the First Minister, 12 December 2002.
- <sup>67</sup>Oral evidence of the First Minister, 25 July 2003.

<sup>68</sup>Written evidence of the Permanent Secretary, December 2002.

<sup>69</sup>Ibid.

<sup>70</sup>See the supplementary written evidence from the Permanent Secretary, 3 July 2003. The Wales Office is staffed by officials on loan to the Assembly. In July 2003, outward loans included three people on loan to the Cabinet Office and one to the Scottish Executive.

<sup>71</sup>Ibid.



# The Wales–Westminster relationship

This chapter describes the present arrangements for passing primary legislation that affects Wales, particularly legislation that relates to the functions devolved to the Assembly.

2. The chapter addresses the following questions:
  - what has been the impact of devolution on the arrangements for handling legislation affecting Wales?
  - how effective are the present arrangements?
  - what are the main advantages and disadvantages identified in evidence?
  - what might be the impact of recent proposals for procedural reform?
3. The preceding chapter considered the relationship between the Welsh Assembly Government and the UK Government, which is the principal means by which the Assembly is able to influence the Government's proposals for primary legislation, including securing Parliamentary time for its own proposals. The focus of this chapter is on the relationship between the Assembly as a deliberative body and Parliament. In particular, it looks at the role of Members of Parliament and Peers in scrutinising and revising the legislative proposals of the Welsh Assembly Government and other legislation affecting Wales that impacts on the devolved fields.
4. All primary legislation affecting Wales is made by the UK Parliament. Annex 5 demonstrates that the UK Government's programme of legislation includes the following:
  - Wales-only Acts;
  - England and Wales Acts dealing with devolved matters – some containing only minor Wales-only provisions and others with substantial Wales-only sections;
  - Acts dealing with non-devolved matters.
5. *A Voice for Wales* indicated that the Assembly would have the opportunity to influence primary legislation affecting Wales, which was not limited to the fields affected by devolution:
 

*In the making of legislation and in the debates on UK policy, Wales's voice and influence must be felt in the Cabinet and in Parliament...*

*The Assembly will need to establish a close partnership with Members of Parliament representing Welsh constituencies... The Government's proposals will allow the Assembly to seek to influence legislation which is being considered at Westminster... The Assembly will also have a general capacity to debate matters of interest to Wales and to make its views known to Parliament.<sup>1</sup>*



6. There are two main formal routes for the Assembly to submit its views. First, the Government of Wales Act provides that the Secretary of State must consult the Assembly about the UK Government's legislative programme, and must participate in at least one Assembly debate on the programme each year.<sup>2</sup> Second, the Assembly's own Standing Orders provide that 'A Minister, or at least three Members, may table a motion calling on the UK Government to bring forward a public Bill on a matter specified in the motion, or amendments to an identified Bill currently before either House of Parliament.'<sup>3</sup>
  7. The Standing Orders also provide that, before 31 March each year, the Assembly must consider a motion setting out the Assembly Government's proposals for primary legislation in the following session of the UK Parliament.<sup>4</sup> The UK Government then decides whether and how to incorporate these proposals in its legislative programme as discussed in Chapter 7.
  8. Since 1999, the role of the Assembly in relation to primary legislation affecting Wales has developed considerably from the somewhat limited role of making its views known and speaking for Wales that was suggested in the White Paper. The practice has developed that, in developing Wales-only primary legislation, the UK Government will seek to fulfil legislative requests of the Assembly, subject to the constraints of time, drafting capacity and agreement on the proposed policy. It is also accepted that the Assembly Government should have an input to the drafting of a large number of other Bills that affect Wales.
  9. As a result, there has developed a process of joint working between the Assembly and Parliament. Some have described this as a process of co-legislation; in practice, it is a process where responsibilities are split between Wales and Westminster. Wales – mainly through the Welsh Assembly Government – is increasingly taking the lead in initiating policy and preparing drafting instructions for legislation, but the scrutiny and challenge role remains at Westminster.
- Practical experience of the primary legislative process for Wales**
10. The evidence suggests that the scrutiny of primary legislation affecting Wales is now a complex process, and one that is changing rapidly with experience. It also presents a number of challenges if it is to work effectively, including:
    - procedural and timing issues – enabling the Assembly in plenary and committees to contribute usefully to Parliament's consideration of Welsh measures;
    - information and understanding – ensuring that Members of Parliament are in a position to consider and respond to Assembly Government proposals and the views of other AMs;
    - clarity and accessibility – ensuring that legislation is drafted in such a way as to enable Members to identify and consider their implications for Wales;

- roles and responsibilities – whose job is it to scrutinise legislation that is initiated by the Welsh Assembly Government, or other legislation affecting the responsibilities of the Assembly?
11. In evaluating this process, the Commission has relied heavily on the evidence of the twenty Members of Parliament whom we met during our review, and on the detailed examination of the primary legislative process as it affects Wales carried out by the Welsh Affairs Select Committee (see paragraphs 29-33 below). The evidence suggests that Westminster is adapting to the advent of the Assembly and that there are examples where the joint scrutiny process has worked effectively, but others where it has not.
  12. The North Wales Group of Labour MPs were positive about the current settlement, but felt that scrutiny arrangements should be improved:

*We consider that the present settlement is working in general terms well...the present arrangement has only been in place for a relatively short period, four years, and we, therefore, as a group feel that... there is no pressing need for major change at this stage...*

*We think that North Wales has a particular perception of the Assembly at the present time which is not positive and we believe that the Assembly needs to address that issue in the current term. And in order to do that, we also believe, as most of us*

*backbenchers, that we need to try, as Members of Parliament, to work more closely with backbench members of the National Assembly during the course of the years ahead to improve the working of the settlement and to look at different ways for developing scrutiny of legislation as it affects our constituents.<sup>5</sup>*

13. Wayne David MP told us about both strengths and weaknesses in the present process for considering legislation affecting Wales. From a perspective of support for the present settlement, he suggested that the lack of contact and mutual understanding between MPs and AMs was a potentially serious flaw in the arrangements, which rely heavily on partnership between the two elected bodies. The Learning and Skills Act 2000, which conferred substantially new powers on the Assembly, was an example where scrutiny had not been effective. There were also occasions when Welsh legislation seemed to be rushed through with little scrutiny:

*Sometimes the approach towards Welsh legislation being introduced here is, we will do it as quickly and as painlessly and with as little fuss as possible and we can move on to something else. I do not think that is good enough. There needs to be maximum transparency, openness and co-operation for the devolution settlement to work as effectively as it could. That is my main point.<sup>6</sup>*

14. By contrast, he cited the positive experience of the Health (Wales) Act 2003, which expanded the role of

Community Health Councils in Wales and established two new statutory bodies, the Wales Centre for Health and Health Professions Wales:

*There has been a high degree of AM and MP involvement in the pre-legislative and the legislative process... The Bill was proposed by the Welsh Assembly Government, accepted in principle by the Westminster Government, but very importantly the proposals went through a pre-legislative scrutiny stage. It was debated in the Health and Social Services Committee of the National Assembly and by the Welsh Affairs Select Committee in this House and I believe they had joint sessions.*<sup>7</sup>

15. Here, the process was facilitated by the Wales-only nature of the legislation and by the pre-legislative scrutiny process. Where the Welsh Assembly Government's proposals are part of an England and Wales Bill, the process of their scrutiny fits less easily with Westminster procedures and time constraints, as the experience of the Planning and Compulsory Purchase Bill suggests.
16. Chapter 7 explained how the content and structure of this Bill's Welsh provisions were negotiated between Cardiff and Whitehall and the timing constraints this created. The Assembly debated the *Planning: Delivering for Wales* policy on several occasions in 2002,<sup>8</sup> and the Environment, Planning and Transport Committee discussed the Bill itself on 17 January

2003 (although none of its comments led to amendments being pursued by the Assembly Government).<sup>9</sup>

17. When it came to scrutiny in Westminster, the separate measures for Wales, which were substantially different from those proposed for England, were given little attention in the Commons. The one Commons Standing Committee sitting that was allocated to consider these clauses was suspended three times for divisions, leaving just over two hours to debate nineteen clauses. In the end, only the first clause was discussed; and much of the debate centred on amendments that were designed to call into question the proposals for England rather than to enhance the provisions for Wales.<sup>10</sup> This Bill was subsequently carried over to the 2003-04 session.
18. Some MPs emphasised the uncertainty about their role in the scrutiny and challenge of primary legislation initiated by the Assembly Government. Ian Lucas MP reflected:

*What is my role to be in those circumstances? Is it my role to actually criticise the Assembly, the proposals, or is it simply to seek to improve them in minor ways, or see difficulties? I think there is a difficulty with the present system. I think there is, however, an answer to it... I think that if legislation is presented in draft it does give you an opportunity to actually make constructive criticisms. If you present legislation that is not in*

*draft form then it is very, very difficult to achieve any improvement.*<sup>11</sup>

19. Jon Owen Jones MP argued that most primary legislation affecting Wales is less well scrutinised now than was the case before devolution because, although Bills in devolved areas are negotiated and agreed between the Assembly and UK Governments, neither MPs nor AMs are in a position to test the proposed legislation:

*Highly contentious bills with significant differences of opinion have been piggy-backed either as "England/Wales Bills" or on "English Bills". The result of that is that it is very difficult to be able to ask difficult questions of a Minister and have them answered. In general, you are asking questions of English Ministers who have no particular knowledge, or no ownership of the line of argument that they are expected to defend.*

*...In Parliament, in effect, there is not the ability to scrutinise and amend and improve that legislation... It's not just that Welsh MPs are not in a position to do that job, Welsh AMs can't do it, because when Parliament has decided what the wording of a Bill will be, Welsh AMs have no power to change it. So there is a lacuna here in the system.*<sup>12</sup>

20. Win Griffiths MP also highlighted how the time pressures that are a feature of the primary legislation process can

squeeze out communication between the various institutions about any policy differences. For example, when the Welsh Assembly Government submitted its views to UK Ministers on the Community Care (Delayed Discharges etc.) Bill:

*We [MPs] were not copied into the process. I suppose because of the time, there was not a lot of debate. There was a bit of a row about it, but right up to near the end there wasn't a lot of debate about it, unlike some of the other things where we have tried to raise issues that concerned us... Because of time, etc., both outside and within the Parliamentary process, it is difficult to achieve a proper dialogue.*<sup>13</sup>

21. In contrast to his concerns about the scrutiny of England and Wales Bills, Jon Owen Jones MP pointed to the extensive scrutiny that has taken place of Wales-only Bills:

*Welsh legislation, and entirely consensual Welsh legislation, has had huge degrees of scrutiny. It has been subjected to scrutiny in draft form by the Welsh Select Committee, has been scrutinised by the Welsh Grand Committee, [and has] then gone on to the floor of the House. So we've had scrutiny perhaps to excess for Bills which are non-contentious.*<sup>14</sup>

22. This point was reinforced by Hywel Williams MP, who commented on the scrutiny process for the Health (Wales) Bill:

*If I may say from the point of view of that Bill, it was discussed extensively – very, very extensively...it does raise a very fundamental question with something where there is no disagreement. Are we saying that we have to go through all these steps? Are we saying that the people in Cardiff are unable to take comparatively innocuous decisions? There was no argument about them. Are we saying that they are unable to do it themselves?<sup>15</sup>*

(Translated from the original spoken in Welsh)

### Examination of primary legislation by the Assembly committees

23. Subject Committees have developed a variety of different practices for considering primary legislative proposals. For example:
- committees may submit comments on consultation papers or draft Bills to the Assembly Minister;
  - Wales Office Ministers have attended committee sessions to discuss forthcoming Bills;
  - members of the House of Commons Welsh Affairs Select Committee attended a meeting of the Assembly Health and Social Services Committee that debated amendments to the draft Health (Wales) Bill;<sup>16</sup>
  - a special committee was established to examine the Public Audit (Wales) Bill.

24. However, there is no formal mechanism by which Assembly committees can convey their views directly to Westminster. As a result, committees are usually reliant on Assembly Ministers to feed their views into the UK Government as they see fit.
25. Furthermore, the committees' meetings often do not fit in well with the Whitehall and Parliamentary timetable for Bills, which restricts the committees' scope to comment on or suggest amendments to the proposed legislation. For example:
- the Environment, Planning and Transport Committee discussed the Planning and Compulsory Purchase Bill just six days before the Wales-only provisions were debated in Committee in the Commons;
  - the Health and Social Services Committee had to convene a special meeting during the 2002 summer recess in order to discuss the draft Mental Health Bill within the UK Government's consultation period.<sup>17</sup>

### Criteria for evaluating the primary legislative process

26. In the light of this evidence, the Commission set out to evaluate the legislative process as it now applies to the legislative proposals of the Welsh Assembly Government. We adopted the following criteria:
- are the present arrangements for initiating and scrutinising legislation for Wales clear, rigorous, consistent and accountable?



- are they likely to produce good legislation based on well worked up policies that have been tested in consultation and debate?
- do they provide appropriate opportunities for the Assembly to initiate and examine proposals for legislation, as envisaged in *A Voice for Wales*?
- do they enable the Welsh Assembly Government to deliver its policy priorities in a reasonable time scale?

### Advantages of the present arrangements

27. Judged by these criteria, the evidence includes a number of advantages of the present arrangements:

- the model of executive devolution is clear – the UK Parliament makes primary legislation for Wales and the requirements of the Welsh Assembly Government are accommodated within the programme of the UK Government, which is accountable for all primary legislation affecting Wales;
- the primary legislation process allows for proposals to be developed and tested in Wales at the policy stage and then to receive legislative scrutiny in Parliament;
- Parliament has extensive experience of testing and improving Bills – and establishing separate arrangements for scrutinising primary legislation in Cardiff would create additional costs for Wales;
- arrangements have evolved to increase the role of Welsh MPs and create more opportunities for AMs and committees of the Assembly to

contribute to the consideration of legislation affecting Wales; and there are proposals to strengthen this further (see paragraphs 29-33);

- the process has delivered many of the legislative proposals submitted by the Assembly during the first term, either as separate Welsh Acts or as part of England and Wales legislation.<sup>18</sup>

### Disadvantages of the present arrangements

28. The evidence also points to a number of deficiencies in the present arrangements:

- frustrated aspirations – that the Assembly cannot itself scrutinise and implement the policy proposals of the Welsh Assembly Government and that these proposals may be held up by the legislative log-jam at Westminster;
- the predominance in the legislative process of the priorities and timetable of the UK Government unduly restricts the Assembly;
- Parliament does not have the time, capacity or mechanisms for discrete consideration of Welsh Parts or clauses of England and Wales Bills;
- there is a lack of consistency and clarity in the drafting of legislation affecting Wales and in the allocation of powers to the Assembly;<sup>19</sup>
- confused accountability – the roles and responsibilities of AMs and MPs in relation to the scrutiny of Welsh legislation are unclear;
- as a result, the scrutiny arrangements at Westminster and in Cardiff are inadequate.

### Impact of proposals for procedural reform

29. Both the House of Lords Select Committee on the Constitution and the Welsh Affairs Select Committee have made a number of proposals that are directly relevant to the analysis in this chapter, relating to ways of improving Parliamentary procedures and drafting conventions in order to enable the National Assembly to consider measures affecting devolved areas.<sup>20</sup> These include recommendations for:
- greater use of pre-legislative scrutiny;
  - the extension of formal joint working between House of Commons Select Committees and Subject Committees of the National Assembly;
  - an annual joint meeting on the legislative priorities for Wales between the Welsh Grand Committee (comprising all Welsh MPs) and the National Assembly;
  - committing a Wales Part of a Bill to a separate Standing Committee and using Special Standing Committee procedures (which would allow the Assembly to present formally its views on a Bill) for consideration of a Wales-only Bill.
30. In its response to these recommendations, the UK Government:
- indicated that it is working to achieve the publication in draft, whenever practicable, of Bills containing significant Wales-only clauses; but that there will always be a need for Parliament to legislate quickly where there is a clear need, and that drafting capacity places constraints on the number of pre-legislative Bills;
  - pointed to the constraints on the separate scrutiny of Welsh Parts of Bills – Bills are normally drafted as a whole and it is not always practical for one Part to be published in advance of the rest. It would not be possible to scrutinise the Wales-only clauses without an understanding of the whole picture as shown by the full draft;
  - supported the proposal for joint pre-legislative scrutiny by the Welsh Affairs Committee and Assembly committees, but noted that such procedural reforms are a matter for Parliament. Similarly, it would be for the House of Commons and the Assembly to take forward the proposal for an annual joint meeting;
  - reported that it has no plans at present to use new approaches for the committee stages of Bills (although it would consider each case on its merits), and argued that a Bill that had been subject to pre-legislative scrutiny would be unlikely to merit further examination by a Special Standing Committee.
31. The Welsh Affairs Committee proposals are designed to improve the present arrangements with respect to the avenues for Assembly–Parliamentary communication and joint scrutiny. They would, in effect, create a Wales subset of Westminster, giving Assembly committee members and other AMs clearly defined routes for making their views known. The role of Welsh MPs would also have a clearer focus through the annual debate on legislative priorities.
32. We understand that officials of the House of Commons and the Presiding Office are considering the practicalities



of joint committee meetings or joint meetings of the Assembly and the Welsh Grand Committee.

Nevertheless, the Government's emphasis on the practical constraints on separate scrutiny of distinctive Welsh clauses in England and Wales Bills suggests that the prospect of major changes to existing practice is uncertain.

33. Moreover, procedural changes will not address all of the problems identified in evidence. One of the key issues that will remain unresolved is the nature of the convention in relation to Parliamentary debate and scrutiny of legislative proposals emanating from the National Assembly. On this the questions raised by the evidence are:
- are individual MPs, whether or not they represent Welsh constituencies, entitled to challenge the Assembly Government's proposals in principle, or is their role simply one of scrutiny to ensure that the legislation enacting them is sound, i.e. well drafted and accurate in its effects?
  - where proposals relate to Welsh Assembly Government policies and debate, challenge and consultation has taken place in Wales, is Westminster best placed to carry out the scrutiny role?

### The scrutiny of legislation by the Scottish Parliament and Westminster

34. These questions do not arise in relation to Scotland because, when the Scottish Parliament legislates on devolved matters, those who propose Bills are directly accountable to the elected body that scrutinises and passes the legislation. As at Westminster, this does

not mean that there are no concerns about the adequacy of scrutiny by the Scottish Parliament – but the process is under the control of the Parliament and the Scottish Executive. Sir David Steel MSP, then Presiding Officer of the Scottish Parliament, gave his view of the strengths and weaknesses of its legislative scrutiny:

*I think the greatest strength of our system is the pre-legislative scrutiny of Bills by our committees... The fact that a Bill, before it is debated by Parliament, is scrutinised by a committee which can listen to all the people affected by that piece of legislation and share their views on it before it ever gets debated, is I think a great strength...*

*A weakness is that I think, at times, we have been a bit rushed when it comes to considering legislation. We have already discussed the quantity of legislation and I hope in the next Parliament it will be less. The time spent therefore on each individual piece of legislation will be increasingly greater.<sup>21</sup>*

35. However, the Westminster Parliament has continued to legislate for Scotland on a wide range of devolved matters, subject to the formal agreement of the Scottish Parliament secured through the passage of a Sewel motion (see Box 8.1). It was envisaged that this device would be used rarely but, in practice, forty-one motions have been agreed in the first term,<sup>22</sup> which has been the cause of considerable debate in Edinburgh.

### Box 8.1: Sewel motions

The devolution of primary law-making powers to the Scottish Parliament has not altered the power of the UK Parliament in Westminster to legislate for Scotland. However, during the Parliamentary stages of the Scotland Act 1998, the Government Minister, Lord Sewel, announced that the Government ‘would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament’.<sup>23</sup> This convention is re-affirmed in the Memorandum of Understanding with the devolved administrations.<sup>24</sup>

The UK Government guidance for Whitehall officials on the Sewel Convention states that ‘The convention applies when legislation makes provision specifically for a devolved purpose; it does not bite when legislation deals with devolved matters only incidentally to, or consequentially upon, provision made in relation to a reserved matter.’<sup>25</sup> In other words, ‘the test has become: “could the Scottish Parliament enact this legislation?” If the answer is yes, its consent is sought.’<sup>26</sup>

The consent of the Scottish Parliament to Westminster legislation on devolved matters in Scotland is secured through what has become known as a Sewel motion. In practice, Whitehall departments are expected to approach the Scottish Executive to gain consent for legislation when appropriate; the Scottish Executive is then responsible for obtaining the view of the Scottish Parliament. Consultation should take place at an early stage in the development of a Bill, and Whitehall officials are expected to advise the Scottish Executive during the passage of the Bill about amendments (that the Government supports) that change or introduce provisions requiring the Scottish Parliament’s consent.

36. The Deputy First Minister of the Scottish Executive, Jim Wallace QC MSP, argued that the Sewel motion procedure has been the sensible way to close loopholes that would otherwise be created by new Westminster legislation for England and Wales – for example, the Proceeds of Crime Act 2002:

*It would have been a criminals’ charter if we had created loopholes in different regimes north and south of the Border, they could have moved their money around...it made eminent good sense to have Westminster to legislate for all of the United Kingdom...*

*It would have been a muddle if we had tried extracting bits that we would have done and bits Westminster did, and tried to put the two together or make sure they were kept in step, and in fact there was a joint agreement that Westminster should legislate for us. But it does tend to be that Westminster are doing particular things and they may show up...the powers to be exercised by Scottish Ministers.<sup>27</sup>*

37. Other uses of Sewel motions have included to:
- comply with international obligations;
  - participate in UK-wide measures, such as the creation of the Food Standards Agency;
  - apply uniform powers and regulation to Scottish and UK-wide bodies;
  - participate in policy reforms, e.g. on extending prescription rights or combating terrorism.<sup>28</sup>
38. The evidence includes the following criticisms of the use of Sewel motions so far:
- there is inadequate scope for Parliamentary scrutiny of Scottish Executive proposals for a Sewel motion;
  - the wording of Sewel motions gives wide discretion to Westminster to legislate on devolved matters in a particular Bill – the Scottish Parliament is not automatically informed of subsequent amendments to the Bill for its approval;
  - the extent of their use ‘represents a seepage of legislation competence from the Scottish Parliament’.<sup>29</sup>

39. The Scottish experience suggests that, if primary powers were to be devolved to the National Assembly:
- the role of Welsh MPs in relation to legislation for Wales on devolved matters would reduce;
  - nevertheless, Westminster would probably continue to legislate extensively for Wales in relation to both devolved and non-devolved matters;
  - consequently, the need for a strong working relationship between the Assembly and the Westminster Parliament would continue.

## Findings

**Our findings from the evidence in this chapter are as follows:**

- **since the creation of the Assembly, a process has evolved whereby much primary legislation is initiated in Wales and scrutinised at Westminster;**
- **this process has some advantages for Wales, including the involvement of experienced Parliamentarians and their officers, and it has evolved rapidly in response to devolution;**
- **in some cases, particularly where pre-legislative scrutiny is possible, the process has proved effective and flexible in ensuring well-informed scrutiny in both Cardiff and Westminster;**
- **there are other examples of substantial policy proposals initiated by the Welsh Assembly Government and presented in England and Wales legislation receiving little scrutiny;**

- the relationship between Cardiff and Westminster, on which the present arrangements depend, presents many challenges in terms of procedures, timing, shared information and mutual understanding;
- there is no parliamentary equivalent of the concordats and accompanying guidance for government on how the Assembly may submit its views on legislation for Wales – the Assembly and the Parliamentary authorities and appropriate committees should consider drafting a parliamentary guidance note on the scrutiny of legislation;
- many of the procedural precedents now being established depend on goodwill – more formal agreements may be needed when the Assembly and the Westminster Parliament are led by opposing parties;
- we welcome the discussions between the Assembly and Parliament on procedural changes to increase the Assembly's involvement in scrutinising Bills – but the difficulties of changing practices at Westminster in ways that could reduce its sovereignty should not be underestimated;
- the fundamental problem is one of split accountability – proposals are initiated in one representative body and scrutinised and adopted in another. Some proposals are scrutinised in great detail in both places, while others fall between the two; and the initiators are not present to explain their policies in the forum that scrutinises and legislates;
- it is hard for the public and lobbying organisations to know who is responsible for legislation under these arrangements;
- if primary powers were devolved to Wales, there would continue to be a considerable body of legislation initiated in Whitehall, on both devolved and non-devolved matters, that would have important implications for Wales. Therefore, supporting and facilitating the relationship between the Assembly and Westminster will remain vital.

### Notes

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<sup>1</sup>Welsh Office, *A Voice for Wales*, Cm 3718 (1997), 8 and 20.

<sup>2</sup>Government of Wales Act 1998 c.38, section 31.

<sup>3</sup>National Assembly for Wales Standing Order 31.9.

<sup>4</sup>Standing Order 31.10.

<sup>5</sup>Ian Lucas MP, oral evidence of the North Wales Group of Labour MPs, 12 June 2003.

<sup>6</sup>Oral evidence of Wayne David MP, 14 March 2003.

<sup>7</sup>*Ibid.*

- <sup>8</sup>*National Assembly for Wales Record of Proceedings*, 31 January 2002 and 26 November 2002; Minutes of the meeting of the Environment, Planning and Transport Committee, 17 July 2002, EPT-13-02 (min).
- <sup>9</sup>Letter from the Chair of the Environment, Planning and Transport Committee to the Minister for Environment, 21 January 2003; and the reply, 22 January 2003.
- <sup>10</sup>House of Commons Standing Committee G, 10th sitting, 23 January 2003.
- <sup>11</sup>Oral evidence of the North Wales Group of Labour MPs, 12 June 2003.
- <sup>12</sup>Oral evidence of Jon Owen Jones MP and Win Griffiths MP, 11 July 2003.
- <sup>13</sup>*Ibid.*
- <sup>14</sup>*Ibid.*
- <sup>15</sup>Oral evidence of Hywel Williams MP, 12 June 2003.
- <sup>16</sup>Health and Social Services Committee, 29 May 2002. For a report of the proceedings, see Committee paper HSS-13-02(p10), agreed on 19 June 2002.
- <sup>17</sup>Minutes of the Health and Social Services Committee, 11 September 2002, HSS-17-02(min).
- <sup>18</sup>See Table 7.1, Chapter 7.
- <sup>19</sup>Discussed in Chapter 7, paragraphs 40-51.
- <sup>20</sup>House of Lords Select Committee on the Constitution (2002), *op. cit.* and the Welsh Affairs Select Committee (2003), *op. cit.* (see Chapter 1).
- <sup>21</sup>Oral evidence of the Presiding Officer, the Deputy Presiding Officer and the Clerk of the Scottish Parliament, 13 February 2003.
- <sup>22</sup>Data taken from The Scottish Parliament Information Centre, *Sewel Motions: Source Sheet No. 16* (Edinburgh: The Scottish Parliament, 28 March 2003).
- <sup>23</sup>*House of Lords Debates*, 21 July 1998, col. 791.
- <sup>24</sup>*Memorandum of Understanding and supplementary agreements between the United Kingdom Government, Scottish Ministers and the Cabinet of the National Assembly for Wales*, Cm 5240 (December 2001).
- <sup>25</sup>Office of the Deputy Prime Minister, *Post-Devolution Primary Legislation Affecting Scotland*, Devolution Guidance Note 10 (October 2002). Available at <http://www.dca.gov.uk/constitution/devolution/guidance/dgn10.pdf> (accessed 2 February 2004).
- <sup>26</sup>Alan Page and Andrea Batey, 'Scotland's Other Parliament: Westminster Legislation About Devolved Matters since Devolution', *Public Law*, Autumn 2002, 506.
- <sup>27</sup>Oral evidence of the Deputy First Minister of the Scottish Executive, 12 February 2003.
- <sup>28</sup>Categories taken from Alan Page and Andrea Batey, *op. cit.*
- <sup>29</sup>John Swinney MSP, oral evidence of the Leader of the Scottish National Party and Shadow First Minister of the Scottish Parliament and Fiona Hyslop MSP, Member of the Parliamentary Bureau, 13 February 2003.



# The boundaries of devolution

This chapter considers the breadth of the Assembly's powers and reviews some of the proposals to extend their scope which were introduced in Chapter 5.

2. Experience, from the limited early beginnings of administrative devolution (Chapter 2), shows that, once begun, devolution has a strong momentum to extend its reach and push against the boundaries set around it. This momentum has been strengthened by the creation of an elected Assembly in 1999, both as a result of the aspirations of the elected Members and the expectations of the people of Wales.

3. The chapter looks at this process from two perspectives:

- part 1 considers examples of proposals to extend the Assembly's powers through transfers of functions under the provisions of the Government of Wales Act, how they came about and their practical implications;
- part 2 considers the impact of the Assembly on legal structures in Wales.

## ***Part 1: Candidates for the transfer of executive powers***

4. The Government of Wales Act envisaged that executive functions, the decision making powers conferred on Ministers by individual Acts of Parliament, would be transferred to the Assembly by means of a Transfer of Functions Order approved by Parliament.

5. Schedule 2 of the Act lists the fields within which powers will be devolved.

Although often viewed as a broad indication of the devolved fields, in fact Schedule 2 is a list of policy areas within which functions *had to be considered for inclusion* in the first Transfer of Functions Order. It neither requires all of them to be included (so, for example many aspects of transport are not devolved) nor prevents functions in other areas from being conferred on the Assembly (as happened in the International Development Act 2001).

6. The first Transfer of Functions Order transferred the powers which were identified as having previously been exercised by the Secretary of State for Wales. (It was not possible to say with total certainty which functions were so exercised because they are very rarely identified as such in statute.) There was a small number of exceptions – such as certain functions in the Deregulation and Contracting Out Act – which were held back because they confer a wide-ranging power to amend primary legislation by order.

7. It was made clear during the passage of the Bill that the intention was to transfer further powers as and when agreed between the Assembly and the UK Government. There have been five Transfer of Functions Orders since July 1999: these have dealt with updating and correcting the few errors made in the first Order, rather than substantive



transfers of new functions, although a number of these are being considered, as discussed below.

8. The candidates for transfer considered in this report fall into two broad categories:
  - proposals to broaden or consolidate the Assembly's powers in areas already largely devolved such as education or health;
  - proposals to transfer to the Assembly powers in new areas such as animal health, rail services and the fire and police services.

### Common themes

9. The impetus for considering these further transfers has come about in different ways. The impression has been of an ad-hoc approach, with individual proposals considered on their merits, without an overall strategy to prioritise candidates for further transfer, taking into account the capacity of the Welsh Assembly Government or the cost benefit calculation in each case.
10. Examples of the pressures for further transfers of powers include:
  - a. a particular set of circumstances such as the foot and mouth outbreak which built up the case for bringing decision-making to Cardiff on operational grounds;
  - b. an aspiration for a holistic approach to policy issues such as transport, crime or substance misuse;
  - c. a response to a particular policy initiative or review by Whitehall

which creates the opportunity for the Assembly Government to seek the levers to adopt a distinctive approach in Wales;

- d. a proposal emerging from a review such as the Bain review of the fire service which recommended a transfer of powers to the Assembly.
11. It is unavoidable that some such proposals will emerge in response to changing circumstances, but it seems to us surprising that the cumulative impact of the range of transfer proposals on the Assembly has not received greater attention.
12. Although each transfer of functions proposal raises different issues, there are a number of common questions which need to be resolved in each case:
  - where should accountability lie – should the powers in question be exercised in Cardiff or Whitehall: what is the balance between UK, GB, E&W or Welsh considerations in decision making in this field?
  - if powers were to be transferred, what consequences might there be for Whitehall policy making in other non-devolved areas?
  - what additional administrative resources – numbers of staff and types of expertise – would be required if the power were to be exercised from Cardiff and what would be the cost to the Welsh Assembly budget?
  - what programme resources would need to be transferred from Whitehall and how would future requirements be

managed within the devolved budget arrangements? What additional programme costs might fall to the Assembly Budget?

- if powers were to be transferred to Cardiff, what strategic or cross-border issues would need to be considered in the exercise of those powers and how would differences be resolved?
- what new 'jagged edges' might be created by the transfer?

These are not new issues – most of them were identified from the beginning of the process of devolution (Chapter 2).

13. Whatever the merits of the case for transfer as seen from Cardiff, the default position is that powers rest with Whitehall unless specifically devolved. Before agreeing to the transfer of further powers, it is necessary for the Whitehall department to satisfy itself that there are no serious risks to its policy objectives or accountability arrangements. This takes time – partly due to the legal process of identifying the precise functions to transfer – and as a result the process tends to be complex and protracted.
14. While it is often relatively easy for commentators to identify possible advantages for Wales from transferring further powers to Cardiff, there has been less discussion of the possible downside including the capacity pressures on the Welsh Assembly Government and the potential reduction in access to the Whitehall department.

15. The following paragraphs review the examples of transfer of powers proposals mentioned in evidence to us.

### Animal health

16. Chapter 5 described how, during the last Foot and Mouth Disease outbreak, the Assembly's lack of powers in relation to animal health created both practical difficulties and public confusion about who was responsible for controlling the disease.
17. The main statutory powers needed to tackle the disease in Wales were held by the Ministry of Agriculture, Fisheries and Food (MAFF) for example, to support the designation of infected areas, the slaughter of infected animals, footpath closures and restrictions on animal movements. Although many of these powers could not be exercised in Wales without the Assembly's agreement, MAFF's greater powers and policy capacity gave it effective control of the decision-making processes and timetable. The Assembly Government was able to exercise some influence on policy decisions; but there were also occasions when it was not told of significant developments or decisions until the last moment.<sup>1</sup>
18. Even when the Assembly assumed operational control of the outbreak in Wales, this was only as agents of MAFF. This meant that Assembly officials were carrying out a dual role of operating under instructions from MAFF, while continuing to advise and seek political guidance from Assembly Ministers.

19. In the light of this experience, the Assembly Government started negotiations with the new Department for Environment, Food and Rural Affairs (DEFRA) in 2002 for the transfer of the relevant executive powers, and appropriate resources, to enable it to deal directly with all issues of animal health and welfare in Wales. The powers identified for transfer include all those in respect of:
- orders to control animal disease;
  - cleansing and movement of animals, e.g. to markets or new grazing areas;
  - transport of animals, including import and export;
  - disease outbreak management and controls on infected areas;
  - slaughter of animals and disposal of carcasses;
  - the prevention and eradication of transmissible spongiform encephalopathies; and
  - the control of pests and diseases affecting bees.
20. The Assembly's Agriculture and Rural Development Committee voiced concerns about the slow rate of progress in securing the transfer of animal health powers.<sup>2</sup> The Minister explained in November 2002 that:

*I think we have a comfort zone that this is proceeding properly and according to plan, but as with all these things there is a very complex set of operational aspects which go behind them.<sup>3</sup>*

21. Having these powers would allow the control of any future outbreak of animal disease to be more responsive, in both content and timing, to the particular circumstances in Wales. Because Great Britain is a single epidemiological area, the overall strategy for managing an outbreak would still be co-ordinated at that level. Similarly, budgets for disease control and research would still be held by DEFRA, although having the transferred powers would allow the Assembly to fund additional programmes if it wished. The scope for unilateral action by the Assembly would also be limited by the need to comply with overarching EU requirements for disease control.
22. The Assembly's Budget includes provision of £1.2 million a year for the team required to implement these powers. This is a net additional cost – there is no offsetting resource transfer from DEFRA. The Minister announced on 21 January 2004 that the transfer of power was planned to proceed in the Autumn of 2004.<sup>4</sup>

### Power generation

23. The limitations of the Assembly's powers in the planning field were highlighted by the Cefn Croes wind farm proposal. In May 2002, the Department for Trade and Industry (DTI) announced that the UK Government had approved the construction of a 39-turbine wind farm at Cefn Croes in Ceredigion. The local authority had made no objection to the proposals; but there were others, including the Countryside

Council for Wales, who had voiced concerns about this major infrastructure development. The Assembly had played no formal part in the decision-making process, its involvement being confined to offering comment on the proposals as a consultee.

24. Had this wind farm been proposed for a site in Scotland, the Scottish Executive, rather than the UK Government, would have taken the decision. Even though the right to make legislation on energy matters has been retained by the UK Parliament, the *executive* functions relating to the approval of large electricity generating stations have been transferred to Scottish Ministers. These powers under Sections 36 and 37 of the Electricity Act 1989 provide for the approval of the construction, extension and operation of a generating station over 50 megawatts and the installation of above ground electricity lines.
25. Under the 1989 Act, DTI must seek the views of the local planning authority and, if it objects, a local public inquiry must be held. Although the Assembly Government is consulted, the Minister told us that legal considerations effectively prevent it from expressing a clear view on the proposal and its planning merits because this would impinge on the decision-making responsibilities of the Secretary of State or the local planning authority.<sup>5</sup>
26. In early 2002, the Assembly Government started negotiations with

the UK Government on the transfer of these powers to allow the Assembly to take decisions about the construction of large power stations in Wales. The Minister for Economic Development explained why he is seeking these powers:

*... in broad terms, there is a huge capacity in Wales for using renewable energy sources. We feel it would be much more in line with our major policy areas, like energy production and renewables, if we had the power to deal with applications over 50 megawatts. That is not to say we would approve them necessarily but we feel it would be more appropriate for us to make the decisions rather than it be done by the DTI.<sup>6</sup>*

27. The Minister also referred to the economic importance of being able to secure more indigenous power generation in Wales. This would not only be in terms of jobs: electricity costs in South East Wales are around 7 per cent above the UK average because of a shortage of local generation.<sup>7</sup>
28. Wales could be given a stronger role in the decision-making process under the current legislation even without transferring these powers. This would be achieved by the Secretary of State exercising her right to leave the planning aspects of such development to be considered by the relevant planning authority (the local authority, unless the Assembly decided to call in the application).<sup>8</sup>

29. However, the UK Government's view so far has been that the integrated nature of the electricity supply system and market in Wales and England does not lend itself to separating decisions on power generation in the two countries.<sup>9</sup> North Wales forms part of a distribution network with Merseyside, whereas South and West Wales are linked to South West England. In contrast, Scotland has long had its own electricity distribution networks and operators.
30. Although not mentioned by either the Assembly Government or the DTI, another important consideration for both sides could be the implications for nuclear power – even though no new nuclear power stations are currently planned in Wales for the next two decades.<sup>10</sup> The powers under the Electricity Act 1989 apply to all forms of electricity generation, not just renewables; so their transfer would allow the Assembly to determine the future development of nuclear energy generation in Wales.
- Student support**
31. The Independent Investigation Group into Student Hardship and Funding in Wales, chaired by Professor Teresa Rees, concluded that responsibility for all elements of student support in Wales should be under one roof.<sup>11</sup> The Welsh Assembly Government agreed, and, in January 2004, the Minister announced that proposals would be contained in the Higher Education Bill to give the Assembly the power to decide what levels of tuition fees and student support will apply in Wales, from the start of the academic year 2006-07.<sup>12</sup>
32. The objective is to enable the Welsh Assembly Government, over time, to design and deliver a student support system which is consistent with its wider strategies. In line with the devolved arrangements in Scotland and Northern Ireland, the Assembly would hold all the public sector financial and policy levers over Higher Education (HE) and student support.
33. This proposed transfer arose against the backdrop of UK government proposals for major changes in the funding of the HE sector in England. Commentators pointed to the complexity of the policy-making framework and the apparent failure of the UK Government's White Paper to take account of the implications for the devolved administrations.<sup>13</sup>
34. Transferring these powers could have major consequences for the Assembly's Budget. If the fees charged by Welsh Universities were to be lower than in England, the Assembly Budget would have to take the strain if HE in Wales is to be funded at a comparable level to England. The evidence of the Higher Education Funding Council for Wales suggested that it would be very difficult for the Assembly to adopt a significantly different funding structure for HE than that in England:
- I do think there is time to get this right but I find it difficult to believe that in the long run it will be possible*

*for Wales to be significantly different in its mechanism in this respect.*<sup>14</sup>

35. The scope for a distinctive approach in Wales has been the subject of intense debate. For example, Ron Davies argued in November 2003:

*Whatever the merits or demerits of the central question of who pays for Higher Education, does any one seriously believe that this is one of those issues where Wales should go it alone ...?*<sup>15</sup>

36. The Secretary of State explained to the Welsh Affairs Committee in June 2003 why this transfer, to which the UK Government was sympathetic in principle (Chapter 7), was so complex to negotiate:

*The main difficulty which has stopped going snap on this policy earlier is nailing down the costs. I know I have said this for some months but it is not an easy matter to nail down because you are looking not just at historic costs, which you can easily model, you are looking at future costs taking into account a future regime which has not bedded down involving grants for the first time and a different system ....and it is a question of really crunching our way through that.*<sup>16</sup>

37. In addition to these programme costs which would be transferred from DfES, there would also be administration costs associated with the transfer of these powers – these would be additional and are estimated at around £0.5 million a year. The long-term

administration costs have not yet been determined.

### Rail services

38. Rail services are an example of the Assembly Government seeking stronger levers to influence transport in Wales by means of delegated powers of direction over the Strategic Rail Authority (Chapter 5).
39. The Minister for Economic Development and Transport announced on 19 January 2004 that the Secretary of State for Transport had recognised the need for powers over public transport issues – especially rail – to be devolved to the Welsh Assembly Government.
40. Although the Assembly's exercise of such powers may not carry the same administrative implications as some of the other candidates discussed here, there could well be a need to strengthen the transport policy capacity within the Assembly Government.

### The Fire Service

41. The Government's plans to transfer to the Assembly powers in relation to the Fire Service were announced in the 2003 White Paper, 'Our Fire and Rescue Service' which set out the Government's response to the review of the service chaired by Sir George Bain.
42. Fire Services are a local authority responsibility, operated through the medium of a Combination Order specifying that certain local authorities shall join together to run a joint Fire Service.



43. The Assembly Government took the opportunity presented by the Bain review to make the case for the acquisition of the formal powers. Bain recommended as follows:

*The Review team endorses the proposal that the Welsh Assembly be given policy and funding responsibility for the Fire Service in Wales. The present split in policy responsibility for the Fire Service, and capital and revenue funding between the Welsh Assembly Government and ODPM provides scope for confusion, delay, uncertainty and tension. It militates against the effective planning of the Fire Service.*<sup>17</sup>

44. The evidence shows that the impetus for transfer came from the practical experience of a common approach to fire prevention by the Assembly Government and the Fire Service. The Mid & West Wales Fire Authority told us that:

*It is fair to say that [through] the close working relationship that the three fire authorities in Wales have been able to develop with the Assembly .... some incredibly productive things have happened .... quite a strong community of interest between the things that we were trying to achieve, in terms of reducing fire deaths and injuries, and what the Assembly are trying to achieve in terms of community regeneration and social inclusion .... fire deaths and injuries and fire*

*generally are quite closely associated with issues of social deprivation.*<sup>18</sup>

45. The Welsh Assembly Government's response to the White Paper explained the planned transfer on grounds of reducing preventable death and injury in Wales. The plans now are to confer on the Assembly powers under the new statutory arrangements to be put in place by the Fire and Rescue Service Bill. In the interim the Assembly is seeking the transfer of the relevant powers under the existing legislation. The statement also confirms that:

*The Assembly Government believes that it would not be practical for the Assembly to establish its own arrangements in relation to fire personnel terms and conditions of employment or pensions. It will therefore seek to follow the Westminster lead in this regard.*<sup>19</sup>

46. The financial impact of transferring fire service powers is likely to be relatively modest because the revenue costs were already devolved to the Assembly. ODPM was responsible for the capital allocation – this was a potential source of tension if HM Fire Inspectorate laid down standards based on ODPM requirements, rather than those of the Assembly.
47. The gradually increasing role of the Assembly in policy on fire and safety has been absorbed without a significant increase in staff costs up to now but the cost is likely to grow in future.



### The Police Service

48. The police service presents a number of interesting challenges for governance in Wales because it is an area where devolved and non – devolved services inter-act very closely on the ground. Executive powers in relation to police functions rest with the Home Office but responsibility for police funding is split between the Assembly, local government and the Home Office. In our public meetings it was suggested that policing should be devolved because of the importance of partnership with local government in making an impact on crime and community safety.

49. The evidence put to us includes three types of tension within the present distribution of responsibility for the police:

- administrative problems arising from the division of responsibility for police finance;
- policy and implementation issues arising from divergence between Assembly Government and Home Office strategies;
- accountability and governance issues.

50. The Minister for Finance, Local Government and Communities, Edwina Hart AM, whose portfolio included liaison with the police as part of the Assembly's community safety strategy, gave evidence to the Commission in December 2002. While emphasising that excellent working relations had been established with the police service in Wales, she explained the practical problems that have arisen in

relation to operational priorities and funding:

*When we look at the priorities in terms of the Home Office and top slicing of police funding for priorities, those priorities are not Welsh priorities in terms of the agenda. They are very much a metropolitan and city agenda.<sup>20</sup>*

51. The implications for police authorities of working with the Assembly Government while at the same time meeting the requirements of the National Policing Plan and Home Office were discussed in the evidence we received from the Police Authorities of Wales (PAW):

*... the division of policy between Westminster and the National Assembly for Wales with regard to policing, which can result in a policy conflict. The National Assembly for Wales document 'Tackling Substance Misuse in Wales' is focused on the issues that are key in Wales and goes further in its approach than the equivalent document in England, 'Tackling Drugs to Build a Better Britain'. The Welsh policy sets targets to include alcohol and wider substance abuse. This is to be applauded but does not feature in [Public] Service Agreements or the main policy document for policing, 'The National Policing Plan' ... Policy areas that influence policing can be focused to Wales, however policing cannot.<sup>21</sup>*

52. The PAW, and the North Wales Police Authority<sup>22</sup>, pointed to problems arising from the fact that policing is not devolved but local government is:

*The four Police Authorities in Wales with regard to Member conduct issues are required to follow Regulations issued by the ODPM and guidance issued by the Standards Board for England. The requirements and Model Code are different to those issued by the National Assembly.*

*This means that our 'Councillor' Police Authority Members have to have regard to two separate codes ... This can lead to confusion to members but, perhaps more importantly, to the public.<sup>23</sup>*

53. In principle, the PAW saw a number of potential advantages from extending the powers of the Assembly to include policing:

*The advantages [of extending the powers of the National Assembly to include police] would include consistency of policy between crime and disorder, community safety and policies that relate to policing that are already functions of the National Assembly ... This would enable a joined-up approach to crime and disorder ... A more cohesive approach across policy areas would allow for policing to be prioritised at a local level and move away from the current position where policing targets are set by the Home Office.<sup>24</sup>*

54. Nevertheless, the PAW recognised that the transfer discussions would be complex and that extensive consultation would be required. Their written evidence includes an analysis of all the relevant powers under which the police currently operate – in each case detailed consideration would need to be given to the case for, and against, transfer as well as the budget implications.

#### Box 9.1 Statutory powers in relation to the police which would need to be reviewed in transfer negotiations

Training and recruitment  
Emergency support  
Police pay and conditions  
Procurement of specialist equipment  
IT and communication equipment and protocols  
Police Standards Unit  
National Policing Plan and performance targets  
National Crime Squad  
Her Majesty's Inspectorate of Constabulary  
Research  
Codes of Practice  
Complaints and discipline  
Cross-border issues

55. The Police Federation of England and Wales lent support for an increased role for the Assembly in setting targets for the police in Wales, but expressed caution about the prospect of divergence in the framework of laws and legal machinery within which the police operate.<sup>25</sup> The Federation also pointed out that police pay and conditions of service are negotiated by the Police Negotiating Board of the United Kingdom, in respect of police officers throughout the UK, and that the federated ranks have no wish to move from this negotiating position, beyond the elements of local consultation and negotiation provided for in the recent police reforms.
56. The financial arrangements underpinning any transfer proposals would be critical. It would be necessary to ensure that:
- the budget provision for the police in Wales currently contained in the Home Office Budget was transferred to the Assembly Budget at an adequate level to cope with present requirements;
  - adequate arrangements were in place to ensure that Wales was not short-changed in future budget allocations determined through the Barnett formula. The fact that an increasing share of the police budget was devoted to centrally funded initiatives would make this difficult to guarantee.
57. In addition to negotiating the transfer of provision for existing police expenditure in Wales from the Home Office to the Assembly Budget, it would be necessary to consider the cost of creating in Wales a new administrative capacity to exercise the transferred

police powers. The cost of this would depend on the extent of the powers transferred, but is likely to be significant and would be a new charge on the Assembly Budget – the Secretary of State told us that:

*In considering this you might want to assume that if the Government agreed to a transfer, they would also transfer the resources presently spent on the police in Wales but that any additional costs would have to be met from the Assembly's budget.<sup>26</sup>*

### Children and Family Court Advisory and Support Service Cymru

58. The transfer of the Children and Family Court Advisory and Support Service Cymru was announced after the conclusion of our evidence. The Minister for Health and Social Services announced on 14 January 2004 that UK Government Ministers had agreed in principle to the transfer of the relevant functions to the Assembly Government and that discussions to finalise the details were then in progress.

### Part 2: The impact of devolution on the administration of justice in Wales

59. The evidence of the legal profession in Wales was that lawyers in Wales see a positive impact from devolution, both in terms of the development of Welsh law – through distinctive Welsh provisions in primary legislation and devolved legislation which is made by the Assembly – as well as the expansion of the profession in Wales and the employment opportunities created:

*What is interesting about the present position of Wales is the way in which its independent legal status is coming to be recognised within the unified legal system of England and Wales, that is 'Legal Wales'.*

*It appears to us that amongst the advantages that further devolution of the organs of the administration of justice to Wales would bring to Wales includes the following:*

- a. the institutions would be closer to the people they are intended to serve;*
- b. efficiency (of courts and tribunals): the prompt disposal of work;*
- c. economic benefits: employment in support and related professions;*
- d. career structures and specialities not presently available in Wales;*
- e. the geographical limitation on the right to use the Welsh language would be accommodated.<sup>27</sup>*

60. The Law Society also saw advantages in a greater involvement of the Assembly in the organisation of the courts in Wales, not necessarily through formal powers but perhaps through an oversight role, for example in considering the organisation of magistrates courts from the perspective of social inclusion and access to justice:

*If you were to ask a broad range of practitioners in Wales as to what they see as being one of the key issues in*

*the way they think the Assembly ought to have a role and make a difference to courts closures and distribution of legal resources around Wales, I think that would be top of the list.<sup>28</sup>*

61. The evidence shows that the process of political devolution has strengthened considerably the momentum for the creation of legal structures at an all Wales level. This would be even stronger with the devolution of primary powers. Witnesses recognised that the creation in June 2003 of the new Department of Constitutional Affairs, with responsibility for both devolution and Justice, has created a new context for considering these matters. This was further underlined by the Secretary of State who pointed us to the Lord Chancellor's planned post implementation review of the new courts administration structure in 2006-07.<sup>29</sup>

### Overview of findings

62. We began our work with the expectation that our report might include specific recommendations for the transfer of further functions to the Assembly. In the light of the evidence reviewed in this chapter and elsewhere in the report, we concluded that this would not be sensible, for the following reasons.
63. First, each significant proposal carries with it major financial, staffing and policy implications. We received some evidence on this, but not sufficient to be able to evaluate all these implications in full.

64. Second, the question of priorities is paramount. Proposals cannot be considered in isolation because of their capacity implications for the Assembly itself, the Welsh Assembly Government and their staff. We do not feel it would be wise for us to seek to identify, with incomplete information, the areas where broader powers would have the most impact on the achievement of the priorities of the Welsh Assembly Government.

65. Third, timing is a key constraint. As the question of powers in relation to student support has shown, proposals for transfer often emerge in the context of structural change at the UK or England and Wales level. In this rapidly changing context, our views on specific proposals could well be overtaken by events.

66. Accordingly, we decided to focus our findings on the strategic and capacity implications of such transfers.

### Findings

From the evidence in this chapter our findings are as follows:

- the creation of the Assembly has given a very strong push to the momentum to extend the boundaries of devolution into new areas – continuing the process which began with the first steps of administrative devolution;
- the Assembly Government is already seeking a number of major extensions to its powers, driven by the aspirations of the Assembly itself, and the people it serves, for a more coherent set of powers related to broad policy areas;
- the evidence points to the benefits of more integrated and responsive policies, not only from devolution of powers to the Assembly but also from the creation of Welsh structures and expertise, where powers are not devolved, as is happening in the administration of justice;
- new executive powers often carry significant costs, which need to be weighed against the expected benefits;
- the costs include creating new capacity, where administration costs are not offset by transfers from Whitehall, as well as potential future pressures on programme costs – with greater experience, the Assembly may feel that the advantage for Wales may not always point to transfers from Whitehall;
- looking to the future, the Assembly Government should determine and explain its priorities for extending the breadth of its powers in a more strategic way than has been possible hitherto, with a realistic appraisal of the pace and likely impact of change.

### Notes

<sup>1</sup>National Assembly for Wales evidence to the Anderson Inquiry into the lessons to be learned from the foot and mouth disease outbreak of 2001, January 2002.

<sup>2</sup>Minutes of the Agriculture and Rural Development Committee 19 March 2003, para 2.5.

- <sup>3</sup>Oral evidence of the Minister for Rural Development, 8 November 2002.
- <sup>4</sup>Minister for Environment, Planning and Countryside, *Statement on the Energy Programme, National Assembly for Wales Record of Proceedings*, 21 January 2004.
- <sup>5</sup>Oral evidence, 7 November 2002, and written evidence of the Minister for Economic Development, Annex 2; written evidence of the Minister for Environment, November 2002.
- <sup>6</sup>Oral evidence of the Minister for Economic Development, 7 November 2002.
- <sup>7</sup>Oral and written evidence of the Minister for Economic Development, 7 November 2002.
- <sup>8</sup>Written evidence of the Minister for Environment, November 2002.
- <sup>9</sup>House of Lords Debates, 28 January 2002, col. 16WA.
- <sup>10</sup>Minister for Economic Development, *Statement on the Energy Programme, National Assembly for Wales Record of Proceedings*, 26 February 2003.
- <sup>11</sup>*Independent Investigation Group on Student Hardship and Funding in Wales (2001) Investing in Learning: Coherence, clarity and equity for student support in Wales*, Cardiff. ISBN 0 7504 2685 3
- <sup>12</sup>Statement of the Minister for Education and Lifelong Learning to plenary, *National Assembly for Wales Record of Proceedings*, 13 January 2004.
- <sup>13</sup>Iain McLean, 'Devolution Bites', *Prospect*, March 2003.
- <sup>14</sup>Oral evidence of the Higher Education Funding Council for Wales, 23 May 2003.
- <sup>15</sup>Lecture for the Welsh Political Archive of the National Library of Wales, 7 November 2003, Aberystwyth.
- <sup>16</sup>Oral evidence of Rt Hon Peter Hain MP, the Secretary of State for Wales, to the Welsh Affairs Select Committee, 25 June 2003.
- <sup>17</sup>*The Future of the Fire Service: Reducing Risk, Saving Lives*, ODPM, 2003, paragraph 6.40.
- <sup>18</sup>Oral evidence of the Mid and West Wales Fire Authority, 10 April 2003.
- <sup>19</sup>Statement to the Committee for Social Justice and Regeneration, 24 September 2003.
- <sup>20</sup>Oral evidence of the Minister for Finance, Local Government and Communities, 5 December 2002.
- <sup>21</sup>Written evidence of the Police Authorities of Wales, June 2003.
- <sup>22</sup>Additional written evidence of the North Wales Police Authority, 29 September 2003.
- <sup>23</sup>Written evidence of the Police Authorities of Wales, June 2003.
- <sup>24</sup>*Ibid.*
- <sup>25</sup>Letter from the Chairman of the Police Federation of England and Wales, 5 September 2003.
- <sup>26</sup>Letter from the Secretary of State for Wales to Lord Richard, 14 November 2003.
- <sup>27</sup>Mr Justice Roderick Evans and Professor Iwan Davies, 'The Implications for the Court and Tribunal System of an Increase in Powers', a paper presented to the Law Society/Richard Commission seminar, 7 February 2003.
- <sup>28</sup>Oral evidence of the Law Society, 26 June 2003.
- <sup>29</sup>Letter from the Secretary of State for Wales to Lord Richard, 14 November 2003.



# The financing of devolved government

This chapter considers the financing of devolved government in Wales, examines the processes of accountability and scrutiny and reviews the option for a revenue varying power.

2. As many witnesses recognised, the power of the purse is one of the most important of the Assembly's powers. *A Voice for Wales* said:
 

*The Assembly will have at its disposal the budget – currently £7 billion – which now falls within the responsibility of the Secretary of State for Wales... The Assembly's decisions about how this budget should be spent will determine the range and quality of public services in Wales... the Assembly will be fully accountable for the proper control and management of its budget and for securing economy, efficiency and value for money.*<sup>1</sup>
3. This chapter considers the adequacy of the financial powers of the Assembly and:
  - the method of financing and the quantum of resources available;
  - the broader fiscal position of Wales;
  - accountability and budget processes.
4. The questions addressed include:
  - how effective are the financing arrangements in ensuring that the Assembly Government is accountable to the Assembly and to the electorate for its expenditure decisions?
  - is the size of the Assembly's budget in itself a bar to the exercise of the powers devolved under the present or a future settlement?
  - are there any changes, such as revenue varying powers, which should be considered in the interests of improving accountability?
5. The arrangements for financing devolution have recently been examined in detail by the House of Lords Select Committee on the Constitution chaired by Lord Norton of Louth.<sup>2</sup> This chapter draws on that report and the evidence on which it was based, in particular that of Professor David Heald of Aberdeen University and of Professor David Bell of Stirling University and the written and oral evidence by the Finance Ministers of Scotland and Wales.
6. We received further evidence from the two Finance Ministers and from Professor Bell. The evidence of many other witnesses included views on the financial arrangements.
7. Issues relevant to the present funding arrangements are considered in Part 1 of this chapter, and to tax-varying powers in Part 2.



### *Part 1: The present funding arrangements*

#### **Background**

8. Fiscal policy decisions – the level of expenditure, taxes and borrowing – are not devolved matters. The 1998 devolution measures did not change the funding arrangements for the devolved administrations: with the exception of the new tax-varying power conferred on the Scottish Parliament – as explained in paragraph 52 below.
9. These arrangements provide the devolved administrations with substantial budgetary freedom within the total Budget set by the UK Government. They are free to allocate funding between services as they wish, with no Treasury PSA<sup>3</sup> strings attached. The exceptions are areas such as local government finance where the Concordat with the Treasury imposes some constraints on the use of resources generated by locally financed expenditure – see paragraphs 18-21 below.
10. The system for determining the size of the devolved Budget was inherited from the pre-devolution arrangements. Its main features are:
  - a. the starting point is the baseline inherited from previous public expenditure settlements;
  - b. this baseline is adjusted automatically in line with the changes made to the budgets of the relevant Whitehall departments;
  - c. the mechanism for doing this is the Barnett formula which gives the devolved administrations a population determined share of the relevant adjustment as set out in box 10.1 below;
  - d. the baseline together with these adjustments produce the total Budget for the Assembly.
11. This is a population-driven system: it does not attempt to take account of any other factors which might influence relative need such as the age of the population or income per head. Thus neither the starting point – the inherited baselines, or the increments, are adjusted for poverty or health or sparsity or any other factor.
12. There is no connection between the level of central government taxes raised in the devolved countries and the amount of spending power they have – the two are entirely separate.
13. The devolved administrations are responsible for only part of public expenditure in their territories. Major spending which falls outside the scope of the Assembly include social security, police and criminal justice, employment, defence and foreign policy. The Minister for Finance, Local Government and Communities told the House of Lords Select Committee on the Constitution: ‘If you are looking at the total expenditure of Government in Wales, we account for about 50 per cent which comes out of Central Government expenditure, and the rest is from other sources – DHSS payments and so on’.<sup>4</sup>
14. In 2001-02, expenditure by the National Assembly and the Wales Office accounted for £8.8 billion of the total identifiable expenditure in Wales of £17.1 billion. The other main blocks of expenditure were Social Protection (£6.1 billion) and Law, Order and Protective Services (£1.1 billion).<sup>5</sup>

### Box 10.1 The Barnett Formula

The Barnett formula is a mechanism for allocating *increases/reductions* in funding to the devolved administrations in Scotland, Wales and Northern Ireland.

There are three elements to the formula:

1. the change in planned spending in departments in England;
2. the extent to which the relevant English departmental programme is comparable with the services carried out by each devolved administration; and
3. the population proportion in each devolved region of the UK.

In 2001, these proportions were:

Scotland 10.23%

Wales 5.89%

Northern Ireland 3.40%

The formula simply multiplies 1. x 2. x 3. The change in funding payable to the devolved administration is therefore the change for England, multiplied by the extent to which a programme is comparable, multiplied by the population of the devolved region as a proportion of the English population.

*Adapted from: 'Select Committee on the Constitution – report on Devolution: Inter-institutional Relations in the United Kingdom'.*

15. Table 10.1 shows the scale of the Budget (Departmental Expenditure Limit) devolved to the Assembly since 1997-98.

**Table 10.1: The devolved Budget for Wales**

	1997-1998	1998-1999	1999-2000	2000-2001	2001-2002	2002-2003	2003-2004
<b>Wales Departmental Expenditure Limit</b> £ billion	6.5	6.8	7.2	7.8	8.6	9.7	10.4

Sources: Public Expenditure Statistical Analyses 1999-2000 (H. M. Treasury, Cm 4201, 1999) and 2003 (H. M. Treasury, Cm 5901, 2003).

### Accountability

16. Under these arrangements the Welsh Assembly Government cannot be held to account for the size of its budget, but it is wholly accountable for the allocation of resources between devolved expenditure programmes, and for the value for money and propriety of these decisions.
17. This statement needs to be qualified in two ways. First, it could be argued that the debate about the public expenditure provision for European funds allocated to Wales under the Objective 1 programme does provide an example of accountability for the size of the Budget – the First Minister, The Rt. Hon. Alun Michael, was held to account for decisions on whether the European funds received under Objective 1 would be additional to, or substitute for, the previous budget plans. However in this case the decision was one for the UK Government and the Welsh Assembly Government was challenged in respect of its negotiations with the Treasury, not for its own decisions.

### The balance of funding for local services between the council tax payer and Assembly grants

18. Second, through its power to determine the central grant in support of local authority spending the Welsh Assembly Government is able to influence the revenue raised by local authorities through the council tax and other sources such as charges. The Budget of the Assembly includes the grant paid in support of local authority spending but does not include council tax income.
19. It might seem therefore that one option open to the Assembly would be to reduce the level of grant paid to local authorities, thereby freeing up resources for other Budget purposes, and rely on higher council tax to make good the shortfall in local authority income. But the Treasury's *Statement of Funding Policy* specifically prescribes that:

*If levels of self-financed expenditure generated by a devolved administration [including council tax] grow significantly more rapidly than comparable expenditure in England over a period and in such a way as to threaten targets set for public expenditure as part of the management of the United Kingdom economy, it will be open to the United Kingdom Government to take the excess into account in considering the level of grant to the devolved administrations.*<sup>6</sup>

*If, due to decisions by the Scottish Executive or the National Assembly for Wales or their respective local authorities, the costs of Council Tax Benefit subsidy paid to local authorities changes at a disproportionate rate (both higher or lower), relative to changes in England, then appropriate balancing adjustments are made to the relevant devolved administration's Departmental Expenditure Limit.*<sup>7</sup>
20. Similarly, where decisions by the Assembly result in a yield from non-domestic rates being reduced (in excess of any comparable decisions in

England) thereby increasing the demand for cash from the Exchequer, the Treasury reserves the right to reduce the Assembly's Assigned Budget by an amount equal to the additional cash requirement.

21. In practice, therefore, the scope to ease Budget pressures by increasing self-financed spending is strictly limited.

### Revenue from fees and charges

22. The power to vary fees and charges for goods and services has been used by the Welsh Assembly Government in a number of policy areas such as: travel on public transport, entry to Museums and swimming pools, and prescription charges. In each case, the decision has been to reduce charges and shift the cost from individuals to the Assembly Budget. The effect is to reduce the purchasing power of the Budget compared to the position where charges were higher and the grant from the Budget lower.
23. In principle therefore, the existing devolution settlement does allow the Welsh Assembly Government to ease the pressure on Budget services by increasing council tax revenue or through charging for services. But, in practice, this power is strictly limited by a number of factors including the agreements mentioned above and by the narrow base of the charges.<sup>8</sup>

### Standing Orders and control of the financial process

24. The financial processes of the National Assembly are governed by Standing Order 19. This covers: the

determination of budgets; how those budgets may be adjusted during the year; the publication of accounts and reports; and the publication of local government finance reports.

25. Standing Order 19 ensures that Ministers publish budget information to a recognised timetable to enable scrutiny of their proposals by Subject Committees as well as the Assembly acting in Plenary.

### Budget process

26. We looked at the budget processes of the Assembly and the Scottish Parliament from the point of view of accountability. The key points are:
  - apart from the reserve tax-varying power, there are no substantive differences in the budgetary powers of the Assembly Government and the Scottish Executive – both are accountable to their elected Members for expenditure decisions, propriety and value for money;
  - in both Scotland and Wales, the Budget proposals are published in draft and subject to scrutiny by the elected Members – the key difference is that in Scotland the Parliament uses a Bill procedure for scrutiny;
  - the Bill procedure may provide for more opportunities for individual Members to influence the proposals although this is constrained by the requirement for zero-sum amendments (where any amendments moved to increase a budget head must indicate how the resulting budgetary deficit is to be met).<sup>9</sup> We were also told that measures were in hand to improve the financial information accompanying Bills;<sup>10</sup>

- the Scottish Parliament has a Finance Committee which is able to consider the Executive's budget proposals in the round and to propose a different share of resources between expenditure programmes. In Wales there is no Finance Committee – the National Assembly Advisory Group report stated:

*We do not recommend that there should be a finance committee. The Assembly cabinet will provide the corporate authority to the budget proposals and any in-year adjustments; it will be responsible for monitoring expenditure against budgets.<sup>11</sup>*

- in the Assembly and in the Scottish Parliament, the Audit Committee has lead responsibility for value for money scrutiny based on the reports of the NAO and the Auditor General for Scotland.

27. The Finance Committee question was raised in evidence by Nick Bourne AM.<sup>12</sup> The absence of such a committee in the Assembly limits its capacity to scrutinise the Executive's Budget proposals in the round. Subject Committees are consulted on budget priorities in their areas and Ministers take account of their views when preparing the Draft Budget. The Draft Budget is published and a motion tabled for the Assembly to note the proposals. Members are free to table amendments but, to date, the Assembly has not formally amended the Draft Budget put forward by the Government. Committees then discuss

the proposals. Their views are again taken into account when Ministers prepare the Final Budget. A motion is tabled for the Assembly to adopt the Final Budget, but amendments are not permitted at this stage.

28. A recent study of budget scrutiny by legislatures commissioned by the Finance Committee of the Scottish Parliament commented as follows:

*The [Scottish] Finance Committee's role is central to the process. Whereas the relevant subject committees are responsible for commenting on the relationship between expenditure plans and policy priorities within their remits, it is the Finance Committee's responsibility to co-ordinate the Parliament's overall response to the Executive's budget proposals...it also has the power to put forward an alternative budget, as long as this remains within the overall budget limit set by the Executive.*

*In nearly all of our case studies, there is some form of balanced arrangement of powers between the Executive and Legislatures. The form of these systems varies greatly but the biggest lesson is that it is the actual practices adopted by both sides (and others) which determine the real dynamics of the budget process, rather than the formal arrangements.<sup>13</sup>*

**The amount of resources available to the Assembly**

29. Public expenditure per head in Wales is significantly above that in England. This refers to 'identifiable expenditure' which includes both expenditure devolved to the Assembly and expenditure by UK government departments which can be attributed on a country basis (paragraph 13 above). 'Identifiable expenditure per head' in Wales in 2001-02 was 17% higher than that in England. The differentials for Scotland and Northern Ireland were 26% and 32% respectively.<sup>14/15</sup>
30. Nevertheless, some witnesses argued that the amount of resources provided to the Assembly by the current system represents an undue constraint on the exercise of devolved powers.<sup>16</sup> They take the view that Wales does relatively badly out of the present system and would do better if it was replaced by a different one in which the budgets for England, Scotland, Wales and Northern Ireland were determined by an assessment of their relative expenditure needs.
31. The evidence of Professors Heald and Bell to the Norton Committee explained that one of the features of the Barnett system is that it will over time reduce the differential between devolved expenditure per head and the average comparable expenditure per head in England. They also outlined the practical and conceptual difficulties of devising an objective needs assessment formula that would command the support of the UK Government and the three devolved administrations.<sup>17</sup>
32. Academics have produced proposals for new resource allocation methodologies – for example, some have suggested that the approach should be for public expenditure levels to compensate for disparities in regional income.<sup>18</sup> This contrasts with needs assessment formulae using indicators such as demand for public services or length of roads to be maintained.
33. Table 10.2 sets the public expenditure differentials (paragraph 29 above) in the context of relative prosperity as measured by Gross Value Added per head.
34. The Commission did not seek to evaluate the merits of different resource allocation methodologies. The Assembly Finance Minister<sup>19</sup> cautioned against assuming that a needs assessment would be guaranteed to benefit Wales. She pointed to the unconditionality and relative certainty provided by the present system and to the 'Barnett plus' arrangements under which the Treasury agreed to supplement the Budget in response to the Objective 1 programme.
35. Nor are we in a position to comment on the adequacy of the devolved Budget in relation to Welsh needs. Within the resources available to it, the Assembly Government has found resources to diverge from standards of provision in England in a number of areas including student support, subsidised transport and prescription charges. This does not support the view that the Assembly's budget has been a bar to policy innovation.



**Table 10.2: Headline Gross Added Value (GVA) and Identifiable Public Expenditure per head**

2001	Wales	Scotland	Northern Ireland	England
GVA: £ per head	11,396	13,660	11,311	14,844
GVA: % of England	76.8%	92.0%	76.2%	-
Identifiable expenditure: £ per head	5,874	6,324	6,616	5,005
Identifiable expenditure: % of England	117%	126%	132%	-

Sources: ONS Regional Accounts and Public Expenditure Statistical Analyses 2003 (H. M. Treasury, Cm 5901, 2003), Table 8.6b. GVA is the difference between the value of goods and services produced and the cost of raw materials and other inputs which are used up in production. It is Gross Domestic Product at market prices less taxes (plus subsidies) on products.

36. Against this we acknowledge the argument put forward by Professor Heald and others that the early years of devolution have coincided with historically high levels of spending growth which are unlikely to continue. Thus although the devolved administrations have enjoyed a degree of flexibility which comes with relatively high public expenditure growth rates – were this to change they would be more constrained.

37. The overall conclusion of the Norton Committee was that the long term continuation of the Barnett formula would present serious difficulties and that it would not be a sustainable basis for allocating funds to the devolved administrations in the long

term. When the formula is reviewed, or a needs assessment carried out, the Committee recommended that it be carried out by an independent body representing all parts of the UK. The Government's response indicated that it has no plans to replace the present system.<sup>20</sup>

### The broader fiscal position of Wales

38. There is a longstanding debate about how to calculate the overall fiscal position. On the expenditure side, judgements have to be made about how to attribute non-devolved spending and, on the revenue side, there are technical problems in attributing revenues on a territorial basis.



39. Depending on how these issues are resolved, it is possible to produce very different estimates of the overall position of the devolved country. There is an official estimate of the position for Scotland<sup>21</sup> but the results are contested. The Welsh Office produced an estimate<sup>22</sup> for 1994-95 on the same basis as that used for Scotland but later official figures for Wales are not available.
40. The results for 1994-95 are summarised in Table 10.3 below which shows expenditure in Wales exceeding revenue by £5.7 billion or some 20% of GDP. (There is no direct Northern Ireland equivalent of these estimates.<sup>23</sup>)
41. These figures are now out of date and highly sensitive to the assumptions made. However, it is widely accepted that the contribution made by Wales to tax revenues is likely to be low relative to the rest of the UK and its share of public expenditure relatively high – thus producing an overall deficit position with the UK Exchequer. This in part reflects the relatively low Gross Value Added in Wales compared with the UK overall; see Table 10.2 above.

**Table 10.3: Estimated fiscal deficits in Wales, Scotland and the United Kingdom: 1994-95**

£ billion	Wales <sup>a</sup>	Scotland <sup>b</sup>	United Kingdom
Total General Government Expenditure <sup>c</sup>	15.6	30.3	295.5
Total General Borrowing Revenue	9.9	22.1 <sup>d</sup>	247.6
General Government Borrowing Requirement	5.7	8.2	47.9
<b>Borrowing as a proportion of GDP<sup>e</sup></b>	<b>20</b>	<b>14</b>	<b>7</b>
<b>Notes</b>			
a. Source: Table 10 of Government Expenditure and Revenue – Wales 1994-95. Published January 1997 by the Welsh Office.			
b. Source: Appendix D of Government Expenditure and Revenue in Scotland 1995-96. Published October 1997 by the Scotland Office. (The original 1994-95 estimates are quoted as published in October 1996.)			
c. Derived from Public Expenditure Statistical Analyses H.M. Treasury, Cm 3201, 1996). Excludes privatisation proceeds.			
d. Excludes North Sea revenues.			
e. GDP at current market prices.			

**The advantages and disadvantages of the present funding arrangements**

42. The advantages of the present arrangements are:

- there is a strong incentive to maximise value for money: when a new expenditure pressure arises the option to respond by increasing revenue is not available so the new expenditure can only be funded at the expense of something else;
- the overall budget is relatively predictable – it is set by the Treasury for a three year period and the Spending Review adjustments are negotiated in a well understood framework of policy and spending pressures;
- there is a very high degree of financial autonomy: the UK Government does not attempt to direct priorities by attaching conditions, as happens in some federal states;
- the fact that the Assembly Government must operate within an externally determined financial envelope helps promote more realistic expectations.

43. The disadvantages are:

- the Welsh Assembly Government does not have to account to taxpayers or to the Westminster Parliament for the revenue required to fund its expenditure;
- the Welsh Assembly Government is constrained by public spending decisions taken in London – so far the climate has been relatively benign but in different conditions financial pressures could add to strains between London and Cardiff.

44. Denzil Davies MP told us:

*We are reaching a point, I believe, where it is democratically unacceptable that the United Kingdom Parliament should be asked to transfer functions to the National Assembly in circumstances where the cost of exercising those functions effectively falls on United Kingdom taxpayers, but where the democratic representatives of those taxpayers have no say in how those functions are exercised by the National Assembly.<sup>24</sup>*

45. The Secretary of State for Wales is answerable to Parliament for the funds passed to the Assembly; the Head of the Wales Office has Accounting Officer responsibilities for these funds which she discharges through an Accounting Officer agreement with the Assembly's Permanent Secretary, who provides evidence to demonstrate that the funds passed to the Assembly have been spent properly. That enables her, in turn, to provide assurance to Parliament on the total funds for which she is responsible, including the monies passed to the Assembly.

46. The Assembly's Permanent Secretary is appointed as the Accounting Officer by the Treasury. He is responsible to the Assembly for the proper use of funds for which he is the Accounting Officer. He may also be called to appear before the Public Accounts Committee in respect of these funds, although he has not been called so far.

**Part 2: Tax-varying powers**

**Tax-varying powers of sub-national governments in other countries**

47. Chapter 2 includes a summary overview of the tax-varying powers available to devolved governments in other countries and explains that the UK devolution settlement gives the devolved governments extensive freedom in spending their budgets but very limited powers to raise revenue.
48. John Hopkins plays down the importance of tax-varying powers in European devolution.<sup>25</sup> He comments on the focus of the Scottish media and electorate on the 'Scottish variable rate' as follows:

*... the focus on finance recognises its importance to the successful operation of devolved institutions. Nevertheless the focus on the tax raising question alone drew a far too simplistic connection between regional autonomy and financial independence. In fact, as we shall see, regional powers of taxation are notable in Europe mainly by their absence. Their impact is marginal and they have a minimal effect on regional autonomy.*<sup>26</sup>

49. Hopkins examines the fiscal powers available in each EU country and the extent to which they have been used – the key points are:
- block funding is the most important method of regional finance utilised across the European union;

- regional tax powers have been used cautiously – for political and internal market reasons.
50. This analysis, along with the evidence quoted in Chapter 2, suggests that the connection between revenue raising powers and policy discretion and accountability is complex and needs to be evaluated against criteria of both principle and practicality.
51. The following paragraphs review the options for a Welsh tax-varying power.

**The power to vary income tax: the Scottish variable rate**

52. Under the 1998 Scotland Act, the Parliament may, by passing a resolution initiated by the Executive, vary the basic rate of income tax in Scotland by up to 3p in either direction. In the case of an increase, the Inland Revenue would collect the additional amount from taxpayers with Scottish residence and, in the case of a decrease, would credit them with rebated amounts. In the case of an upward variation, the allowed spending of the Scottish Parliament would be increased by the Treasury by the relevant amount. In the case of a downward variation an offsetting reduction would be made.
53. The Scottish Executive gave a commitment that the tax-varying power would not be used during the lifetime of the first Scottish Parliament and has ruled out its use during the life of the second Parliament. In his oral evidence to the Commission, the Deputy First Minister of the Scottish Executive, did however say:

*Who is to say at some time in the future if things got tight that there wouldn't be a clamour to use the powers so I certainly would not dismiss the powers at all and I think it was an important part of the devolution settlement. If I may use this without being pejorative, I think it is the difference between a Parliament and an Assembly – because a Parliament has taxation powers; it is a function of a Parliament.<sup>27</sup>*

54. The White Paper *Scotland's Parliament* explained the rationale for choosing the income tax route as follows:

*The Government propose that the tax-varying power should operate on income tax, because it is broadly based and easy to administer. Income tax is relatively simple and easy to understand and has none of the difficulties associated with the other major tax bases: different rates of VAT on different sides of the border would cause practical problems and there would be specific difficulties with EU rules; corporation tax would place an unreasonable burden on companies operating in Scotland; National Insurance is inappropriate because of its direct link with the social security system; and council tax and non-domestic rates would over-burden the local government finance system and undermine the accountability of local government to its electorate.<sup>28</sup>*

55. Professor David Heald points out that one of the features of the 'Scottish

variable rate' is that it is embedded in the UK tax system and thus affected by changes in it.<sup>29</sup> Since devolution, the estimated value of the tax-varying power in Scotland has increased by over 44% (from £540 million to £780 million) as a result, *inter alia*, of changes to the structure of UK income tax.

56. The effect of the restructuring of tax bands in the March 1999 Budget was to increase the yield of a one penny change in the Scottish variable rate to £230 million compared with £180 million prior to the change. The Treasury statement said: 'In the Treasury's view an amendment of the Scottish Parliament's tax-varying powers is not required as a result of these changes'.<sup>30</sup>

57. The UK Government estimate that for Wales the revenue raised or foregone by an adjustment of 1p in the basic rate of income tax would be £120 million in 2003-04.<sup>31</sup> A 3p variation would represent £360 million, approximately 3.5% of the Assembly's planned Departmental Expenditure Limit for 2003-04.

58. Professor Heald suggests that the focus on the tax-varying power in the pre-referendum debate distracted attention from the issue of the value for money secured from existing programmes. He also suggests that:

*the Scottish Parliament needs to use the power in the medium term, as it will otherwise atrophy...both politically and administratively.<sup>32</sup>*

### The advantages and disadvantages of the Scottish variable rate method

59. The main advantages are:
- the income tax base is relatively broad so the burden of the additional expenditure is widely shared;
  - it is administratively fairly simple – it would be administered by the Inland Revenue as part of the UK income tax system.
60. The disadvantages include administration costs and vulnerability to changes in the UK income tax structure.
61. With his written evidence to the Commission in February, Andy Kerr MSP, Minister for Finance and Public Services, Scottish Executive, provided a 1999 estimate of the annual running costs of the tax.<sup>33</sup> This reported that the annual running costs of maintaining the necessary database would amount to between £2 and £2.5 million. The cost of implementing and running the tax, if implemented, was estimated to add a further £20 million over the lifetime of the Parliament. The statement also drew attention to the extra work and cost which would face the estimated 91,000 UK employers of Scottish taxpayers in preparing for the tax.
62. The revenue forecast is vulnerable not just to normal variations in the take due to economic activity but also because control over the definition of tax bases and bands rests with the Treasury (paragraph 55). It is open to the Treasury to propose an amendment to the tax-varying powers for Scotland

if, in the Treasury's opinion, a proposed modification either of or under the Income Tax Acts would have 'a significant effect on the practical extent ... of the Parliament's tax-varying powers'.<sup>34</sup>

### The local authority precept option

63. Another option with a precedent within the UK, would be to give the Assembly the power to precept local authorities. This would mean requiring local authorities to collect a specified additional amount of revenue on the Assembly's behalf. This is the approach already used to fund police authorities and the London Assembly and is proposed for the English Regional Authorities.
64. The advantages of this approach would be:
- it would use the existing council tax base;
  - it could be relatively transparent: local authorities could spell out to council taxpayers the precise element of the tax which was attributable to the Assembly's precept;
  - unlike the income tax route the precept would not be affected by the Chancellor's budget decisions.
65. The disadvantages would be:
- it would involve an additional burden for 22 local authorities;
  - it would be unpopular with local authorities and council taxpayers: although the responsibility for the precept would be the Assembly's, combining it with the council tax bill would confuse accountability;

- the council tax base is relatively small and so, taking account of council tax benefit, council tax increases of over 50% would be needed to raise an amount equal to the product of a 3p increase in the basic rate of income tax – see paragraph 57 above.

### The council tax option

66. An alternative to the precept option, which would have the same effect of increasing the revenue raised from council taxpayers, would be to allow the Assembly Government to reduce the grant contribution to local authority expenditure thus increasing the share of local authority expenditure funded by the council tax. This could be achieved, subject to the agreement of the Treasury, within existing powers by reducing the constraints on the growth of local authority self-financed expenditure included in the Statement of Funding Policy (paragraph 19 above). The implications for council tax benefit mentioned above would have to be resolved.

67. Other potential options which could be considered if the aim was to confer a tax-varying power on the Assembly, include allowing the Assembly to impose an additional tax on items or activities which are currently subject to UK taxes – other than the income tax device available to the Scottish Parliament. These options were reviewed in detail by the Royal Commission on the Constitution (The Kilbrandon Commission, see Chapter 2).<sup>35</sup> Its report set the options for revenue raising powers in the context of a wider choice between two broad approaches for financing devolved government:

- the revenue basis: devolved governments to have their own independent source of revenue to finance their expenditure – there could be a measure of equalisation to compensate for a low regional tax base but expenditure would be constrained by revenue;
  - the expenditure basis: devolved governments to be given a guaranteed expenditure budget with autonomy in spending decisions.
68. Kilbrandon suggested that the revenue basis implies a preference for maximum independence whereas the expenditure basis implies a preference for financial equity across the UK. The conclusion was to reject the revenue basis and accept the expenditure basis – which is the system currently in place. Kilbrandon noted that the system of finance prescribed for Northern Ireland in 1920 was the revenue basis but the system which came to be used in practice was the expenditure basis. This came about due to the pressures for equity in standards of public provision.<sup>36</sup>
69. Plaid Cymru has suggested that the Assembly should be given the power to borrow for investment in strategic infrastructure and that other tax-varying options might be considered, including environmental taxes (such as the landfill tax) and Corporation Tax (with the possibility of reducing this in the Objective 1 area).<sup>37</sup> We have not explored these ideas in any detail.
70. Nor have we given detailed consideration to a regional sales tax as an alternative to the Scottish model of



tax-varying power. Research by the Institute of Fiscal Studies and others point to practical difficulties posed by this option including: internet purchases, cross-border shopping and relatively high collection costs (where collection systems would need to be maintained and paid for whether or not extra taxes were levied).

### Arguments for and against a tax-varying power at the margin

71. Assuming that the Assembly will continue to be funded on an expenditure basis for the foreseeable future through the block grant system, we considered the advantages and disadvantages of giving it a revenue varying power at the margin, following the Scottish precedent or some other device.
72. Some witnesses<sup>38</sup> argued against such a power for Wales on practical grounds, arguing that it was unlikely to be used.
73. The arguments against can be summarised as follows:
  - in the context of the block grant system- the impact of a tax-varying power on overall financial accountability would be limited;
  - the scope to provide a financial cushion in a tight UK public expenditure climate would be limited by the scale of the power – assuming it followed the Scottish variable rate, it would generate up to a maximum of 3.5% of the Budget (paragraph 57 above);
  - if projected additional revenue were to be used for long-term funding there

could be problems if the tax take fell below projections, creating a funding shortfall to be met by the Budget;

- the existence of the power, even if not used, could be a deterrent to businesses or individuals planning to locate or expand on the Welsh side of the border.

74. Professor Heald summarised the case for such a power at the margin of a block budget:

*There is broad academic consensus that elected bodies should be fiscally responsible at the margin, especially when they have legislative powers. The key qualifier is the phrase 'at the margin' meaning that after the fiscal equalisation system has compensated for differences in needs and resources (i.e. taxable capacity) the cost of additional expenditure (and the benefit of lower expenditure) should fall on 'local' taxpayers. There are powerful economic factors, including globalisation and membership of the European Union, which mean that sub-national governments cannot be fully self financing.<sup>39</sup>*

75. The Fabian Society report *Paying for Progress* points to the divergence in the revenue raising powers of the UK devolved bodies and recommends the granting of a power to both Wales and Northern Ireland 'on the general model of the Scottish Variable Rate'.<sup>40</sup>

76. The UK Government's White Paper on the English regions makes the case for revenue raising powers as follows:



*'We also believe that an assembly should be able to raise some extra money within the region if it believes that this is desirable ... and likely to be supported by the region's voters.'<sup>41</sup>*

77. The key arguments for a tax-varying power seem to us as follows:

- it would allow the Assembly to raise some money of its own, with direct accountability to the electorate;
- it would give the Assembly the opportunity to reduce as well as increase taxes;
- it would allow the Assembly, with public support, to fund additional projects of importance to Wales.

### Findings

In the light of the analysis in this chapter our findings are as follows:

- the arrangements for financing devolution provide the Welsh Assembly Government with substantial budgetary freedom;
- there are concerns about the adequacy of the devolved Budget but it has still been possible for policy innovation to take place;
- alternative methodologies for calculating the devolved Budget would require the agreement of the UK Government and the devolved administrations – we are not in a position to evaluate the options or their implications for Wales;
- if a legislative Assembly is constituted it is desirable, though not essential, to confer tax varying powers;
- if a tax-varying power is to be granted, the most practicable method appears to be that of the Scottish variable rate.

### Notes

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<sup>1</sup>Welsh Office, *A Voice for Wales*, Cm 3718 (London: The Stationery Office, July 1997), 9, 25.

<sup>2</sup>*Devolution: Inter-Institutional relations in the United Kingdom*, Second Report of the Select Committee on the Constitution, HL Paper 28, (Cm 5780), Session 2002-03. The evidence was published as HL Paper 147, Session 2001-02.

<sup>3</sup>Public Service Agreement (PSA) targets are the means by which the Treasury applies conditions to the additional resources conceded to Departments in spending rounds. These constrain Departments freedom in allocating resources at sub Department level. The devolved administrations are free from the requirement to agree such targets with the Treasury.

<sup>4</sup>Oral evidence to the Select Committee on the Constitution, Session 2001-02 - 'Devolution: Inter-Institutional Relations in the United Kingdom', HL Paper 147, 245-246.

<sup>5</sup>*Public Expenditure Statistical Analyses 2003*, (H. M. Treasury, Cm 5901, 2003), Table 8.7.

<sup>6</sup>*Funding the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly : A Statement of Funding Policy* (H M Treasury, July 2002 (Third edition)). Section 2.2.vii.

<sup>7</sup>*Ibid.* Section 5.3.i.

<sup>8</sup>In 2002-03, direct fees and charges by the Assembly amounted to only £42,000. This figure excludes income raised by bodies funded by the Assembly – local authorities' income, excluding council tax and non-domestic rates, totalled about £450 million in 2001-02; income raised by other bodies is estimated to be in the region of £140 million in each year. Source : Welsh Assembly Government.

- <sup>9</sup>Oral evidence of John Swinney MSP, Leader of the Scottish National Party, Shadow First Minister of the Scottish Parliament, and Alex Ferguson MSP, February 2003.
- <sup>10</sup>Written evidence of the Scottish Finance Minister, February 2003.
- <sup>11</sup>*National Assembly Advisory Group, Report to the Secretary of State for Wales*, August 1998, paragraph 7.10.
- <sup>12</sup>Oral evidence of Nick Bourne AM, Leader of the Welsh Conservatives, 28 February 2003.
- <sup>13</sup>Colin Talbot and Carole Johnson, *Budget Setting and Financial Scrutiny: Experiences in Devolved/Regional Governments* (Scottish Parliament, 2003).
- <sup>14</sup>*Public Expenditure Statistical Analyses 2003* (H. M. Treasury, Cm 5901, 2003), Table 8.6b.
- <sup>15</sup>These figures are derived from an analysis of identifiable expenditure across both devolved and non-devolved services. The latest published figures for comparable expenditure within the devolved 'block' Budgets were provided by the Treasury in 1998. These figures suggest that, in 1995-96, 'block' spending per head in Wales was 25% higher than comparable spending in England. The differentials for Scotland and Northern Ireland were higher; being 32% in both cases. Source : The Barnett Formula (Treasury Committee, Session 1997-98: Second Report, HC 341, and Fourth Special Report, HC 619), Appendix II, paragraphs 7-10.
- <sup>16</sup>Including the evidence of Plaid Cymru, the Welsh Liberal Democrats, and the Institute of Welsh Affairs.
- <sup>17</sup>Oral evidence to the Select Committee on the Constitution, Session 2001-02. *Devolution: Inter-Institutional relations in the United Kingdom*, HL Paper 147, 148-157.
- <sup>18</sup>Professor Iain McLean, Memorandum to the Select Committee on the Constitution, Session 2001-02, *Devolution: Inter-Institutional relations in the United Kingdom*, HL Paper 147, 422-427; R. Ross MacKay, 'Barnett Squeeze' *Agenda*, Winter 2003/04, 24-27.
- <sup>19</sup>Oral evidence, 5 December 2003.
- <sup>20</sup>The Government's Response to the Second Report of the Select Committee on the Constitution, HL Paper 28, Cm 5780, Session 2002-03.
- <sup>21</sup>*Government Expenditure and Revenue in Scotland*, produced annually by the Scottish Office until 1999 and by the Scottish Executive thereafter.
- <sup>22</sup>Welsh Office, *Government Expenditure and Revenue - Wales 1994-95* (Welsh Office, January 1997).
- <sup>23</sup>Response to Parliamentary Question by Alex Salmond MP. Official Report, 13 Jan 2003, Col 426W.
- <sup>24</sup>Written evidence of Denzil Davies MP, July 2003.
- <sup>25</sup>*Devolution in Context: regional, federal and devolved government in the European Union*, (London: Cavendish, 2002).
- <sup>26</sup>*Ibid.* Page 211.
- <sup>27</sup>Oral evidence of the Rt. Hon. Jim Wallace QC MSP, Deputy First Minister, Scottish Executive, 12 February 2003.
- <sup>28</sup>*Scotland's Parliament*, (Cm 3658, 24 July 1997), Paragraph 7.12.
- <sup>29</sup>*Funding the Northern Ireland Assembly: Assessing the Options* (Northern Ireland Economic Council, March 2003), 55.
- <sup>30</sup>Effects on the Scottish Parliament's tax varying powers - statement regarding Section 76 of the Scotland Act 1998', following Table 1.3 of *The Financial Statement and Budget Report March 1999* (H.M.Treasury).
- <sup>31</sup>Letter from Alison Jackson, Head of the Wales Office to the Secretary of the Commission, 30 July 2003.
- <sup>32</sup>*Funding the Northern Ireland Assembly: Assessing the Options* (Northern Ireland Economic Council, March 2003), 56.
- <sup>33</sup>Scottish Parliament Official Report, 24 June 1999.

<sup>34</sup>Section 76 of the Scotland Act 1998.

<sup>35</sup>*Royal Commission on the Constitution 1969-1973*, (London: HM Stationery Office, 1973), Chapter 15: The Public Finance of Devolution.

<sup>36</sup>Vernon Bogdanor, *Devolution in the United Kingdom* (Oxford University Press, 1999), 85-86.

<sup>37</sup>Written and oral evidence, February 2003.

<sup>38</sup>Oral evidence from the Rt. Hon. Ron Davies AM on 26 September 2002, Rt. Hon. Rhodri Morgan AM, First Minister, on 12 December 2002 and Kevin Brennan MP on 25 July 2003.

<sup>39</sup>*Funding the Northern Ireland Assembly: Assessing the Options* (Northern Ireland Economic Council, March 2003), 54.

<sup>40</sup>*Paying for Progress - A New Politics of Tax for Public Spending* (Fabian Society, 2000), 10-11.

<sup>41</sup>*Your Region, Your Choice: Revitalising the English Regions* (ODPM, Cm 5511, 2002), 5.6.

# The cost of devolution

This chapter examines the costs of devolved government in Wales since the establishment of the Assembly, and the implications of possible future development.

2. The chapter addresses the following questions:
  - how do the actual costs compare with the forecasts provided in *A Voice for Wales*?<sup>1</sup>
  - what are the components of the additional costs incurred since 1999?
  - what are the likely costs of possible changes in the future?
3. As in Scotland and Northern Ireland, the costs of devolution were met from within the devolved Budget, under the financial arrangements discussed in Chapter 10. No additional resources were provided by the UK Government to meet the cost of the new Assembly and executive structure.
4. In July 1997, *A Voice for Wales* estimated the additional costs of the Assembly as 'in the range £15-20 million, in addition to the running costs of the Welsh Office of around £72 million a year.' In October 1997, the Welsh Office employed 2,321 staff and was responsible for a budget of £6.5 billion (1997-98 out-turn).
5. The total running costs of the National Assembly for Wales and the Wales Office in 2002-03 were £177 million. This includes the salaries of all Assembly Members and their support staff, civil servants, accommodation, IT and all associated costs. In 2003 the Assembly was responsible for a budget of £9.7 billion (2002-03 estimated out-turn).
6. The breakdown of these costs is shown in Table 11.1.
7. This shows that the running costs of devolved central government in Wales in 2002-03 was £105 million more (146%) than the running costs of the Welsh Office in 1997. The National Assembly for Wales and the Wales Office employed 3,777 staff in 2003, an increase of 1,456 (63%) over the Welsh Office total in October 1997.
8. This increase has a number of different components, not all of which can be attributed to devolution, either directly or indirectly.
9. Part of the increase, £34 million, is due to the absorption into the Assembly of a number of ASPBs and other bodies such as Tai Cymru (Housing for Wales) and the Care Standards Inspectorate – the 'Merged Bodies' column in Table 11.1. The running costs of these bodies were previously outside the central administration budget. They were brought into the Assembly in order to achieve economies of scale in central overheads, as well as other gains in efficiency and accountability.

**Table 11.1: Central administration costs of central government in Wales 2002-03<sup>a</sup>**

	Wales Office	National Assembly for Wales			Total	
		Presiding Office	Cabinet Secretariat	Merged bodies		Other
Staff <sup>b</sup>	48	251 <sup>c</sup>	68	584	2,826	<b>3,777</b>
£ million	3	23 <sup>d</sup>	3	34	114	<b>177</b>
<b>Notes</b>						
a. Source: Welsh Assembly Government, Finance Group.						
b. March 2003.						
c. Civil servants working in the Presiding Office: excludes elected Members and their support staff.						
d. Includes the cost of Members and their support staff as well as a number of costs incurred on behalf of the Welsh Assembly Government for example translation and accommodation costs.						

10. If these merged bodies are excluded, the total cost which is broadly comparable with the central government responsibilities of the Welsh Office in 1997 is £143 million – more or less double the costs in 1997 in cash terms. Adjusted for inflation, the increase is 75% as shown in Table 11.2 below.

### Cost of devolved government since the establishment of the Assembly

11. In seeking to analyse the cost of devolved government, it is possible first to identify the running costs of the new structures put in place by the Government of Wales Act, including the new elected Assembly and its Presiding Office, as well as the Executive Committee (the Cabinet) and its Secretariat.

12. The Presiding Office (in March 2003) directly employed 251 staff (employed in such areas as Research and

Committee Services, Record of Proceedings, Human Resources, Finance, Public Information and Education and the Table Office). Some Presiding Office services such as Office Facilities Management, Reception and Security are also provided to the Cabinet Secretariat and the Translation Service, which is within the Presiding Office, does about two thirds of its work for the Welsh Assembly Government.

13. The Presiding Office budget also covers the salaries and allowances of the 60 Assembly Members and their support staff; this amounted to £8 million in 2002-03. The total cost in 2002-03 was £23 million which included the one-off capital cost of £1.5 million to purchase the Pierhead Building.

14. In March 2003, the Cabinet Secretariat employed 68 staff, including the Ministers' Private Offices, and in 2002-03 cost £3 million (this does not

include Cabinet Ministers' salaries which are paid from the Presiding Office budget).

15. Added together, the cost of the Presiding Office and the Cabinet Secretariat in 2002-03 was £24.5 million (excluding the capital cost of the Pierhead Building). This is roughly the same as the estimate provided in *A Voice for Wales* of £15-20 million – which, adjusted for inflation, would be £17-23 million.<sup>2</sup>
16. This broad comparison aims to put into context the figures in *A Voice for Wales*. It does not take account of the cost of the pre-1999 Secretary of State and junior Ministers' private offices – whose functions have been taken over partly by the Cabinet Secretariat and partly by the Wales Office.
17. The cost of devolved government has increased by considerably more than the cost of the Government of Wales Act structures – as discussed below.

### Capital costs

18. In addition to running costs, *A Voice for Wales* estimated one-off capital costs of devolution at £12-17 million. The latest estimated cost of the new Assembly building is £41 million excluding VAT and fees. This is a decision taken since devolution for which the Assembly itself is accountable. It illustrates a further distinction which needs to be drawn between:
  - the costs of the devolution process itself;

- decisions of the devolved bodies since devolution.
19. In the case of the new building, the requirement for a permanent home can be seen as an unavoidable cost of devolution but the specification of the building itself is not.
  20. This distinction is also relevant to the evaluation of trends in the cost of devolved government – but it is a matter of judgement where the former ends and the latter begins.

### Costs of executive government since devolution

21. Table 11.1 shows that since devolution there has been a considerable increase in the cost of running the executive arm of the National Assembly compared with the cost of the Welsh Office, over and above the direct costs of the new Assembly and Cabinet structures. These increases are summarised in Table 11.2.

### How far can the current cost of the Welsh Assembly Government be attributed to devolution?

22. In a number of respects, devolution has contributed to additional costs for the executive arm of the Assembly over and above the cost of the Cabinet Secretariat. These include:
  - the general increase in policy and administrative activity needed to implement the priorities of the Assembly, including a nine-Member Cabinet, produce papers and briefing for the Committees and deal with constituency queries from 60 Members;

**Table 11.2: Cost of devolved central government in Wales in 2002-03 compared with Welsh Office costs in 1997-98, adjusted for inflation**

% increase	total	excluding merged bodies	excluding merged bodies, CabSec, Presiding Office
Cash	116%	75%	43%
Staff	63%	38%	24%

Source: Welsh Assembly Government Finance Group.

- the costs of new tasks, functions and policies such as the Wales European Funding Office, the Communities Directorate, the Sustainable Development Unit, the Equalities Unit, the Youth Policy Team etc.;
  - a greater emphasis on consultation and engagement in formulating and implementing new policies – since 1999 the Government and Committees have issued over 440 consultation documents;<sup>3</sup>
  - the aspiration to formulate new policies tailored to Welsh circumstances and to rely less on adapting Whitehall policies;
  - enhanced legal expertise needed to interpret and implement the devolution settlement.
23. This increased activity was a strong theme in evidence to the Commission – witnesses emphasised the range and ambition of the Assembly's policy agenda. In general this was welcomed but the costs of participating in these processes were highlighted as well.
24. It is clear from the evidence that the creation of the Assembly has led to a much more wide-ranging policy agenda, both in terms of content and the consultative processes followed. This was underestimated in *A Voice for Wales* – its estimates would really only cover the new structures required by the Act (paragraph 15 above). The White Paper did not anticipate the cost of the transformation of policy ambition which would follow the creation of the Assembly.
25. However, had devolution not occurred, it seems highly unlikely that the running costs of the Welsh Office would have remained at the level they were in 1997. It seems reasonable to suppose that at least some of the areas mentioned in paragraph 22 above might have been the subject of policy development had the previous model of administrative devolution continued post 1997.



**Table 11.3: Comparison in trends in gross administrative expenditure between the National Assembly and Whitehall Departments, not adjusted for inflation**

	1997-98 £ million	1998-99 £ million	2002-03 £ million	% <u>2002-03</u> 1997-98	% <u>2002-03</u> 1998-99
<b>National Assembly</b>	72 <sup>a</sup>	82 <sup>b</sup>	117 <sup>b</sup>	+ 63%	+ 43%
<b>Roughly comparable Whitehall departments<sup>c</sup></b>	n/a	2,040 <sup>d</sup>	3,021 <sup>d</sup>	n/a	+ 48%
<b>Total all UK civil departments</b>	13,246 <sup>e</sup>	14,197 <sup>d</sup>	19,788 <sup>d</sup>	+ 49%	+ 39%
<b>Notes</b>					
a. Source: A Voice for Wales.					
b. Source: Welsh Assembly Government Finance Group.					
c. Education; Health; Transport, Local Government and the Regions, Office of the Deputy Prime Minister; Trade and Industry; Environment, Food and Rural Affairs; Culture, Media and Sport.					
d. Source: Public Expenditure Statistical Analyses 2003 (H. M. Treasury, Cm 5901, 2003), Table 5.1.					
e. Source: Public Expenditure Statistical Analyses 1999-2000 (H.M. Treasury, Cm 4201, 1999), Table 5.5.					

26. This is supported by trends in Whitehall departments over this period as shown in Table 11.3. These figures need to be treated with caution because they are influenced by machinery of government changes, such as the transfer of central government functions to executive agencies. With that caveat, they confirm that the period since 1997-98 has been a period of growth in Whitehall's administration costs.

### Wales, Scotland and Northern Ireland

27. The Commission sought comparisons of the cost of the devolved bodies: the figures available are set out in Table 11.4 below.

**Table 11.4: Central administration costs of devolved government in the UK**

2002-03	Elected body £ million	Government £ million
<b>Wales</b>	23 <sup>a</sup>	151 <sup>a</sup>
<b>Scotland</b>	50 <sup>a</sup>	205 <sup>b</sup>
<b>Northern Ireland</b>	39 <sup>a</sup>	719 <sup>c</sup>
<b>Notes</b>		
a. Source: Welsh Assembly Government Finance Group.		
b. Source: the Administration Outturn Statement in the Scottish Executive Consolidated Resource Accounts for the year ended 31 March 2003 - laid before the Scottish Parliament, December 2003.		
c. Source: 'Building on Progress: Northern Ireland Departments Budget 2002', p64.		

28. It has been stressed to us that it is not possible to make inter-country comparisons between the figures in Table 11.4. This is because of major differences both in the coverage of the devolved services and in the extent to which they are administered directly or by executive agencies.

29. For example:

- in Northern Ireland, devolved services include social security, which is not devolved in either Wales or Scotland;
- the equivalent of most of the expenditure incurred by local authorities in Wales and Scotland is carried out by Northern Ireland departments;
- in Scotland, central administration costs include functions such as policing, which is not devolved in either Wales or Northern Ireland;
- in Wales, central administration costs include functions such as the regulation of social housing and the inspection of care standards which in Scotland are carried out by executive agencies and not included in central administration costs.

30. To produce like-for-like figures would require a detailed study extending beyond our terms of reference.

### **The cost of primary powers**

31. Chapter 13 sets out a model for legislative devolution to Wales. It is impossible to forecast precisely what this would cost – it would depend on the scale and complexity of the legislative programme and the number of Assembly Members required to carry out legislative scrutiny. The cost would

be shared by the Welsh Assembly Government and the Assembly's Presiding Office.

32. Recognising these uncertainties, the Commission sought information on the possible costs of managing in Cardiff a legislative programme of around six average-sized Bills a year, on the assumption that 20 additional Members would be needed (see Chapter 12).

33. Based on the information provided by the Assembly Government and the Presiding Office, the direct cost could be of the order of £10 million in each year as summarised in Table 11.5. We have not assumed any offsetting savings in the Westminster process.

### ***The Welsh Assembly Government***

34. The main cost would arise from the need to provide Bill Teams to manage the legislation from the policy instructions stage through to responding to amendments and briefing Ministers. Costs would depend on the scale of the programme and the approach adopted to managing it: Table 11.5 assumes separate Bill teams as well as a legislation management unit – at a cost of about £2 million. This does not include an expansion of the policy capacity of the administration – see below.

35. It is possible that, with extensive pre-legislative scrutiny and a smoothly managed timetable, the programme could be managed centrally at a lower cost than this. But in the absence of fuller information, we felt it prudent to

assume that the Welsh Assembly Government would continue with its existing practice of separate Bill Teams and Table 11.5 reflects this.

36. In addition, based on experience in Scotland, it seems reasonable to assume that the cost of Parliamentary Counsel would add a further £0.5 million.

### *The Presiding Office*

37. The main costs would arise from increasing the size of the Assembly by a further 20 Assembly Members. Based on the average cost of an Assembly Member in 2002-03 (£137,733), and allowing for overheads such as accommodation and IT, the cost of 20 additional AMs could be around £5.5 million a year. These costs would arise simply from the expansion in number of Members.

However, primary legislation would result in other costs – legal advice, enhanced Research and Committee Services, translation, transcription and publication costs – which might increase this to around £7.5 million a year.

### **Evaluation of possible costs**

38. The figures in Table 11.5 are an estimate of the direct costs of handling a programme of primary legislation in Cardiff with an Assembly of 80 Members. They assume that the main burden of the additional work would fall on the Presiding Office, as a result of the cost of the additional Members, and the cost of the scrutiny and amendment of primary legislation. They also include costs of drafting and Bill management which would fall on the Assembly Government.

**Table 11.5: Potential costs of handling primary legislation in Cardiff**

Costs of handling primary legislation	£ million
Welsh Assembly Government:	
Bill Teams x 6 (administrators and lawyers)	1.7
Legislation co-ordination unit	0.25
Parliamentary Counsel	0.5
<b>Total Welsh Assembly Government</b>	<b>2.45</b>
Presiding Office:	
20 AMs (salaries, pensions, support staff, travel)	2.75
20 AMs (accommodation, IT)	2.75
Other (Committee staff, verbatim record, research, translation, lawyers, publication costs)	2.5
<b>Total Presiding Office</b>	<b>7.5</b>
<b>Total Assembly</b>	<b>9.95</b>

39. These figures do not include an estimate of the potential increase in the administrative workload as a result of responding to 20 additional Members, nor do they quantify the cost of a further increase in policy ambition which could follow extended powers. Experience suggests that there is a real danger of underestimating this, but there is also a risk that it could be overstated.
40. This potential impact on future policy ambition is a matter of judgement which cannot be quantified. The evidence shows that the Assembly Government does now have the capacity to initiate legislative proposals across the policy portfolios. There will certainly be pressure to do more if the scope of the powers is increased – but we do not think the impact need be anything like as dramatic as the effect of the crucial first step of introducing an elected body in 1999. This would be a choice for future administrations to make and defend.
41. Accordingly we felt it right to limit our estimates in Table 11.5 to the additional costs which are the unavoidable consequences of our recommendations, bearing in mind that both the policy and scrutiny capacity of the Assembly is likely to continue to grow within the existing settlement.
42. An increase of £10 million would represent an increase of 6% in the Assembly's 2002-03 central administration costs budget (£174million), and about 0.1% of the Assembly's devolved Budget in that year (£9.7 billion).

### Findings

In the light of the evidence in this chapter our findings are as follows:

- the overall cost of devolved government in Wales has increased considerably since the Assembly came into being and has been met from within the overall Budget for Wales under the arrangements discussed in Chapter 10;
- the costs have been considerably more than foreseen in *A Voice for Wales*, which seems to have anticipated only the direct costs of the new structures;
- but the increase in central administration costs are not due to devolution alone – many policy developments would probably have been initiated by a post-1997 Welsh Office, as borne out by growth in comparable departments in Whitehall in this period;
- some of the additional administrative costs are due to the benefits perceived from devolution – more responsive and transparent processes and the design and implementation of policies designed to meet Welsh needs;
- the infrastructure needed to support an elected Assembly with secondary legislative powers is now in place, along with a substantially expanded policy capacity;
- if further powers are granted, some additional direct costs are unavoidable – in both the Assembly Government and the Presiding Office;

- experience suggests that there could also be other indirect costs due to new policy development and additional pressure from the increase in Membership;
- however, there is no reason why the growth in costs should replicate the 'step change' expansion which took place when the Assembly replaced the Welsh Office;
- the direct increase in costs is likely to be in the order of £10 million per year – of which around half would be due to an increase in Assembly Members from 60 to 80.

*Notes*

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<sup>1</sup>*A Voice for Wales*, Cm 3718 (London: The Stationery Office, July 1997).

<sup>2</sup>Source: Welsh Assembly Government Finance Group.

<sup>3</sup>As at 10 February 2004. Source: Welsh Assembly Government Finance Group.



# The electoral arrangements

This chapter considers the second part of the Commission's terms of reference dealing with the Assembly's electoral arrangements.

2. The issues addressed include:

- whether the present electoral system permits the election of an Assembly which is appropriately representative of Wales;
- whether any changes would be needed if the Assembly were to acquire further powers.

Whether the number of Assembly Members is adequate to discharge the Assembly's present role is discussed in Chapters 4 and 14.

3. We issued a consultation paper on the electoral arrangements in March 2003. This included the following possible definitions of representativeness:

- a. the close identification between an individual elected Member and the area represented;
- b. the match between seats won and votes secured in the election;
- c. the similarity between the characteristics of AMs and those of the electorate;
- d. the extent to which different interests in Wales are represented in the Assembly;
- e. the extent to which Members' policy priorities represent the concerns of the people of Wales.

## Evidence received on the electoral system

4. Most of the concerns expressed in evidence focused on the first point – the role of AMs and their relationship with their constituencies. The Electoral Reform Society and the Parliament for Wales campaign argued for changing the system on grounds of voter choice and participation. In relation to points c. and d. the major issue raised with us was the lack of representation of minority groups in the Assembly.

## The Commission's approach

5. We decided to approach the electoral system by addressing the following questions:

- what are the advantages and disadvantages of the present electoral system?
- can the present system be used to create additional Members if they are recommended?
- what realistic alternatives (if any) are there to the present system?

6. In evaluating the different systems, we had in mind the following considerations:

- the impact on proportionality – how the representation of parties in the Assembly under each system compares with their support amongst the electorate;



- boundaries - whether the electoral boundaries required for each system are meaningful for local people, and/or match those for other elections;
- equal opportunities – the likelihood that under-represented groups would be selected as candidates and/or be elected;
- the connection between Members and voters;
- clarity of each system – how easily understood by the electorate;
- possible impact on voter choice and turnout – incentives for parties to campaign and for electors to vote;
- the implications of each system for majority or coalition government.

### Main features of electoral systems

7. A summary of the features of the most commonly used voting systems is in Table 12.1.

### Independent Commission on Proportional Representation

8. Our report has been prepared over much the same period as that of the Independent Commission on Proportional Representation chaired by Professor David Butler and Peter Riddell which is due to report in March 2004. That Commission has reviewed experience of PR voting systems in the UK. The introduction to its report points out:

*There is no single ideal electoral system. Different systems are associated with providing a strong and stable executive; representation of*

*minority interests; proportionality in the relationship between the share of votes cast and the balance of party representatives elected; a clear link between the voter and their representatives.<sup>1</sup>*

### The AMS system

9. The present system for electing the Assembly is the AMS system. This is a form of proportional representation which was developed for use in the Federal Republic of Germany after the Second World War. It attempts to combine, in a single voting system, features of the First Past the Post (FPTP) and the Party List systems. The objective is to retain the clear link between a representative and his or her electoral area and, at the same time, provide a mechanism to compensate for the lack of proportionality which usually arises from elections conducted entirely under FPTP.<sup>2</sup>

10. The Assembly has 60 Members, 40 elected by FPTP to represent single Member constituencies, with the same boundaries as for the Westminster Parliament, and 20 elected from party lists to represent five regional constituencies of four Members each.<sup>3</sup> There are separate ballot papers for the local constituency and for the regional list. Regional list Members are elected for each region from closed party lists in proportion to the votes cast in the region for each party in the second (list) ballot, after taking into account the seats gained in that region by each party in the first ballot.

Table 12.1: Electoral systems: definitions and key features

System	Description	Features	Where used
FPTP	First Past the Post	<ul style="list-style-type: none"> <li>one or more candidate(s) per constituency</li> <li>candidate(s) with most votes win(s)</li> </ul>	<p>Westminster US Congress Canada Indian Parliament Local government: England and Wales, USA, Canada and India</p>
AV	Alternative Vote	<ul style="list-style-type: none"> <li>voters rank candidates 1,2,3</li> <li>same as FPTP if candidate wins 50%+ of first preference votes</li> <li>if not, candidate with least votes eliminated and votes redistributed to next-ranked candidate till one candidate wins absolute majority</li> </ul>	<p>Australian House of Representatives Presidency of Ireland</p>
SV	Supplementary Vote	<ul style="list-style-type: none"> <li>same as FPTP if candidate wins 50%+ of vote</li> <li>If not, all candidates except two highest scoring are eliminated</li> <li>second preferences redistributed between first two until overall winner elected</li> </ul>	<p>To elect Mayor of London</p>
AMS	Additional Member System	<ul style="list-style-type: none"> <li>combines constituency (FPTP) and party list</li> <li>two separate ballots and two types of Member</li> <li>allocation of list seats takes account of FPTP results</li> <li>ratio of constituency to list Members varies in each country</li> </ul>	<p>Germany, New Zealand Parliament, London Assembly, Scottish Parliament, National Assembly for Wales</p>

Table 12.1: Electoral systems: definitions and key features (continued)

System	Description	Features	Where used
AV+	Alternative Vote plus	<ul style="list-style-type: none"> <li>■ combines AV in single Member constituencies and party list</li> <li>■ two types of Member</li> <li>■ allocation of list seats as AMS</li> </ul>	Not used but recommended by Jenkins Commission for House of Commons
STV	Single Transferable Vote	<ul style="list-style-type: none"> <li>■ multi-member constituencies</li> <li>■ voters rank candidates 1,2,3 etc</li> <li>■ voters can vote for candidates across parties</li> <li>■ candidates who achieve quota are elected<sup>a</sup></li> <li>■ votes above or below quota are redistributed until required number of candidates elected</li> </ul>	Republic of Ireland Australian Senate Northern Ireland (Assembly, local government and European Parliament)
	Party list system	<ul style="list-style-type: none"> <li>■ multi-member seats</li> <li>■ voters cast single vote for a party list (closed list system)</li> <li>■ parties rank candidates in order</li> <li>■ seats allocated to the parties in proportion to votes gained</li> <li>■ generally party lists are closed but open lists (where voters can choose among candidates within a party's list) are possible</li> </ul>	Belgium (national Parliament) Israel France, Spain, Belgium, Italy (European Parliament)
<b>Note</b>			
a. The quota is the total number of valid votes cast in the constituency, divided by one more than the number of candidates to be elected, and then add on one vote.			

11. The AMS system was put in place by the Government of Wales Act and was an integral part of the devolution proposals, as explained in *A Voice for Wales*:

*The electoral system will reflect the diversity of modern Wales and ensure fair representation for all areas and parties.*

*Electors will have two votes – one for a candidate for their local constituency and another for a party list. This retains local constituencies while giving a strong element of proportional representation.<sup>4</sup>*

12. Proportional systems were also introduced for the other devolved bodies. Scotland has the same system as Wales, except that the balance of list seats is greater, producing a more proportional outcome. The Assembly in Northern Ireland is elected by STV (which has been used in the province for local council elections since 1973 and for European elections since 1979). Table 12.2 shows the size and electoral system of each devolved body.

13. The proposal that the Assembly should be elected by means of a proportional system was linked to the aim to create a more inclusive form of politics in Wales and to secure the backing of the other pro-devolution parties in Wales.<sup>5</sup> The AMS system was agreed as the basis for electing the Assembly by the Welsh Labour Party Conference in 1997.<sup>6</sup>

14. Ron Davies told us that the STV system of proportional representation was also considered by the Labour party in the mid-nineties but was ruled out on practicality grounds:

*One of the issues that we considered way back in 1995-96 was the question of multi-member constituencies, of creating new constituencies. Had we done that of course we would have had to have had a Boundary Commission and that process would have taken forever and a day and that would have frustrated our overall political timetable. So we had to settle on the existing constituency arrangements, parliamentary constituencies and European Constituencies.<sup>7</sup>*

**Table 12.2: size and electoral systems of devolved bodies**

UK Devolved Bodies	Constituency Members	Regional Members	Total Members	Ratio FPTP: List	Ratio Member: population
Wales	40	20	60	67%:33%	1: 48,600
Scotland	73	56	129	57%:43%	1: 39,200
Northern Ireland	Elected by STV system		108	n/a	1: 15,700

### Experience of the AMS system in Wales

15. Two Assembly elections have been conducted under the AMS system. Table 12.3 below shows the share of votes cast for each of the parties (averaging the votes from the 1st and 2nd ballots) and compares this with the proportion of seats gained.

16. The experience of AMS so far suggests that the system has a number of advantages and disadvantages which are summarised below.

#### Advantages of AMS

17. The main advantages are:

- the single Member constituency representation, elected by FPTP, is familiar and straightforward;
- the constituency boundaries are the same as those at Westminster;

- a broadly proportional result is achieved by the combined effect of the constituency and regional ballots.

#### Disadvantages of AMS

18. The main disadvantages are:

- it creates two types of AM with overlapping responsibilities: the single constituency Member and the regional Member who is one of four representatives covering the region which includes the constituency; in the present Assembly all Labour AMs are constituency Members and two-thirds of opposition AMs are regional list Members;
- the freedom for candidates to stand for both constituency and party regional seats is seen as a weakness (paragraphs 21-23 below);
- the constituency element may be seen as disproportionately large and, because of the 40:20 split, the overall

**Table 12.3: Comparison of the parties' share of seats with their share of votes cast in the 1999 and 2003 elections<sup>8</sup>**

Party	1999		2003	
	Votes gained as % of votes cast	Seats won as % of total seats	Votes gained as % of votes cast	Seats won as % of total seats
Conservative	16.2	15.0	19.5	18.3
Plaid Cymru	29.5	28.3	20.5	20.0
Labour	36.5	46.7	38.3	50.0
Lib Dems	13.0	10.0	13.4	10.0
<b>Total</b>	<b>95.1</b>	<b>100</b>	<b>91.7</b>	<b>98.3<sup>a</sup></b>
<b>Note</b>				
a. The John Marek Independent Party secured one seat.				

result favours the largest party. (The higher the proportion of constituency seats, the lower the proportionality. In Wales, the constituency seats comprise 67% of the total compared with 57% in Scotland, 50% in Germany, and 56% in the London Assembly);

- the closed party list system reduces voter choice in favour of party control. Parties choose the candidates and determine their priority order on the list;
- studies suggest that regional Members have less direct contact with constituents than do constituency Members;<sup>9</sup>
- there is some evidence that people do not understand the dual-voting system, particularly the relationship between the first and second vote;
- since regional AMs are elected to represent voters whose preferred party was unsuccessful in the first ballot, there is little incentive for the parties to campaign in safe seats – which influences the level of public interest and turn-out;
- in the first (FPTP) ballot, votes are wasted in the sense that either they are cast for losing candidates or they contribute to excessive majorities which give no further advantage to the winning candidates and their parties. FPTP as a system favours contests between two parties, but in Wales where there are four major parties, a majority of votes can be 'wasted'.<sup>10</sup>

### Options for reforming AMS

19. We received a number of suggestions for adjustments to the AMS system to

address these concerns. The main candidates were:

- introduce protocols to regulate competition between list and constituency AMs – this would cover such issues as rights to claim to represent a constituency and location of constituency offices;
- replace the regional list with a national list – this would be designed to reduce competition since regional list Members would have no geographical constituency beneath the all-Wales level. It would also produce a more proportional result by taking out the distortions produced by the existence of regional boundaries;
- limit candidates to one ballot – either the constituency ballot or the regional list ballot – to remove the possibility that a candidate could 'lose' in the constituency and still be elected as a regional Member;
- replace the two ballot paper system with a single ballot – the List system would operate as now except that regional seats would be allocated having regard to each party's share of the total vote throughout the region for constituency candidates and taking account of the constituency seats won in the region;
- replace the closed party lists with an open list – voters could vote for their preferred individual candidate from the party list;
- allocate the regional seats to those regional candidates who poll the most number of votes in the constituency ballot.

20. These proposals raise problems of their own, and all except the first, would require an amendment to the Government of Wales Act:

- the evidence from Scotland suggests that protocols are difficult to enforce effectively – there are strongly competing perspectives on the proper role and status of different types of Member;<sup>11</sup>
- creating a national list could exacerbate rather than reduce the gap between the two type of Member – regional representation for example in North Wales or West Wales could be lost but the two-tier Member issue would not have been resolved;
- preventing candidates from standing in both regional and constituency ballots might mean that regional candidates would do no active campaigning and the parties would be deterred from fielding strong candidates in marginal seats (preferring to keep them on the List) thus reducing voter choice;
- the proposal to prevent candidates from standing in both ballots is based on the premise that a candidate defeated in the constituency ballot has been rejected by the electorate – this is not necessarily the case, particularly where candidates come a close second; another view is that the winning candidate was simply preferred;
- abolishing the separate second ballot might simplify the system but it would make it harder for very small parties to compete because they would need to contest every constituency seat;
- replacing the closed party lists with open lists might increase voter choice but it might make it more difficult for

parties to take positive action to promote candidate diversity;

- allocating the regional seats to regional candidates who poll the most number of votes in the constituency ballot would require all regional candidates to stand as constituency candidates, which would again present problems for small parties.

21. Many of the concerns about AMS arise from the two categories of Member. The Electoral Reform Society confirmed that:

*AMS creates two categories of elected representatives. This is an intrinsic defect of additional member systems. Although in the Assembly constituency and regional list Members have equal rights, there remains a perception that list seats are consolation prizes for parties which failed to win constituency seats.*

*Constituency Members are viewed as having greater legitimacy as representatives of issues in their constituencies, while regional list Members are not regarded as local representatives in the same way.*

*There have been accusations that List Members have concentrated their energies in constituencies in their regions where there are future prospects of winning constituency seats. If the Welsh Assembly were to acquire greater powers, it must be anticipated that the tensions between list and constituency AMs will increase.<sup>12</sup>*



22. This is the source of the most persistent criticism of AMS:

*How can it be right that under the system adopted candidates who are defeated in the first-past-the-post ballot can then be elected under the regional list ballot?*<sup>13</sup>

*Candidates use the list as an insurance against failing to win a constituency contest. This dual candidacy can also confuse the electorate, who may wish to consciously reject a particular candidate only to find them elected via the list. It should remain a basic democratic right not to elect a particular candidate.*<sup>14</sup>

*[In the May 2003 elections] no less than 17 out of the 20 AMs elected from lists were candidates who lost constituency contests*<sup>15</sup>

23. Adjusting the AMS system would not address this issue. It is possible that tensions could diminish over time as the system becomes more familiar and entrenched (as in other countries – the rivalry between constituency and regional Members does not appear to be a problem in Germany and New Zealand, for example). However the party distribution of the different categories of seats in Wales suggests that it may be optimistic to rely on better relations in the future.

### Using the AMS system to elect a larger Assembly

24. If an increase in the overall size of the Assembly were desired, the simplest

way to achieve this would be to increase the number of regional list Members. For example, an Assembly of 80 Members could be created by retaining the constituency link with the Westminster boundaries and finding the balance of 40 from the five regional seats. This could be achieved with no electoral system change, simply by adding to the number of Members selected from the lists in each regional constituency.

25. This would double the number of regional list Members and bring the balance of constituency and list seats to 50:50. Because each regional constituency would elect eight Members from the regional lists, compared with four now, the representation of the parties would be much more closely aligned with their share of the vote. Thus, on present voting patterns, the prospect of a single-party majority government in the Assembly would be reduced significantly.
26. In view of the problems inherent in the two categories of Member, we very much doubt that the AMS system could carry the weight of doubling the regional Membership. With sixty Members, and the constituency Membership in the majority, it is possible that the tensions could diminish. But if there were substantially more regional Members, the scope for competition and argument about their activities seems likely to increase.
27. Accordingly, increasing the number of Members points strongly to changing the electoral system. If such a change

is in prospect, we do not think it would be sensible to amend the AMS system in the interim. This would rule out modifications such as a national list.

### Alternatives to AMS

28. If AMS is to be replaced there seem to be only two feasible alternatives:

- First Past the Post (or a variant of it) as the basis for electing all AMs;
- Single Transferable Vote (STV).

### An Assembly elected by FPTP

29. In an Assembly elected by FPTP, all Members would be elected by a simple majority, i.e., the candidate with the most votes is elected. The main advantages of the system are: its simplicity, the clear link between Member and constituency, and consistency with the Westminster and local government systems.

30. Under FPTP, it would be possible to elect an Assembly of 80 Members by electing two AMs for each constituency. The result would be much less proportional than under the present system. On the basis of the votes cast in the first ballot of the 2003 Assembly election – the largest party would gain 75% of the seats, having secured 40% of the vote.

31. An alternative would be to create 80 single Member constituencies elected by FPTP.<sup>16</sup> This would involve a major boundary re-drawing exercise, to create new constituencies from the present Parliamentary constituencies which vary enormously in size from Meirionnydd Nant Conwy (33,742 electors in 2003) to Vale of Glamorgan

(68,947 electors in 2003). The impact on the composition of the Assembly would depend on how the boundaries were drawn but again would be far less proportional than under the present AMS system.

32. This would have major implications for accountability, scrutiny and debate in the Assembly. Scrutiny is not the preserve of opposition candidates – it is also a duty of Members who belong to the government party. However there is no doubt that reducing the representation of the smaller parties would seriously weaken the capacity for opposition and challenge. The Assembly's claim to represent Wales as a whole, as proposed in *'A Voice for Wales'*, would be much diminished.

33. The relatively small size of the Assembly creates a very different situation from Westminster. The Government majorities potentially available at Westminster under FPTP do not rule out the election of sufficient opposition Members to make possible effective scrutiny. This would not be the case in Wales.

### The AV and SV systems

34. The same objection would apply to the AV and SV systems. These systems work in the same way as FPTP provided the winning candidate achieves 50% of the vote on first preferences.<sup>17</sup> Where that is not the case, votes are redistributed according to the order of preference indicated on the ballot paper. Under AV, the votes of the least successful candidates are redistributed until a candidate passes the 50% threshold and is elected.

Under SV, all but the top two candidates are eliminated and their votes re-distributed to achieve an overall winner.

35. Simulations of the results of Westminster elections suggest that AV and SV could be less proportional than FPTP. If voters voted as they did in the 1997 Westminster election, the simulations suggest that these two systems would have produced a less proportional result than the actual outcome, giving the largest party a larger majority than did FPTP.<sup>18</sup> Both AV and SV can only be used in single-member constituencies (the multi-member version is STV). We do not believe that either SV or AV are realistic options to replace the AMS system.

#### AV+

36. The AV+ system was recommended by the Jenkins Commission for elections to the House of Commons. It is similar to AMS except that the constituency Members are elected by AV rather than FPTP. It offers no advantages over the AMS system in the Welsh context.

#### An Assembly elected by STV

37. The aim of the STV system is to give the voter the widest choice possible between candidates whilst eliminating, as far as possible, wasted votes.
38. The main features of STV are:
- STV allows party-based voting without limiting choice to candidates of a single party. It is as concerned with

the election of individuals as with the choice between political parties;

- constituencies are multi-member and each party or organisation can field more than one candidate;
- electors rank candidates in order of preference;
- seats are allocated by quota system. The quota is used to calculate how many votes a candidate needs to get elected. Those above quota are elected. Excess votes for the successful candidate(s) are reallocated to their voters' next highest ranked candidate;
- candidates with least support are also eliminated and their votes redistributed to their voters' next highest ranked candidate.

39. The advantages of STV are as follows:

- all elected Members are on an equal footing – being elected the same way – and have the same constituency responsibilities;
- it encourages a genuine contest in every constituency;
- multi-Member constituencies could be created relatively easily by grouping Westminster seats, or by using local authority boundaries (see paragraph 47 below);
- it is straightforward for voters to operate: the system works smoothly in Australia, the Republic of Ireland and Northern Ireland (Table 12.1); the Scottish Executive plans to introduce STV for local authority elections in Scotland and the system was recommended by the Sunderland Commission<sup>19</sup> for use in local authority elections in Wales;

- it maximises voter choice (between candidates of different parties or of the same party, or candidates with no party label) and the incentive to vote and campaign;
  - constituents have a choice of elected representatives to approach with problems;
  - few votes are wasted: voters know that their second preference will help elect someone – should their first choice not be elected;
  - it creates opportunities for independent candidates – because the electorate vote for the individual, not necessarily a party;
  - it creates opportunity for diversity (paragraphs 49-53 below);
  - more or less every vote counts equally and the result is broadly proportional – but the degree of proportionality is affected greatly by constituency size (paragraphs 44-46 below);
  - because individual Members do not have ‘safe’ seats, STV increases their accountability to their constituency.
40. The disadvantages of the system are:
- each constituency has several Members – the link between the single Member representative and the constituency is removed;
  - it can introduce intra-party competition and factionalism – candidates in the same party have an incentive to compete against each other in campaigns and for constituency casework;
  - the size of constituency could be a problem in rural areas;
  - if the size of constituency is very large, it can be too easy for quite small parties to get elected;
  - the counting system is relatively complex (as is the counting system for the list seats under the AMS system) – although no real problems have been encountered with this in either Northern Ireland or the Republic of Ireland.
41. One of our members joined a group of observers of the Northern Ireland Assembly election on 26 November 2003. This confirmed that voters have no difficulty in understanding the voting system and the requirement to specify preferences. The system was universally felt to be fair and the counting system enjoyed the confidence of all the parties.
- The impact if STV were introduced for elections to the National Assembly**
42. It is not possible to forecast the impact of introducing STV on the composition of a future Assembly. The system would require the creation of new constituencies and the outcome of an STV election would depend on how these were constructed and how voters cast their first and subsequent preferences.
43. Some argue that introducing STV would necessarily produce an outcome that is more proportional than the present system so that no party would have an overall majority. Thus it is argued that STV would inevitably lead to a coalition government – which can be regarded as either a positive or negative feature of the system.

44. This is not necessarily the case. The outcome of an STV election depends critically on the size of constituency and the number of Members representing each. An STV election with two or three Members per constituency could produce an outcome which favoured the larger parties more than the present AMS system. It is generally accepted that proportionality is hard to achieve with less than four-member or five-member seats.<sup>20</sup>
45. The larger the number of seats in an STV constituency, the more proportional the result will be across Wales. However, the aim of proportionality has to be balanced against the need for truly local representation. For instance, a single national constituency comprising the whole of Wales would produce an almost perfectly proportional result. However, it would be difficult to reconcile with the fundamental principles of local representation and accountability.
46. Thus we recognise it will be better to create smaller units in the knowledge that it involves some loss of proportionality. Some will regard that as having a second advantage – to make single party majority government more likely. Broadly speaking, the smallest unit size favours the larger parties. It means that votes for the smaller parties will be redistributed in every constituency to the largest, adding to the seats of those larger parties in the same way that first past the post eliminates all except the single winner.

### Creating STV constituencies

47. The balance between the two objectives: of creating electoral units which reflect recognised communities, and of proportionality, would, currently, be a matter for the Boundary Commission for Wales (BCW). However, the parliamentary responsibilities of the BCW are to transfer to the Electoral Commission following the current review of parliamentary constituencies and Assembly Electoral Regions. Constituencies of between four and six Members (and exceptionally of three Members in some areas) could be constructed to share boundaries with Westminster (by linking two or three constituencies). These numbers could be adjusted easily to reflect any change in the number of Westminster constituencies. Constituencies of between four and six Members (and exceptionally of three Members in some areas) could also be constructed to share boundaries with local authorities.

### The case for STV over AMS

48. Thus, on proportionality grounds alone, the choice between AMS and STV is not clear-cut. In our view, the most important advantages of STV over AMS are three-fold:
- all Members would have equal status and share the same relationship with constituents;
  - the majority of votes would count and there would be no such thing as a wholly safe seat – giving all the parties an incentive to campaign in every constituency;
  - there are opportunities for greater representation of minority interests.

### The implications of electoral system change for diversity of representation

49. It is widely recognised that the Assembly's electoral system has achieved a more gender-balanced representation than exists at Westminster, in the Scottish Parliament or in any of the national parliaments abroad who report their data to the Inter-Parliamentary Union.<sup>21</sup> However a number of witnesses expressed disappointment at the failure, under the present electoral system, to achieve better representation of ethnic minorities and people with disabilities in Wales and urged the Commission to make recommendations to redress this.

50. The Joint Committee for Ethnic Minorities in Wales told us:

*The Labour Party 'zipped in' five Black and Minority Ethnic candidates to the five list seats available throughout Wales [2003] but in spite of this gallant and praiseworthy effort, the result was still that there was not a single Black/Asian candidate elected to the Assembly.*

*The answer lies in amendment to the Act which would encourage – or perhaps force – registered political parties to include Black/Asian candidates on their lists at a level where they stand a chance of being elected.<sup>22</sup>*

51. We considered this carefully but concluded that the scope for electoral system change to solve this problem is limited. One remedy lies with the

political parties to ensure that the candidates they put forward represent adequately the range of interests across Wales – as has been achieved with the increased representation of women in the Assembly and in the Scottish Parliament.<sup>23</sup>

52. Systems such as AMS and STV, which require the parties to put forward more than one candidate, create an expectation that the parties will offer a balanced slate of candidates and in that sense should improve the diversity of candidates.

53. Under STV, individuals or representatives of organisations can also stand as candidates (for example, representing ethnic minorities or people with disabilities) without having to compete and gain selection within internal political party structures.

### Findings

Our findings on the electoral system are as follows:

- the AMS system has a number of advantages – it has achieved its objective of ensuring that the Assembly represents all the major political parties in Wales;
- inherent in the system is the creation of two types of Assembly Member – this is a problem that will not be solved by adjustments to AMS;
- if the Membership were to remain at sixty, this problem might not be sufficient in itself to justify a change of electoral system;



- however an increase achieved by raising the regional Membership would be likely to exacerbate the problem – we do not think the AMS system could carry the weight of a such an increase;
- replacing AMS with the First Past the Post system would not be defensible – it would reduce the representation of some parties to a level well below their support in Wales;
- this would seriously weaken the capacity for opposition and scrutiny in the Assembly, and would depart from the arrangements for the other devolved administrations in the UK;
- if the number of Assembly Members is to increase we recommend that, on balance, the STV system of election is the best alternative to the present system;
- the size and boundaries of the STV constituencies will be a matter for the Boundary Commission for Wales (see paragraph 47 above) – a range of four to six Members (and exceptionally of three Members in some areas) per constituency should make possible a reasonable balance between local accountability and proportionality;
- STV would maintain the principle of proportionality and would not rule out the possibility of majority government – if the electorate wished it;
- our conclusions on the size of the Assembly are set out in Chapter 14.

## Notes

<sup>1</sup>*Changed Voting, Changed Politics, Lessons of Britain's experience with PR since 1997*, Report of the Independent Commission to Review Britain's Experience of PR Voting Systems (The Constitution Unit, University College, London, March 2004).

<sup>2</sup>'Introduction to the most widely known voting systems', prepared for *Improving Local Democracy in Wales (Report of the Commission on Local Government Electoral Arrangements in Wales)*, July 2002, and quoted in the Richard Commission consultation paper 'Electoral arrangements of the National Assembly for Wales', February 2002.

<sup>3</sup>The five electoral regions are the five European Parliamentary constituencies in Wales provided for by the European Parliamentary Constituencies (Wales) Order 1994.

<sup>4</sup>Welsh Office, *A Voice for Wales*, Cm 3718 (London: The Stationery Office, July 1997).

<sup>5</sup>Kevin Morgan and Geoff Mungham, *Redesigning Democracy: the Making of the Welsh Assembly*, Seren, Bridgend, 2000, 104 -106.

<sup>6</sup>*Ibid.*, 107

<sup>7</sup>Oral evidence of Ron Davies AM, 26 September 2002.

<sup>8</sup>Source: House of Commons Research Paper 03/45, 14 May 2003.

<sup>9</sup>*Changed Voting, Changed Politics, Lessons of Britain's experience with PR since 1997*, 64.

<sup>10</sup>For example, in the constituency contests on 1st May 2003: (i) Votes which ensured victory of the winning candidate : 26.4%; (ii) Votes which contributed to unnecessary majorities : 20.8%; (iii) Votes cast for losing



candidates : 52.8%. Thus 73.6% of votes were 'wasted' in this sense. In the list contests, votes were also wasted in that they were cast for parties which failed to win seats. (Written evidence of the Electoral Reform Society.)

<sup>11</sup>J. Bradbury, O. Gay, R. Hazell, J. Mitchell, *Local Representation in a Devolved Scotland and Wales: Guidance for Constituency and Regional Members, Lessons from the First Term*, (Economic and Social Research Council, 2003).

<sup>12</sup>Written evidence of the Electoral Reform Society.

<sup>13</sup>Oral evidence from the Secretary of State for Wales to the Welsh Affairs Committee, June 2003.

<sup>14</sup>Written evidence from Dr Denis Balsom.

<sup>15</sup>Written evidence from the Electoral Reform Society.

<sup>16</sup>Oral evidence of Ron Davies AM, 26 September 2002.

<sup>17</sup>In 1999, seven constituency AMs gained over 50% of the votes (of which three were Labour and four Plaid Cymru). In 2003, 15 constituency AMs gained over 50% of the votes (of which 11 were Labour, two Plaid Cymru, one Welsh Conservative and one Welsh Liberal Democrats).

<sup>18</sup>Research by Patrick Dunleavy and Helen Margetts, 1998 - quoted in *Changed Voting, Changed Politics, Lessons of Britain's experience with PR since 1997*.

<sup>19</sup>*Improving Local Democracy in Wales* (Report of the Commission on Local Government Electoral Arrangements in Wales, July 2002).

<sup>20</sup>Report of Group of Academics' (Vernon Bogdanor, David Butler, John Curtice, Patrick Dunleavy, David Farrell, Ron Johnston, Iain McLean and Helen Margetts) chaired by David Butler - submitted to the Independent Commission on the Voting System.

<sup>21</sup>House of Commons Research Paper 03/45, 14 May 2003.

<sup>22</sup>Oral evidence from the Joint Committee for Ethnic Minorities in Wales, 25 July 2003.

<sup>23</sup>Meg Russell, Fiona Mackay, Laura McAllister, 'Women's Representation in the Scottish Parliament and National Assembly for Wales: Party Dynamics for Achieving Critical Mass', in *Journal of Legislative Studies*, Vol 8, No. 2, Summer 2002.

# Developing devolution in Wales

Chapters 13 and 14 draw together the issues set out earlier in the report and set out our recommendations on the way ahead for devolution in Wales.

2. In developing our recommendations, our starting point was to define a clear vision of what we believe the Assembly's role and purpose should be. This is the vision we agreed.

## Vision: the role of the Assembly

The Assembly is the democratically elected representative body for the whole of Wales. The Welsh Assembly Government should be able to formulate policies within clearly defined fields, and should have the power to implement all the stages for effective delivery, in partnership with the UK Government and other stakeholders. The Assembly Government should be able to set its own priorities and timetables for action. It should be accountable to the people of Wales through the elected Assembly for its policies and their implementation.

3. This seems to us to reflect the aspirations of the people of Wales for an Assembly that has a real job to do and has the powers to govern Wales in an effective way.
4. This vision is very much in line with the UK Government's principles for constitutional change in the UK, namely:
  - enhancing the **credibility and effectiveness** of public institutions;
  - strengthening **democracy and public engagement** with decision-making;
  - increasing **trust and accountability** in public bodies.<sup>1</sup>
5. As Lord Falconer, Secretary of State for Constitutional Affairs, has said, 'These are not abstract values, but values that have an impact in everyday lives.'<sup>2</sup>
6. In recommending this vision, we recognise that there are a number of practical constraints on its realisation:
  - no tier of government in Europe is autonomous – each must operate within the framework of international commitments, European governance and the powers and responsibilities of related tiers of government;
  - there are resource constraints on what the Assembly can and should aspire to do – it would not be desirable for it to replicate the work of the UK government or of local authorities.
7. This chapter describes the main proposals made in evidence for the future development of devolution in Wales, and considers their implications. In the final chapter, we set out our conclusions and recommendations for the way ahead, to achieve our vision.

### The status quo

8. The first proposal to be considered is that the devolution arrangements for Wales should remain unchanged. Some who gave evidence argued that the current settlement is working well, and that more time is needed for the arrangements to bed in before the case for further change can be properly assessed. The key features of the status quo are summarised in Box 13.1.
9. This route does not imply that the settlement will be static. With no amendment to the Government of Wales Act, and no major change of policy by the UK Government, the devolution settlement is likely to continue to evolve as it has since 1999. On the assumption that the Welsh Assembly and UK Governments continue to be drawn from the same party, the momentum to broaden the Assembly's powers through further transfers (following the precedents described in Chapter 9) is likely to continue. New legislation will continue to confer new powers on the Assembly, within the scope of each Bill; and this process could be made more consistent without amending the Government of Wales Act 1998, for example, by incorporating aspects of the Rawlings Principles into the Devolution Guidance Notes for Whitehall.<sup>3</sup>
10. Following the Welsh Affairs Select Committee report on the primary legislative process, procedural changes could also be introduced to strengthen the scrutiny in Westminster of legislation affecting Wales, subject to the practical constraints identified in the UK Government's response.<sup>4</sup>
11. In addition, some of the structural and procedural barriers identified in evidence, such as the corporate body model and the Assembly's subordinate legislation procedures, would remain unchanged unless the 1998 Act could be amended.

#### Box 13.1: The status quo

- primary legislation for Wales passed at Westminster;
- on average, one Wales-only Bill a year, subject to UK Government agreement;
- distinctive Welsh clauses in England & Wales Bills, by agreement with the UK Government;
- more pre-legislative scrutiny where practicable, allowing the Assembly to be consulted ahead of Parliamentary scrutiny of the final Bill;
- potential for more collaboration between Assembly and Westminster on scrutiny of primary legislation – subject to practical and procedural constraints;
- continuing evolution of the settlement, with further powers possibly being transferred on a case-by-case basis by agreement of the Assembly and the UK Government;
- 60 AMs elected by AMS;
- corporate body structure.

12. The costs associated with the status quo are evaluated in Chapter 11. Administrative cost pressures are likely to arise from further transfer of powers proposals; for example, the staff required to implement the animal health powers are estimated to cost in the order of £1.2 million a year (Chapter 9).
15. There would be no need to amend the Government of Wales Act; the new approach would be achieved, with the consent of Parliament, by agreement between the UK Government and the Welsh Assembly Government. The UK Government would commit itself to framing Bills to bestow upon the Assembly the widest possible legislative competence within devolved areas.

### A new model of executive or framework-legislative powers

13. Another possibility would be for the powers of the Assembly to develop within the existing Government of Wales Act framework, but with much broader secondary legislative powers.<sup>5</sup> The objective would be to enable the Government in the Assembly to deliver its programme, but through specific powers delegated to it by Parliament.
14. There are no formal legal or constitutional rules that define what should be the subject of primary rather than secondary legislation. As the Assembly Counsel General observed, the current settlement depends 'on what Parliament decides, on a measure by measure basis, shall be provided through primary legislation and what through secondary legislation.'<sup>6</sup> Accordingly, the Assembly's powers could be strengthened within the current settlement by including in future primary legislation new framework provisions designed to allow the Assembly to, for example, make through secondary legislation any changes it wished within the field covered by the Act. The aim would be to construct broad delegated powers that reflect the democratic mandate and scrutiny powers of the Assembly.
16. Parliament would also have to agree to adopt a different view of powers delegated to the Assembly (which would be very broad) compared with powers delegated to Ministers in England. By convention, delegated powers are tightly constrained and subject to scrutiny by the House of Lords Delegated Powers and Regulatory Reform Select Committee, which has generally taken the same approach in assessing the appropriateness of delegated powers whether they will be given to UK Ministers or to the Assembly.<sup>7</sup>
17. There are precedents for a more permissive approach to the Assembly's powers: the Education Act 2002; and the NHS Reform and Healthcare Professions Act 2002 and the Health (Wales) Act 2003, which confer on the Assembly powers to amend certain primary legislation.<sup>8</sup> Although the powers granted under these Acts do not give the Assembly the freedom to do anything it chooses within the scope of the Act, the two Health Acts in particular do confer some broad powers on the Assembly to shape NHS delivery in Wales.

18. The key features of this model are summarised in Box 13.2. Because it is an evolution of the current settlement, it does not require any amendment of the 1998 Act and therefore could be implemented relatively speedily. Moreover, the additional flow of legislation could be accommodated broadly within the Assembly's existing committee structure – although there would be capacity implications if the Assembly's powers were considerably extended under this approach. Welsh MPs in Westminster would continue to be responsible for scrutinising primary legislation affecting Wales and ensuring that appropriate powers are conferred on the Assembly.
19. Nevertheless, the growth of the Assembly's powers under this model would continue to depend on the agreements reached with Whitehall and Westminster on the scope of powers to be conferred in each new Bill. In addition, the potential for broad permissive powers would depend on the scope of the primary legislation.
20. The cost would depend on the extent of the new permissive powers and how they were used. If drawn in such a way as to enable the Assembly Government to do considerably more than under the status quo, there could be capacity implications for both the Welsh Assembly Government and the Presiding Office. There would be a need for greater scrutiny of Assembly subordinate legislation in Cardiff, which would have implications for the Presiding Office. However, the continued role of Westminster in relation to primary legislation would

mean that the Assembly could probably cope with the extended powers without increasing its membership or changing its electoral system.

### Box 13.2: New model of framework-legislative devolution

- no amendment to Government of Wales Act;
- size and electoral arrangements of Assembly unchanged;
- building on precedents set in health and education legislation, delegated powers conferred on the Assembly expressed in broad terms, giving it much greater scope to make changes within the fields concerned;
- much broader delegated powers would require greater scrutiny by Assembly Committees;
- capacity implications if the Assembly enabled to do much more than now;
- momentum for further transfers of powers would be likely to continue as under the status quo;
- framework powers would provide deeper experience of acting through secondary legislation.

## Scotland

21. To go further than would be possible under a delegated powers model, a new Wales Act would be needed to confer on the Assembly the power to pass primary legislation in devolved fields. The model of primary powers for Wales that was most often proposed in evidence was the Scotland Act 1998; but features of the Northern Ireland model were also suggested to us.

22. The White Paper *Scotland's Parliament* recommended the proposed arrangements on grounds of stability and clarity:

*The Government have given careful thought to the best way of building stability into the settlement. The Scotland Act 1978 provided for the transfer of specified areas of legislative and executive competence... It would have required frequent updating and might have given rise to regular legal arguments about whether particular matters were or were not devolved. This approach now seems incompatible with the Government's objective of ensuring maximum clarity and stability. Consequently the legislation establishing the Scottish Parliament will follow the approach of the Northern Ireland Constitution Act 1973 in listing matters reserved to the UK Parliament rather than specifying devolved matters.<sup>9</sup>*

23. The main features of the Scottish structure are summarised in Box 13.3 below.

24. A feature of the Scottish model, which has been used much more extensively than expected, is the provision that allows for legislation for Scotland in devolved fields to be passed both in Edinburgh and at Westminster. A convention, proposed by Lord Sewel during the passage of the Scotland Bill, has been established that Westminster will only legislate in these circumstances with the agreement of the Scottish Parliament.<sup>10</sup> A similar mechanism exists in relation to Northern Ireland, but has been used on only a few occasions to date.<sup>11</sup>

25. Following this convention, Westminster has legislated for Scotland in areas such as the proceeds of crime, food safety, adoption and consumer protection. Its use testifies to the strong pressures for common legislation across the UK.<sup>12</sup>

26. A second feature of the Scottish model is the distinction between legislative and executive powers. In some areas, the executive powers of Scottish Ministers are more broadly drawn than the legislative powers of the Scottish Parliament. For example, under the Scotland Act 1998, railways are a reserved matter; but, since the Act was passed, the Scottish Executive has been granted certain powers in relation to the rail network.<sup>13</sup>

Box 13.3: Legislative devolution in Scotland

- two categories of legislative responsibility: reserved (to Westminster) or devolved matters (Holyrood can legislate);
- separate Parliament and Executive;
- Westminster can legislate for Scotland on devolved matters – by convention, it legislates only with the consent of the Scottish Parliament;
- reserved matters are specified in Schedule 5 of the Act – everything else is devolved;
- reserved matters include: the Constitution, defence, fiscal and monetary policy, immigration and nationality, competition, monopolies and mergers, employment legislation, most energy matters, railway services (excluding grants), social security, elections (except local elections), most company and commercial law, broadcasting and equal opportunities;
- devolved matters include: health, education and training, local government, social work, housing, environment, planning, economic development, transport, agriculture, fisheries and forestry, most civil and criminal law and the criminal justice system, police and prisons, sport and the arts;
- the list of reserved matters may be amended by Order in Council (without new primary legislation);
- Bills passed by Scottish Parliament are scrutinised for vires by the Advocate General for Scotland before being passed to Her Majesty for Royal Assent;
- the UK Parliament can confer delegated executive powers on Scottish Ministers in non-devolved areas (e.g., railways and energy);
- power to vary the basic rate of income tax in Scotland up to 3p in the pound in either direction;
- 129 Members of the Scottish Parliament (MSPs) elected by AMS.



### Northern Ireland

27. The main features of the model of devolved primary powers that operates in Northern Ireland are set out below in Box 13.4. The structure of devolution in Northern Ireland is different from that of Scotland in having three categories of function: excepted, reserved and transferred. Reserved matters are an intermediate category where the Northern Ireland Assembly can legislate, subject to the approval of the UK Government and UK Parliamentary control.<sup>14</sup>

28. This structure was designed to address the particular political circumstances of Northern Ireland. It allows the Assembly to legislate on reserved matters such as police and criminal justice, although the need to do so has been relatively infrequent<sup>15</sup> (the Assembly has not attempted to pass an entire Bill dealing with reserved matters).<sup>16</sup> It also provides a means of identifying functions that could be moved into the category of devolved matters over time without the need for primary legislation, by agreement through the Order in Council procedure.

#### Box 13.4: Legislative devolution in Northern Ireland

- three categories of legislative responsibility: excepted (only Westminster can legislate, in most circumstances);<sup>17</sup> reserved (the Assembly can legislate with the agreement of the UK Government); and transferred matters (Assembly can legislate);
- excepted matters include: Crown and UK Parliament, elections including local elections, international relations, defence, national security, immigration and nationality, taxes under UK laws, national insurance;
- reserved matters include: criminal law, public order, police, civil defence, competitions, monopolies and mergers, some consumer protection matters;
- transferred matters include: health, education and training, local government, social work, housing, environment, planning, economic development, transport, agriculture, fisheries and forestry, sport and the arts;
- the functions in the excepted category are ring-fenced, but the functions in the reserved and transferred category can be moved between categories by consent, by Order in Council;
- the Secretary of State for Northern Ireland is responsible for submitting Bills for Royal Assent;
- the Northern Ireland Assembly cannot vary its income by adjusting UK taxes;
- 108 Members elected by STV.

29. Scotland and Northern Ireland offer different models in respect of tax-varying powers. The Scottish Parliament has a specific power to alter its revenue by varying UK income tax rates, whereas the Northern Ireland Assembly is prohibited from operating in the field of UK taxation. To date, the executive in Scotland has not used its tax-varying powers and is committed not to use them for the term of the current Parliament.

### A legislative Assembly for Wales

30. In the light of these models, the most appropriate structure for a legislative Assembly for Wales would be as set out in Box 13.5.
31. We considered whether this model should draw on the Northern Ireland structure by including an intermediate category of matters on which the Assembly could legislate only with the agreement of the UK Government, but which could be devolved to the Assembly at a later date.
32. This approach could be taken in one of two ways. First, it could be used as a means of initially limiting the matters on which the Assembly could pass primary legislation. For instance, areas of social policy such as health and education could be fully devolved, but other areas in which the Assembly currently has executive powers, such as economic development or transport, could be included in the intermediate category for possible later transfer to the Assembly.
33. Alternatively, the approach could be used to broaden the powers of primary legislation beyond the policy areas in which executive powers are currently devolved. The latter would be included in the devolved category, and the intermediate category would include new areas, such as policing, which are currently not devolved.
34. Either way, adopting the Northern Ireland model would require drawing a distinction between two categories of devolved fields: one in which the Assembly could legislate without reference to Westminster (apart from the requirement for mutual consultation to which all the devolved administrations are committed under the devolution concordats); and another in which the Assembly could legislate only with the Secretary of State's agreement. This approach would risk creating greater complexity and uncertainty in the settlement and is not therefore incorporated into our model.
35. Instead, the model described in Box 13.5 has two categories of primary legislative responsibility and provides that all matters are devolved to the Assembly unless specifically reserved. It assumes that the devolved fields broadly mirror those set out in Schedule 2 of the Government of Wales Act, and therefore do not include all the areas that are devolved to the Scottish Parliament. However, as is the case for both Northern Ireland and Scotland, there would be scope to amend the range of matters devolved to the Assembly, without further primary legislation, by Order in Council.

36. Were legislative powers to be granted to the Assembly on the model below, it seems likely that the governing principle would be that distinctive Welsh legislation that enacted the policies of the Welsh Assembly Government would be passed in Cardiff. For example, the Assembly might have passed measures such as the Children's Commissioner for Wales Act 2001; the Wales provisions of the Learning and Skills Act 2000; the Health (Wales) Act 2003 and related reforms in the NHS Reform and Healthcare Professions Act 2002; and legislation to create a single Public Services Ombudsman for Wales.
37. Where it was agreed that proposals of the UK Government should be applied to Wales, these would be passed at Westminster. Following the Scotland and Northern Ireland precedents, this would require a motion to be passed in the Assembly signalling its agreement to the proposals. Procedures would also be required to establish whether changes made during the passage of the Bill made it necessary to seek further approval from Cardiff.
38. This would be a matter for negotiation between the Welsh Assembly Government and the UK Government, but such measures might include the England and Wales provisions of the Local Government Act 2003; the compulsory purchase provisions of the Planning and Compulsory Purchase Bill; the England and Wales provisions of the Education Act 2002; the Carers and Disabled Children Act 2000; and the Food Standards Act 1999.
39. The balance between Wales-only legislation, passed in Cardiff and England and Wales legislation, passed at Westminster, could change over time depending on:
- the political relationship between Cardiff and Westminster;
  - the scale of the legislative programme of the Welsh Assembly Government;
  - the capacity of the Assembly to scrutinise and debate such measures.
40. The model also provides for the executive powers of the Welsh Assembly Government to continue to be broadened within the framework of UK legislation without necessarily broadening the Assembly's legislative powers at the same rate. For example, certain executive powers in relation to the police could be transferred without devolving legislative powers in this field.
41. The cost would depend on the scale and complexity of legislation promoted by the Welsh Assembly Government, the procedures adopted by the legislature for scrutinising it and the number of Assembly Members. Our evaluation of the possible costs is set out in Chapter 11.

Box 13.5: A legislative Assembly for Wales

- Wales Bill needed to amend Government of Wales Act and confer primary law-making powers on the Assembly;
- Bill specifies reserved matters (Westminster legislates); everything is devolved to the Assembly unless specifically reserved;
- reserved matters could include: the Constitution, defence, fiscal and monetary policy, immigration and nationality, competition, monopolies and mergers, employment legislation, most energy matters, railway services (excluding grants), social security, elections arrangements (except local elections), most company and commercial law, broadcasting, equal opportunities, police and criminal justice;
- devolved matters: the fields set out in Schedule 2 of Government of Wales Act i.e. health, education and training, social services, housing, local government, planning, culture, sport and recreation, the Welsh language, ancient monuments and historic buildings, economic development, industry, tourism, transport, highways, agriculture, fisheries, food, forestry, environment, water and flood defence;
- corporate body structure replaced with executive and legislature;
- Assembly can construct its own rules of procedure and Standing Orders, adopted by a majority of two thirds;
- executive powers in a particular field can be devolved even if the Assembly has no corresponding primary legislative powers;
- Cardiff legislative programme might contain around four to six government Bills a year;
- change in Membership and electoral system;
- option of tax-varying power.

42. Our recommendations on the way ahead are set out in the next chapter.

## Notes

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<sup>1</sup>The Rt Hon the Lord Falconer of Thoroton, *Constitutional Reform Speech*, University College London, 8 December 2003, <http://www.dca.gov.uk/speeches/2003/lc081203.htm>. (accessed 4 February 2004).

<sup>2</sup>Ibid.

<sup>3</sup>See Chapter 7, Box 7.1.

<sup>4</sup>See Chapter 8, paragraphs 29-33.

<sup>5</sup>See oral evidence of Professor David Miers and David Lambert, 28 February 2003.

<sup>6</sup>Written evidence of the Counsel General, December 2002.

<sup>7</sup>See Chapter 7, paragraph 50.

<sup>8</sup>See Chapter 7, paragraph 48.

<sup>9</sup>Scottish Office, *Scotland's Parliament*, Cm 3658 (London: The Stationery Office, July 1997), paragraph 4.3.

<sup>10</sup>See Chapter 8 for further discussion of the Sewel Convention.

<sup>11</sup>This procedure is discussed in the oral evidence of the Rt Hon the Lord Alderdice, Speaker of the Northern Ireland Assembly, 19 September 2003.

<sup>12</sup>Alan Page and Andrea Batey, *op. cit.*

<sup>13</sup>See Chapter 5.

<sup>14</sup>Northern Ireland Act 1998 c.47, section 15.

<sup>15</sup>Oral evidence of the Speaker of the Northern Ireland Assembly, 19 September 2003.

<sup>16</sup>Ibid.

<sup>17</sup>The Northern Ireland Assembly may legislate on excepted matters if the provision concerned is ancillary to other provisions dealing with reserved or transferred matters, but only with the agreement of the UK Government.



# Conclusions: the way ahead

This chapter sets out our conclusions on the way ahead for devolved government in Wales, based on our evaluation of the present settlement and its evolution since 1999.

## Principles

2. We set out in Chapter 13 the vision and principles which have informed our enquiry. As explained in Chapter 1, we have worked on the assumption that gains in democracy and accountability are valuable in themselves and that more open, participative and responsive governance is likely to produce better policy outcomes.
3. We reached our conclusions by examining the dynamics of the present arrangements, and the principles which have come to be accepted in the relationship between Wales and Westminster.
4. The evidence demonstrates that there is now in place an evolving legislative relationship based increasingly on the expectation that, in principle, the needs and wishes of the Assembly should be met. For example:
  - it is recognised that the Assembly Government is the initiator of policy on devolved matters and a major stakeholder on non-devolved issues as well;
  - it is the Welsh Assembly Government that formulates distinctive legislative proposals for Wales on devolved matters; and proposes them to the UK Government and Parliament for enactment;
  - the Assembly Government is consulted on the content of legislation affecting devolved fields and has opted out of such legislation if it wishes;
  - Assembly Committees, and individual Members, have the opportunity, so far as is practicable, to comment on Bills being considered at Westminster, particularly through pre-legislative scrutiny;
  - there are extensive areas where policy and legislation are conducted on an England and Wales basis, by agreement between the Governments in Cardiff and London, not least where European competence applies.
5. This is the position that has evolved, through practice and precedent, since the establishment of the Assembly. The Assembly has already become the initiator of much legislation for Wales on devolved matters and this is accepted both in Cardiff and at Westminster as the right relationship.



6. Our analysis of the first four years of the devolution settlement has amply demonstrated that it has been anything but static. The Welsh Assembly Government and the National Assembly have been heavily involved in legislation, through the use of their own secondary legislative powers and, with Whitehall and Westminster, in developing primary legislation.
7. It seems to us, therefore, inaccurate to describe the present situation as one of merely executive devolution. It already has some of the features and practical infrastructure of legislative devolution. For example:
  - Wales-only Bills are devised in Cardiff and officials of the Welsh Assembly Government, by agreement with the Wales Office and the lead department, draft policy instructions for the Parliamentary draftsmen;
  - the same is true of substantial Wales-only clauses in England and Wales Bills;
  - those Bills that are subject to pre-legislative scrutiny are scrutinised in both Cardiff and Westminster.
8. New legislation has already conferred upon the Assembly considerable permissive powers in the key policy areas of health, education and the environment, including powers to amend by order UK primary legislation. These are important precedents which could be expanded to cover progressively all devolved services.
9. The Assembly has used its powers of secondary legislation to reflect its own policy choices and priorities. Some of the most popular decisions of the past four years, nationwide free bus passes for the elderly and disabled, and free prescriptions, have been introduced by statutory instrument and not primary legislation.
10. It is this growing and maturing experience which, in our view, should determine the development and the pace of the Assembly's legislative activity and future powers. The case for change does not rest on the limitations of the existing settlement – but also on the legislative and regulatory experience gained in these first four years.
11. One of the most encouraging developments over this period has been the growing consensus in favour of devolution not only within Wales but also at Westminster. We hope that our proposals can build on that consensus, and thus provide the best foundation for a stable and sustainable settlement.
12. We have been impressed by the breadth and depth of the Assembly's consultation processes, linked to a growing civic Wales. The Assembly has drawn on expertise across Welsh society and beyond in formulating policy. A large number of witnesses testified to the openness and accessibility of the process. The civil service has responded positively to the new agenda.
13. By contrast, we also found an extensive lack of understanding of the settlement and the role of the Assembly and the Assembly Government, which cannot be wholly

attributed to its complexity. We have been struck by the contrast between the enthusiasm of those actively in contact with the Assembly, and a seemingly wider public indifference expressed by the particularly low turnout at the two elections.

14. We believe that the way forward should address this by making the processes of devolved government more accountable and clearer to the wider public, and by giving the Welsh Assembly Government the tools to implement directly its policies and translate its priorities and timetable into legislative form.
15. Devolution post-1999 has been driven by a new democratic dynamic, with a far-reaching impact beyond the agencies of government. The pressure of elected politicians, needing to respond to the most immediate problems, will, we suspect, ensure that devolution will not proceed at the gradual pace experienced in the 20th century.<sup>1</sup> That is already evident after the first four years. Pressures to accelerate the process will, we expect, continue to grow.

### The way ahead

16. We set out in Chapter 13 the possible ways in which devolution could develop in future.
17. We do not think the status quo is a sustainable basis for future development. Although there has been significant evolution in the Assembly's powers since 1999, it has been an ad hoc, piecemeal development, on a case by case

basis, not founded upon any agreed general policy, or informed by any clear set of devolution principles. The legislative relationship between Cardiff, Whitehall and Westminster has grown significantly, but remains dependent upon particular situations and even individual departmental inclinations.

18. The status quo is also, as many have pointed out, dependent on goodwill between the administrations in Cardiff and Whitehall. Time and precedent may entrench the principle of devolution in such a way as to make it difficult for a government in London to challenge it openly. But the present settlement offers scope for delay or obstruction. Even with goodwill on both sides, there are practical constraints on the achievement of the Assembly's legislative requirements (Chapter 8).
19. To overcome this, we are agreed that the process of devolution to Wales should be taken forward to enhance the legislative competence of the Assembly.

### A legislative Assembly for Wales

20. We set out our model for a legislative Assembly in Chapter 13, Box 13.5. This is a distinctive model for Wales: it combines a continuing programme of England and Wales legislation, reflecting practical needs, with the opportunity for distinctive Wales legislation passed in Cardiff. New procedures would be needed, learning from and adapting the Scottish experience.

21. This will improve the accountability and clarity of the legislative process, with benefits for the people of Wales, the politicians who serve them, and civil society. Policies currently initiated, debated and consulted upon in the Assembly could be enacted there. The Government in the Assembly would be able to carry through its programme, without needing to rely on the willingness, legislative capacity and timetable of the Government at Westminster.
  22. Complexity would not disappear from the settlement: as in other devolved and federal systems, there will continue to be areas where the competence of the UK Government and that of the devolved government overlap (Chapters 5 and 9). But, in cases of doubt, the burden of proof will benefit devolution – matters not specifically reserved to the UK Government would fall within the competence of the Assembly.
  23. A legislative Assembly will require new primary legislation – a Wales Bill. An illustrative timetable for the preparation and consideration of such a measure is set out below. This is a logical and sustainable model for Wales which, with public support, could be achieved by 2011 and we so recommend.
- A new legislative partnership**
24. In the interim, and as a bridge to full legislative competence, we recommend the model of framework legislative powers outlined in Chapter 13. This would involve the progressive transfer of delegated powers in respect of devolved services, allowing the maximum scope for the Assembly to exercise its secondary legislative powers to implement its policies without further recourse to Westminster.
  25. This would require Whitehall and Westminster to accept the logic of devolution in framing legislation: that the process of delegating executive powers under primary legislation should take account of both the Assembly's status as an elected body and of its procedures for the scrutiny of secondary legislation. It would also allow the Assembly to continue to develop its expertise in formulating policy in broad fields and in drafting secondary legislation.
  26. Such an approach could be implemented quickly and easily – it would not require an amendment of the Government of Wales Act. If the permissive powers were considerably broader than now, the scrutiny capacity of the Assembly, and the policy capacity of the executive, would need to increase, but this could be managed without increasing the overall Membership.
  27. The UK Government has recently acknowledged the need to revise the existing devolution guidance. We believe such a revision should embrace the principle of framework legislation of the kind we envisage. The new legislative partnership could take the form of a memorandum of understanding which could emphasise the commitment to such a partnership.

28. Provided Westminster could accept such a potentially far-reaching change to the way it frames primary legislation, this approach would enable the Assembly to continue to develop its capacity and would provide for a smooth transition to a legislative Assembly.

### Legislation for Wales at Westminster

29. If our proposed new Wales Bill is enacted, Wales will, for practical reasons or where policy objectives converge, continue to require Westminster legislation in respect of devolved matters. That has been the surprising experience of the Scottish Parliament in its first four years (Chapters 4 and 8).

30. Such legislation is likely to be even more extensive in respect of Wales than it has been for Scotland. This would reflect cross-border issues as well as Wales's closer historic and institutional relationship with England – 'the uniquely powerful geo-political concept of England and Wales'<sup>2</sup> which is likely to continue to call for a common approach in many areas. The Sewel mechanism used in respect of Scotland is a practical means of achieving this – Wales should build on this approach (Chapter 8).

31. There would therefore continue to be a substantial programme of legislation at Westminster affecting Wales, and devolved services, each year. The role of Welsh Members of Parliament, and of the Secretary of State for Wales, as a link between the Assembly and Westminster would continue to be essential, for a number of reasons:

- to ensure that the implications of Westminster legislation for devolved matters are scrutinised effectively;
  - to act as a link in securing the approval of the Assembly for proposals affecting devolved areas in England and Wales legislation;
  - to monitor the implications for Wales of legislation in fields where primary powers are not devolved, or legislation which creates new executive bodies for England and Wales, where the interests of the Assembly need to be considered.
32. This would, of course, be in addition to MPs' continuing constituency role in respect of Westminster legislation in non-devolved areas.

### The implications of a legislative Assembly

33. If the principle of the devolution of primary powers is accepted, a number of consequential changes follow which are discussed in more detail below:
- the structure of the Assembly should be changed from a single unitary body to a separate executive and legislature;
  - the capacity of the Assembly should be increased, by a combination of reviewing its working methods and increasing its Membership from 60 to 80 – with implications for the method of election;
  - the capacity of the Presiding Office will need to increase to cope with the additional Members and additional scrutiny work;

- the executive will need the capacity to manage the legislative process and its policy capacity will need to continue to develop, but a step change will not be needed.

### Tax-varying powers

34. We have also given consideration to the question of conferring tax-varying powers, if there were a transfer of primary legislative powers.
35. There is a strong case in principle for primary legislative powers to carry with them revenue-varying powers. In practice, however, we regard powers of taxation as desirable, but not essential to the exercise of primary powers.

### The implications for the structure of the Assembly

36. We do not believe that the corporate body structure of the Assembly could sustain an increase in its powers. Early in its life, the Assembly chose to create a clear distinction between the executive, the Welsh Assembly Government, and the Assembly as a forum for scrutiny, debate and holding the executive to account. On grounds of accountability and clarity, there is a strong case for changing the Assembly's legal structure with the powers it currently has. With enhanced powers the case is indisputable.
37. Accordingly, we recommend that the Assembly should be replaced by two separate bodies – an executive and a legislature. With this separation, and the stronger scrutiny focus required by

primary legislation, we recommend that, on balance, Ministers should no longer automatically be members of Subject Committees. The over-riding imperative is for clarity of responsibility for scrutiny and challenge, and for the independence of committees from the Government.

### The implications for the membership of the Assembly

38. If the powers of the Assembly are increased, scrutiny will have to be given much greater priority in the work of the Assembly, particularly of committees. This would be an onerous responsibility since there would be no revising chamber and no reference back to Westminster.
39. The impact on the committees' workload would vary, according to the scale of the legislative programme and the subject matter: for example, education and health and social services would face a greater burden than economic development or culture. Committees would have less freedom to determine their own work priorities and the culture would need to be one of greater challenge and scrutiny.
40. It would be for the Assembly itself to determine how to cope with this additional work. With greater flexibility on working arrangements, and rigorous priority setting, capacity could be enhanced with the present Membership (Chapter 4) but this would not be sufficient to cope with primary legislation. The aim should be for Members to sit on one Subject

Committee each – in order to develop subject expertise and facilitate weekly meetings (or more, where business necessitates this).

41. This means that primary powers would require an increase in the size of the elected Assembly. This should be kept to the minimum required by the additional work. We believe that an increase of one third, from 60 to 80, combined with increased flexibility on working arrangements, would be necessitated by the additional scrutiny workload.

### The implications of increased membership for the Assembly's electoral arrangements

42. The implications for the Assembly's electoral arrangements of an increase to 80 Members are considered in Chapter 12. We considered first whether the change could be achieved without changing the present Additional Member System (AMS) of election – by doubling the regional list Membership from 20 to 40.
43. We saw considerable difficulties with this option. The AMS system creates two different types of Assembly Member, representing different but overlapping constituencies. There are no options for reforming the AMS system which overcome this problem and the tensions it creates between the two types of Member. Accordingly we do not believe that the AMS system could carry the weight of doubling the regional list Membership.

44. If the AMS system is not to continue, there are two realistic alternatives – First Past the Post or the Single Transferable Vote (STV). We do not think First Past the Post is an acceptable option, bearing in mind that proportionality was an intrinsic element of the *A Voice for Wales* proposals.
45. If voters voted as they did in 2003, First Past the Post would give around three quarters of the seats to the largest party, even though it secured no more than forty per cent of the vote. This would undermine both the fairness of representation and the prospect of effective scrutiny in the Assembly.
46. There are, therefore, strong arguments, of both principle and practice, for continuing with a degree of proportionality in the system of election to the Assembly. On this basis, First Past the Post is ruled out, as are the Alternative Vote and Supplementary Vote systems.
47. If AMS is to be replaced, the best option for electing an 80 Member Assembly is the STV system. This would not necessarily produce a more proportional outcome than AMS – it might not, depending on the size of constituency (Chapter 12). The case for adopting the STV system would be to maintain the principle of proportionality while ensuring that all Members were elected in the same way, and enjoyed the same relationship with the electorate.



### Capacity and cost

48. The cost of the acquisition of primary powers by the Assembly will be determined by the cost of the additional Members, the scale and complexity of the legislative programme proposed by future administrations in Cardiff, and the procedures which the Assembly decides to adopt for the scrutiny of this programme.
49. Although it is impossible to predict with certainty what the cost implications would be, bearing in mind that the Assembly is likely to continue to evolve in the period until primary powers could come into effect, the figures provided to us by the Assembly suggest that the direct costs would be of the order of £10 million a year. This would include the cost of 20 additional AMs, together with additional capacity in the Presiding Office and for the drafting and management of Bills within the executive (Chapter 11).
50. This does not include the cost of responding to scrutiny by more Members or the increase in capacity which might be required for new policies. The pressure for enhanced policy capacity should not be underestimated but this will be a matter for future administrations to determine and defend. The evidence suggests that, during the Assembly's first 4-5 years, the capacity of the Welsh Assembly Government to initiate policy, including legislative measures, has already expanded considerably, in breadth and depth.
51. We see no reason to expect that this expansion must be repeated simply as a consequence of enabling the legislative stage of the policy process to be completed in Cardiff Bay instead of at Westminster. We believe that the assessment of the Permanent Secretary – that the acquisition of primary powers would represent a manageable progression for the civil service in Cardiff – is accurate and realistic.<sup>3</sup>
52. It was recognised from the beginning of administrative devolution that the costs of separate Welsh structures were likely to be significant compared with administering Wales from Whitehall. The costs incurred in establishing and developing the Assembly have been borne by the devolved Budget at a time when the overall public expenditure context has been relatively benign – this may not always be the case.
53. However, these costs need to be set against the benefits perceived by those who have engaged with the Assembly's processes. From this perspective, the costs of devolution represent an investment – in more responsive, accountable and representative governance and a more confident and participative civil society.

### Timescale

54. Whether, and when, to accept our recommendations is, of course, a matter for the Assembly, the UK Government and Parliament, in the light of the views of the people of



Wales. However, we set out below the broad timescale within which the necessary legislation could be enacted, if this was desired, assuming a UK General Election in 2005. All the timing assumptions are, of course, entirely illustrative and represent no more than our estimate of what might be a possible scenario. A referendum, if desired, could be accommodated within this timetable.

55. This seems a realistic timescale for devolving primary legislative powers to Wales. It seems to us unlikely that the new powers, together with the required increase in Members, could be in place before 2011. However, if the bridging approach suggested above is adopted, the Assembly will be in a position to continue to develop its expertise in the formulation and scrutiny of primary legislation and will be well placed for a smooth transition to its new role.

### The representation of Wales at Westminster

56. The question of Welsh representation at Westminster falls outside our terms of reference. However, we recognise that conferring primary powers on the Assembly will have implications for the role of Welsh Members at Westminster, although we envisage that the amount of England and Wales legislation, covering both devolved and non-devolved matters, will continue to be significant. In the case of Scotland, it was accepted that the devolution of primary legislative powers would lead to a reduction of Scottish representation at Westminster. It is likely that a similar expectation will arise if such powers were devolved to the Assembly.

57. The Scottish precedent suggests that such implications could be expected to take effect some time after 2011 – on our illustrative timetable. In the interim, it seems likely that Welsh MPs

#### Illustrative timescale for implementation

2005	Possible UK General Election
2005	Drafting approval for new Wales Bill
2006	Bill published for pre-legislative scrutiny
<i>May 2007</i>	<i>Assembly election</i>
November 2007	Wales Bill introduced
July 2008	Royal Assent
2008-2010	Boundary Review
2011	Election of new body with 80 Members and primary powers

will continue to play a crucial part in facilitating the partnership between Wales and Westminster, which is so vital to present arrangements and, indeed, is likely to continue to be important post-2011.

### The need for a further referendum

58. Although not within our terms of reference, we considered whether the measures we recommend would require a further referendum.
59. It is of crucial importance that the people of Wales are properly consulted about major changes in the way they are governed, and how their representatives are elected, whether through a General Election, a referendum or other means.
60. Referendums raise many difficult issues,<sup>4</sup> including how to define the question, or questions, whether to set a threshold and when the vote should be held.
61. In addition, the proposal to enhance the powers of the National Assembly, building on the continuing development of its powers under the present structure, would have a strong element of evolution. On this view, a meaningful referendum would be complex to devise and might not be justified.
62. Against this, it could be argued that the devolution of primary legislative powers, and the consequential change in Membership and electoral system, constitute a major departure from the original settlement, itself only narrowly endorsed in a referendum. On this view, a further referendum would be required.

63. The judgement is one for the UK Government and Parliament to make in the light of their assessment of the response to our report and the ensuing debate in Wales.

### Summary of recommendations

64. This report was agreed by the Members of the Commission on 31 January 2004.
65. Our recommendations are summarised below. One of us expressed a wish to comment further upon the recommendations, as set out in Annex 8.

#### We recommend:

- that there should be a legislative Assembly for Wales on the model in Chapter 13;
- in the interim, the framework delegated powers approach should be expanded as far as possible with the agreement of the UK Government and Parliament;
- that, if a legislative Assembly is constituted, it is desirable, though not essential, to confer tax-varying powers;
- that to exercise primary powers the Assembly needs an increase in membership to 80 Members;
- that the structure of the Assembly should be reconstituted with a separate legislature and executive;
- that the present voting system cannot sustain an increase to 80 – the best alternative is the STV system;
- these changes should be in place by 2011, or sooner if practicable.

## Notes

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<sup>1</sup>Chapter 2.

<sup>2</sup>Professor Rawlings (Chapter 2).

<sup>3</sup>Written evidence of Sir Jon Shortridge KCB, Permanent Secretary, National Assembly for Wales, December 2003.

<sup>4</sup>See, for example, David Butler and Iain McClean, 'Referendums', in Bridget Taylor and Katarina Thomson (eds) *Scotland and Wales: Nations Again?* (Cardiff, University of Wales, 1999).



# Terms of reference

The Commission's terms of reference, set out below, were approved by the Assembly in plenary on 20 June 2002.

## Background

The Welsh Assembly Government's document *Putting Wales First*<sup>1</sup> contained a commitment to:

*establish an independent Commission into the powers and electoral arrangements of the National Assembly in order to ensure that it is able to operate in the best interests of the people of Wales. This review should investigate inter alia the extension of proportionality in the composition of the Assembly, and of the relevant competencies devolved.*

## Terms of reference

The Commission's detailed terms of reference are as follows.

### Assembly powers

The Commission should consider the sufficiency of the Assembly's current powers, and in particular:

- whether the Assembly's powers are sufficiently clear to allow optimum efficiency in policy-making;
- whether both the breadth (*ie.*, *the range of issues over which it has control*) and the depth (*ie.*, *the capacity to effect change within those issues*) of the Assembly's powers are adequate to permit integrated and consistent policy-making on issues

where there is a clear and separate Welsh agenda;

- whether the mechanisms for UK Government policy-making as regards Wales, and the arrangements for influence by the Assembly on these, are clear and effective, and in particular whether they correct any apparent shortcoming from the previous item;
- whether the division of responsibility between the Assembly and the UK Government places inappropriate constraints on Whitehall policy-making, both on matters over which the Assembly has control and otherwise.

The Commission should consider any possible financial implications arising from the implementation of its proposals.

### Electoral arrangements

The Commission should consider the adequacy of the Assembly's electoral arrangements, and in particular:

- whether the size of the Assembly is adequate to allow it to operate effectively within a normal working week, and without placing undue pressure on Members;
- whether the means of electing the Assembly, including the degree of proportionality, adequately and accurately represents all significant interests in Wales;

- whether any changes which may be recommended to the Assembly's powers make either necessary or desirable changes to the size of the Assembly or the means of electing it.

### Report

The Commission should report on its deliberations, including its recommendations on the above matters, by the end of 2003. It may make interim reports or recommendations if it sees fit.

### Procedural matters

The Commission is to be free from any influence from either the Welsh Assembly Government or the Assembly as a whole. It shall determine its own agenda and priorities within these terms of reference.

The Commission may determine its own working procedures. However, it should:

- invite oral and/or written evidence from any who wish to provide it;

### Notes

- accept such evidence in either English or Welsh;
- meet in public unless those giving evidence request otherwise or unless, in exceptional circumstances, the Commission resolves to meet in private;
- publish periodic accounts of its proceedings and evidence received.

The Commission has no power to compel any person to give evidence or to see any documents other than those available under the Assembly's freedom of information policy or similar equivalent regimes.

### Secretariat

The Commission will be supported by a Secretariat comprising seconded Assembly civil servants.

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<sup>1</sup>Welsh Assembly Government, *Putting Wales First: A Partnership for the People of Wales*, October 2000.

# Programme of evidence sessions

Date	Location	Evidence taken from:
September 2002		
26	Cardiff	The Rt Hon Ron Davies AM Professor Kevin Morgan Institute of Welsh Affairs: John Osmond Professor Keith Patchett
October 2002		
10, 11	Aberystwyth	Academic Seminar on the constitutional settlement, held jointly with the Economic and Social Research Council's Devolution Research Programme. Speakers included: Professor Martin Laffin Dr Richard Wyn Jones Professor Robert Hazell Professor Drew Scott Alasdair McLeod John Adams and Professor Kevin Woods
24, 25	Cardiff	Robert Buckland Jane Davidson AM, Minister for Education and Lifelong Learning, Welsh Assembly Government Professor Robert Hazell, Director, The Constitution Unit, School of Public Policy, UCL Mari James Professor Martin Laffin, University of Durham
November 2002		
7, 8	Cardiff	Andrew Davies AM, Minister for Economic Development, Welsh Assembly Government Jane Hutt AM, Minister for Health and Social Services, Welsh Assembly Government



Date	Location	Evidence taken from:
November 2002		
7, 8	Cardiff	Michael German AM, Minister for Rural Development and Wales Abroad, Welsh Assembly Government
21, 22	Cardiff	Sue Essex AM, Minister for the Environment, Welsh Assembly Government
		Carwyn Jones AM, Minister for Open Government, Welsh Assembly Government
		Jenny Randerson AM, Minister for Culture, Sport and the Welsh Language, Welsh Assembly Government
December 2002		
5, 6	Cardiff	The Lord Elis-Thomas AM, Presiding Officer of the National Assembly for Wales
		Dr John Marek AM, Deputy Presiding Officer of the National Assembly for Wales
		Edwina Hart MBE AM, Minister for Finance, Local Government and Communities, Welsh Assembly Government
		Kirsty Williams AM, Chair, Health and Social Services Committee, National Assembly for Wales
		Richard Edwards AM, Chair, Environment, Planning and Transport Committee, National Assembly for Wales
		Gwenda Thomas AM, Chair, Local Government and Housing Committee, National Assembly for Wales
		Mick Bates AM, Chair, Legislation Committee, National Assembly for Wales

Date	Location	Evidence taken from:
December 2002		
12, 13	Cardiff	The Rt Hon Rhodri Morgan AM, First Minister, National Assembly for Wales
		Rhodri Glyn Thomas AM, Chair, Culture Committee, National Assembly for Wales
		The Rt Hon Dafydd Wigley AM, Chair, Audit Committee, National Assembly for Wales
		Gareth Jones AM, Chair, Education and Lifelong Learning Committee, National Assembly for Wales
		Winston Roddick QC, Counsel General, National Assembly for Wales
		Sir Jon Shortridge KCB, Permanent Secretary of the National Assembly for Wales
January 2003		
16, 17	Swansea	Academic Seminar on electoral arrangements, held jointly with the Economic and Social Research Council's Devolution Research Programme. Speakers included: Roger Scully Barry Winetrobe Professor David Butler Dr Simon King Oonagh Gay James Mitchell Jonathan Bradbury Professor Robert Hazell
30, 31	London	Meeting with Peers
		Meeting with Clerks to the House of Commons
		Round table session with a cross party group of backbenchers

Date	Location	Evidence taken from:
January 2002		
30, 31	London	Meeting with Clerks to the House of Lords Cabinet Office briefing seminar
February 2003		
7	Cardiff	Seminar on legal aspects of the constitutional settlement, convened by the Law Society in Wales. Speakers included: Milwyn Jarman QC Nichola Cooke QC Nicholas Neale Emyr Lewis Phillip Howell-Richardson Terence Grange Mr Justice Roderick Evans Professor Iwan Davies Huw Williams Clive Lewis Professor David Miers
12, 13	Edinburgh	Professor David McCrone, Professor of Sociology and Co-Director, Institute for Governance, University of Edinburgh Professor David Bell, Professor of Economics, University of Stirling Lord James Douglas-Hamilton QC, MSP, Conservative Spokesperson on Justice & Home Affairs, Scottish Parliament Patricia Ferguson MSP, Minister for Parliamentary Business, Scottish Executive Colin Boyd QC, Lord Advocate, Scottish Executive Robert Gordon, Head of Legal & Parliamentary Services, Scottish Executive

Date	Location	Evidence taken from:
February 2003		
12, 13	Edinburgh	Professor Alan Page, Professor of Public Law, University of Dundee
		The Rt Hon Jim Wallace QC MSP, Deputy First Minister, Scottish Executive
		The Rt Hon Sir David Steel KBE MSP, Presiding Officer of the Scottish Parliament
		Murray Tosh MSP, Deputy Presiding Officer of the Scottish Parliament
		Paul Grice, Clerk/Chief Executive of the Scottish Parliament
		Sir Muir Russell KCB, Permanent Secretary of the Scottish Executive
		Bristow Muldoon MSP, Convenor, Local Government & Transport Committee, Scottish Parliament
		Alex Ferguson MSP, Convenor, Environment & Rural Development Committee, Scottish Parliament
		Trish Godman MSP, Convenor, Local Government Committee, Scottish Parliament
		Karen Gillon MSP, Convenor, Education Committee, Scottish Parliament
		John Swinney, MSP, Leader Scottish National Party, Shadow First Minister of the Scottish Parliament
		Fiona Hyslop, MSP, Member of the Parliamentary Bureau, Scottish Parliament

Date	Location	Evidence taken from:
February 2003		
27, 28	Cardiff	<p>Plaid Cymru the Party of Wales: Ieuan Wyn Jones AM, Leader of the Assembly Group and President Cynog Dafis AM, Policy Director Jocelyn Davies AM, Party Spokesperson on Constitutional Affairs Simon Thomas MP, Parliamentary Group Representative Dafydd Trystan, Chief Executive</p> <p>Glyn Davies AM, Chair, Agriculture and Rural Development Committee, National Assembly for Wales</p> <p>Nick Bourne AM, Leader of the Welsh Conservatives in the National Assembly for Wales</p> <p>Professor David Miers, Professor of Law, Cardiff Law School and David Lambert, Cardiff Law School</p> <p>Welsh Liberal Democrats: Michael German AM, Leader of the Welsh Liberal Democrats Robert Joffe, Policy Officer</p>
March 2003		
13, 14	London	<p>The Rt Hon Peter Hain MP, Secretary of State for Wales</p> <p>Electoral Reform Society: Ken Ritchie, Chief Executive</p> <p>Wayne David MP</p> <p>Youth Justice Board: Mark Perfect, Chief Executive Sue Williams</p>

Date	Location	Evidence taken from:
March 2003		
13, 14	London	UNISON: Bill King, Regional Convener Dominic MacAskill, Policy Development & Campaigns Committee
27, 28	Llandudno	Environment Agency Wales: Helen Phillips, Director Nigel Reader, Director of Finance
		Tom Middlehurst AM, Chair, European Affairs Committee, National Assembly for Wales
		Representatives from Wrexham, Conwy and Gwynedd Youth Forums
		CBI Wales: David Rosser, Director Robert Salisbury, Chair
		National Council for Education and Training in Wales: Enid Rowlands, Chair Grenville Jackson, Director of Policy
		Lord Thomas of Gresford, Liberal Democrat Spokesperson for Wales, House of Lords
		Welsh Language Board: Rhodri Williams, Chair John Walter Jones, Chief Executive Rhys Dafis, Language Planning Meirion Prys Jones, Language Planning
April 2003		
10, 11	Haverfordwest	Countryside Council for Wales: John Lloyd Jones, Chair Roger Thomas, Chief Executive
		Christine Gwyther AM, Chair, Economic Development Committee, National Assembly for Wales

Date	Location	Evidence taken from:
April 2003		
10, 11	Haverfordwest	Peter Clarke, Children's Commissioner for Wales
		Cymdeithas yr Iaith Gymraeg: Huw Lewis, Chair Iwan Stanley Dafydd Morgan Lewis
		Arts Council of Wales: Peter Tyndall, Chief Executive
		Mid & West Wales Fire Authority: Douglas Mackay, Chief Fire Officer Gareth Sullivan, Vice Chair Gareth Thomas, Director of Service Support Judith Morris, Corporate Head of Policy
		All Wales Ethnic Minority Organisation: Naz Malik, Director
		Dr Denis Balsom
		National Museums and Galleries of Wales: Paul Loveluck, President Eurwyn William, Acting Director General
May 2003		
8, 9	Royal Welsh Showground, Llanelwedd	National Farmers Union Cymru: Peredur Hughes, President Malcolm Thomas, Director
		Urdd Gobaith Cymru: Jim O'Rourke, Chief Executive
		Wales Young Farmers' Clubs: Meinir Wigley, Chair Louise Owen, Rural Development Officer
		Country Land & Business Association: Julian Salmon, Director



Date	Location	Evidence taken from:
May 2003		
8, 9	Royal Welsh Showground, Llanelwedd	Farmers Union of Wales: Bob Parry, President Barrie Jones Siôn Aron
		Royal Welsh Agricultural Society: Meuric Rees Peter Sturrock
		Meat Promotion Wales: Rees Roberts, Chair Gwyn Howells
		Roy Norris, Chair, Welsh Ambulance Services NHS Trust (appearing in a personal capacity)
		Dr Denis Balsom
		Forestry Commission: Huw Davies, Policy Officer
		RSPB Wales: Dr Tim Stowe Katie-Jo Luxton
		National Trust in Wales: Iwan Huws, Director
		The Association of National Parks Authority: Martin Fitton, Chief Executive
		Lord Livsey of Talgarth CBE
22, 23	Newport	David Melding AM
		CYTŪN: The Reverend Aled Edwards
		Evangelical Alliance: Daniel Boucher

Date	Location	Evidence taken from:
May 2003		
22, 23	Newport	Hindu Community Representative: Naran Patel
		South Wales Jewish Representative Council: Alan Schwartz
		Muslim Council for Wales: Saleem Kidwai
		Disability Wales: Rhian Davies, Chief Executive
		Stonewall Cymru: Derek Walker, Policy Officer
		Wales Women's National Coalition: Angharad Davies, Chair Joyce Watson, Fieldworker Mary Slater, Coalition Manager
		Mr Justice Thomas, Judge, Chancery Court
		Professor Iwan Davies, Head, Department of Law, University of Swansea
		Phillip Howell-Richardson, Partner, Morgan Cole
		Nicholas Cooke QC
		Higher Education Funding Council for Wales: Roger Williams, Chair Steve Martin, Chief Executive
		Equal Opportunities Commission in Wales: Kate Bennett, Director
		Disability Rights Commission Wales: Will Bee, Director
		Professor Vernon Bogdanor CBE FBA, Professor of Government, University of Oxford

Date	Location	Evidence taken from:
June 2003		
12	London	Professor David Butler
		Dr Simon King
		Lord Carlile of Berriew
		Donald Anderson MP
		Ian Lucas MP
		Betty Williams MP
		Gareth Thomas MP
		Llew Smith MP
		Hywel Williams MP
13	Cardiff	National Botanic Garden of Wales: Professor Dianne Edwards, Acting Director Mr Alan Hayward, Chairman of Trustees
		Professor Richard Rawlings, Law Department, London School of Economics
		Wales TUC: Felicity Williams, Assistant General Secretary Graham Smith, General Council Jeff Evans, General Council Jim Hancock
		Wales Transport Research Centre: Professor Stuart Cole
26, 27	Merthyr Tydfil	Wales Council for Voluntary Action: Graham Benfield, Chief Executive Anna Nicholl
		Geraint Talfan Davies
		Police Authorities of Wales (PAW): Councillor Ray Thomas, Chair, PAW & South Wales Police Authority Haydn Lewis, Chair, Dyfed Powys Police Authority

Date	Location	Evidence taken from:
June 2003		
26, 27	Merthyr Tydfil	Police Authorities of Wales (PAW) Viv Waters MBE JP, Chair, Gwent Police Authority Lyn James, Financial Advisor, PAW & Treasurer, South Wales Police Authority Kelvin Dent, Legal Advisor, PAW and Clerk, North Wales Police Authority Daisy Seabourne, Policy Officer, PAW
		The Law Society: Huw Williams, Working Party Member Vicki Chapman, Head of Law Reform Emyr Lewis
		Chamber Wales: Paul Rutter, Chair
		Wales Tourist Board: Nigel Adams, Head of Policy
		Undeb Cenedlaethol Athrawon Cymru: Edwyn Williams, General Secretary Moelwen Gwyndaf, Secretary of Pensions, Pay, Working Conditions
		Sports Council for Wales: Gareth Davies, Chair Huw Jones, Chief Executive
July 2003		
10, 11	Cardiff	Welsh Local Government Association: Sandy Blair, Director Russell Goodway, Spokesperson, Finance & Wales Programme for Improvement Colin Mann, WLGA Plaid Cymru Leader Steve Thomas, Head, Policy Unit Rachel Jowitt, Policy Division

Date	Location	Evidence taken from:		
July 2003				
10, 11	Cardiff	Parliament for Wales Campaign: David Morris, Chair Dr John Cox FRSA Dr Russell Deacon		
		Meeting with members of the Welsh Affairs Committee		
		Brian Hancock, Member of the First Assembly, National Assembly for Wales		
		Welsh Overseas Agencies Group: Stephen Thomas, Welsh Centre for International Affairs John Townley, Oxfam Cymru		
		Delyth Evans, Member of the First Assembly, National Assembly for Wales		
		Jill Evans MEP		
		Eurig Wyn MEP		
		Win Griffiths MP		
		Jon Owen Jones MP		
		Gareth Jones, Member of the First Assembly, National Assembly for Wales		
		Denzil Davies MP		
		25	Cardiff	Kevin Brennan MP
				The Rt Hon Rhodri Morgan AM, First Minister, National Assembly for Wales
Gwenda Thomas AM, Chair, Equality of Opportunity Committee, National Assembly for Wales				
		Llais y Ddraig Girlguiding Cymru: Caryn Parker Claire Rogers		

Date	Location	Evidence taken from:
July 2003		
25	Cardiff	Canllaw Online: Elise Stewart, Director
		Council for Wales Voluntary Youth Services: Veronica Wilson, Chief Executive
		Boys and Girls Clubs of Wales: Dave Evans, Chief Executive
		Wales Youth Agency: Courtney Taylor, Training Manager
		Lord Morgan of Aberdyfi
		Chartered Institute of Housing Cymru: Keith Edwards, Director Tamsin Sterling, Chair Louise Matts, Policy Officer
		Alison Halford, Member of the First Assembly, National Assembly for Wales
		Commission for Racial Equality: Dharmendra Kanani, Acting Director, Countries, Regions and Communities Bailjit Gill, Deputy Director, Countries, Regions and Communities
		Joint Committee for Ethnic Minorities in Wales: Tunji Fahm, Joint Convenor Sabz Ali Khan, Joint Convenor Sabrina Khan
September 2003		
19	Cardiff	The Lord Alderdice, Speaker of the Northern Ireland Assembly
		Trade Union Side, National Assembly for Wales: Howie Oliver, Chair Bev Bambrough, Vice Chair Kevin Davies, Secretariat Laurie Pavelin

# Public meetings

Date	Location
15 January 2003	Swansea
26 March 2003	Llandudno Junction
10 April 2003	Haverfordwest
8 May 2003	Llandrindod Wells
22 May 2003	Newport
26 June 2003	Merthyr Tydfil
10 July 2003	Cardiff
24 July 2003	Llanelwedd
7 August 2003	Meifod





# Index of written evidence

The following individuals and organisations submitted written evidence to the Richard Commission as part of its consultation. Copies of all submissions are published separately, and are also included on the attached CD-ROM, except for those few where the individuals or organisations concerned requested that their evidence be treated as confidential.

## Written Evidence provided in support of Formal Evidence Sessions

John Osmond, Institute of Welsh Affairs & Professor Keith Patchett, Institute of Welsh Affairs

The Rt Hon Ron Davies AM

Jane Davidson AM, Minister for Education and Lifelong Learning, Welsh Assembly Government

Robert Buckland

Professor Martin Laffin, University of Durham

Jane Hutt AM, Minister for Health and Social Services, Welsh Assembly Government

Andrew Davies AM, Minister for Economic Development, Welsh Assembly Government

Michael German OBE AM, Deputy First Minister and Minister for Rural Development and Wales Abroad, Welsh Assembly Government

Jenny Randerson AM, Minister for Culture, Sport and the Welsh Language, Welsh Assembly Government

Alun Pugh AM, Minister for Culture, Welsh Language and Sport, Welsh Assembly Government

Sue Essex AM, Minister for the Environment, Welsh Assembly Government

Carwyn Jones AM, Minister for Open Government, Welsh Assembly Government

The Lord Elis-Thomas AM, Presiding Officer, of the National Assembly for Wales & Dr John Marek AM, Deputy Presiding Officer of the National Assembly for Wales

Edwina Hart MBE AM, Minister for Finance, Local Government and Communities, Welsh Assembly Government

Panel of Subject Committee Chairs, National Assembly for Wales

Kirsty Williams AM, Chair, Health & Social Services Committee, National Assembly for Wales

Richard Edwards AM, Chair, Environment, Planning & Transport Committee, National Assembly for Wales

Gwenda Thomas AM, Chair, Local Government & Housing Committee, National Assembly for Wales

Mick Bates AM, Chair, Legislation Committee, National Assembly for Wales

The Rt Hon Rhodri Morgan AM, First Minister, National Assembly for Wales

The Rt Hon Dafydd Wigley AM, Chair, Audit Committee, National Assembly for Wales (& in a personal capacity)

Gareth Jones AM, Chair, Education & Lifelong Learning Committee, National Assembly for Wales

## annex 4: index of written evidence

Winston Roddick QC, Counsel General,  
National Assembly for Wales

Sir Jon Shortridge KCB, Permanent  
Secretary of the National Assembly for  
Wales

The Rt Hon Sir David Steel KBE MSP,  
Presiding Officer of the Scottish Parliament

Andy Kerr MSP, Minister for Finance and  
Public Services, Scottish Executive  
Scottish Executive

Plaid Cymru The Party of Wales

Glyn Davies AM, Chair, Agriculture & Rural  
Development Committee, National  
Assembly for Wales

Agriculture & Rural Development  
Committee, National Assembly for Wales

Nick Bourne AM, Leader of the Welsh  
Conservatives in the National Assembly for  
Wales

Welsh Conservative Party

Professor David Miers, Professor of Law,  
Cardiff Law School

David Lambert, Cardiff Law School

Welsh Liberal Democrats

The Rt Hon Peter Hain MP, Secretary of  
State for Wales

UK Government

Electoral Reform Society

Wayne David MP

UNISON

Environment Agency Wales

CBI Wales

Enid Rowlands, Chair, National Council for  
Education and Training in Wales

Welsh Language Board

Countryside Council for Wales

Cymdeithas yr Iaith Gymraeg

Arts Council of Wales

Mid & West Wales Fire Authority

All Wales Ethnic Minority Association

Dr Denis Balsom

National Museums & Galleries of Wales

National Farmers Union Cymru

Urdd Gobaith Cymru

Wales Young Farmers Clubs

Country Land & Business Association

Farmers Union of Wales

Meat Promotion Wales

Roy Norris

Association of National Parks Authorities

The National Trust

RSPB Cymru

Lord Livsey of Talgarth CBE

David Melding AM

CYTŪN

Disability Wales

Stonewall Cymru

Wales Women's National Coalition

Higher Education Funding Council for  
Wales

Equal Opportunities Commission

Professor David Butler & Dr Simon King

North Wales Group of Labour MPs

Ian Lucas MP

Llew Smith MP

National Botanic Garden of Wales

Professor Richard Rawlings

Wales TUC

Wales Transport Research Centre  
 Wales Council for Voluntary Action  
 Dyfed Powys Police Authority  
 Police Authorities of Wales  
 North Wales Police Authority  
 The Law Society  
 Chamber Wales  
 Wales Tourist Board  
 Undeb Cenedlaethol Athrawon Cymru  
 Sports Council for Wales  
 Welsh Local Government Association  
 Welsh Local Government Association  
 Labour Group  
 Parliament for Wales Campaign  
 Welsh Overseas Agencies Group  
 Delyth Evans, Member of the First  
 Assembly, National Assembly for Wales  
 Win Griffiths MP  
 Jon Owen Jones MP  
 Denzil Davies MP  
 Kevin Brennan MP  
 Wales Labour Party  
 Council for Wales Voluntary Youth Service  
 Canllaw Online  
 Chartered Institute of Housing Cymru  
 Alison Halford, Member of the First  
 Assembly, National Assembly for Wales  
 Commission for Racial Equality  
 Joint Committee for Ethnic Minorities in  
 Wales  
 The Lord Alderdice, The Speaker, Northern  
 Ireland Assembly

**Written evidence provided in response  
 to the Commission’s public consultation  
 on the Powers and Electoral  
 Arrangements of the National Assembly  
 for Wales**

**Politicians and Political Parties**

Leighton Andrews AM  
 Bargoed & Gilfach Labour Party  
 Carn Ward Labour Party  
 Wales Council of the Co-operative Party  
 Huw Irranca-Davies MP  
 Dr Brian Gibbons AM  
 Wales Green Party  
 John Griffiths AM  
 Mark Isherwood AM  
 Laura Ann Jones AM  
 Llandaf Branch Labour Party  
 Mold & District Labour Party  
 Mumbles Labour Party  
 Newport West Labour Party  
 Pengam Labour Party  
 Penyffordd & Penymynydd Labour Party  
 Plasnewydd Labour Party  
 Gwilym Prys Davies  
 The Rt Hon The Lord Roberts of Conwy  
 Treherbert Branch Labour Party  
 UK Independence Party  
 Usk & District Labour Party  
 The Rt Hon Alan Williams MP

**Local Government**

Bridgend County Borough Council  
Cil-y-Cwm Community Council  
Coedffranc Community Council  
Ferwig Community Council  
Gowerton Community Council  
Graig Community Council  
Gwynedd Council  
Llanfair-ar-y-Bryn Community Council  
Llanuwchllyn Community Council  
Llwchwr Town Council  
Newport City Council  
Pembrokeshire County Council  
Powys County Council  
Ruabon Community Council

**Organisations and Institutions**

Age Concern Cymru  
Anti Poverty Network Cymru  
Audit Commission in Wales  
Auditor General for Wales  
Richard Brunstrom, Chief Constable, North Wales Police  
Campaign for the Protection of Rural Wales – Newport and Valleys Branch  
Care Council for Wales  
Chamber Wales  
Chartered Institute of Environmental Health  
Community Enterprise Wales  
Congregational Federation  
Countryside Alliance Wales  
CPT Wales  
Cymuned

Engineering Employers Federation  
ERA European Regional Affairs – Wales  
Fairbridge De Cymru  
Fforwm  
Help the Aged  
The Incorporated Law Society for Cardiff & District  
Institute of Chartered Accountants in England and Wales  
Mentrau Iaith Cymru  
National Union of Students in Wales  
Newport Crossroads Caring for Carers  
North East Wales NHS Trust  
North Wales Fire Authority  
Police Federation of England and Wales  
Powys Association of Voluntary Organisations  
Presbyterian Church of Wales  
Royal College of Nursing Wales  
Royal Institution of Chartered Surveyors Wales  
Royal Town Planning Institute in Wales  
South & West Wales Fishing Communities Ltd  
Standing Committee for Legal Wales  
University of Bangor  
University of Wales College Newport  
Voluntary Arts Wales  
Welsh Development Agency  
Welsh Food Alliance

**General Public**

LG Ager

A Bevan

M Biggs

M Bird

Jonathan Bishop

D Bowen

Jon Brown

TH Brown

Gareth Butler

Robin Campbell

G Carruthers

J Chambers

M Child

Antony Peter Clark

Dr John Cox FRSA

DP Davies

GV Davies

John Davies

J Davies

L Davies

Nancy Davies

R Davies

M Day

EM Edwards

A Eickhoff

WB Evans

Dean Flowers

A Griffith

BJ Gooch

DT Hardacre

KA Harris

K Hayden

T Hellis

BR Hood

Ken Hopkins

RL Howell

Gerallt Huws

G &amp; S Jackson

CV James

I James

Ken James

Leighton Jenkins

D Elwyn Jones

A Lloyd Jones

Clive M Jones

Silvan Jones

G Kensler

R Kitaruth

Tom Lamrick

A Lockhead

Luke Magee

J McDougall

Patrick McGuinness

B Mee

M Moffatt

T Morgan

K Morgan

Ian Murray

Aharon Nathan

Roy Noble OBE

GD Northam

Colin Nosworthy	I Seaton
Richard Noyce	J Sheppard
J Owen	Cllr Chris Simpson
L Owen	Cllr VE Smith & EG Smith
S Owen	VH Stacey
R Page	M Symes
AW Percy	T Tobin
C Percy	Derek Tong
Hilary Pepler	B Tudor
WC Philpin	R Tyler
P Powell	JR Walker
V Power	JPG Walters
Dr RF Purnell	RG Waters
Jeff Rees	E Williams
Ralph Rees	Gareth Williams
Ioan M Richard	JB Williams
Alun John Richards	ME Williams
D Roberts	O Williams
Gwyn Roberts	T Williams
J Roscoe	Y Wood
DC Sage	Gareth Woodham
Tom Saul	FC Wykes
T Scales	

### Commissioned Papers

The following papers were commissioned to assist the Commission in its work. Some have been published separately by the individuals or bodies concerned.

Bradbury, J. *The division of labour between AMs and MPs: multi-level politics and local representation in Wales, 2004.*

Cooke, N. *Criminal justice policy and the operation of the criminal justice system, 2003.*

Davies, I. and Evans, R. *The implications for the court and tribunal system of an increase in powers, 2003.*



- Grange, T. *Criminal justice policy and the operation of the criminal justice system*, 2003.
- Howell-Richardson, P. *The Impact of the last three years on the courts, tribunals and professions*, 2003.
- Jarman, M. *A Barrister's perspective on problems with current legislation and policy making in Westminster and Cardiff*, 2003.
- Jeffery, C and Reilly, A. *Powers and electoral arrangements: international comparisons*, 2003.
- Laffin, M. *An introduction to the issues facing the Commission*, 2002.
- Lewis, C. *The structure of the devolution settlement in Wales*, 2003.
- Lewis, E. *A Solicitor's perspective on problems with current legislation and policy making in Westminster and Cardiff*, 2003.
- Miers, D. *Practical factors to be considered in relation to an increase in legislative powers of the Assembly*, 2003.
- Neale, N. *The contribution of the legal profession to the economic development against the background of extended powers; the potential benefits of working together more easily in a small country*, 2003.
- Rowlands, E. *Whitehall's last stand*, 2003.
- Scully, R. and Wyn Jones, R. *Public opinion, the National Assembly & devolution – briefing note on the latest evidence. Dept of International Politics, Aberystwyth*, 2003. (Updated version of earlier paper, *Public attitudes on the devolution settlement in Wales*, presented to the Commission in October 2002.)
- Williams, H. *A Legal Perspective on issues relating to an increase in the powers of the National Assembly for Wales*, 2003.



# Primary legislation affecting Wales

This annex lists Acts of the UK Parliament affecting Wales that have been made between 1 July 1999 - 31 December 2003 (based on the date of Royal Assent).

England and Wales Acts whose provisions relate only to England, and Consolidated Fund, Finance and Appropriation Acts, have not been listed.

All legislation that confers functions on the Assembly is shaded. The number and

scope of the functions conferred by individual Acts varies considerably. In some cases (such as the Regulation of Investigatory Powers Act 2000), the functions conferred on the Assembly also apply to other public authorities covered by the Act concerned.

## ACT

### 2003

Anti-social Behaviour Act

Arms Control and Disarmament (Inspections) Act

Aviation (Offences) Act

Communications Act

Community Care (Delayed Discharges etc.) Act

Co-operatives and Community Benefit Societies Act

Courts Act

Crime (International Co-operation Act)

Criminal Justice Act

Dealing in Cultural Objects (Offences) Act

Electricity (Miscellaneous Provisions) Act

European Parliament (Representation) Act

Extradition Act

Female Genital Mutilation Act

**ACT**

**2003**

Fire Services Act

Fireworks Act

Health (Wales) Act

Health and Social Care (Community Health and Standards) Act

Household Waste Recycling Act

Human Fertilisation and Embryology (Deceased Fathers) Act

Income Tax (Earnings and Pensions) Act

Industrial Development (Financial Assistance) Act

Legal Deposit Libraries Act

Licensing Act

Local Government Act

Marine Safety Act

National Lottery (Funding of Endowments) Act

National Minimum Wage (Enforcement Notices) Act

Ragwort Control Act

Railways and Transport Safety Act

Sexual Offences Act

Sustainable Energy Act

Waste and Emissions Trading Act

Water Act

**2002**

Adoption and Children Act

Animal Health Act

British Overseas Territories Act

Civil Defence (Grant) Act

Commonhold and Leasehold Reform Act

**ACT**

**2002**

Commonwealth Act

Copyright, etc. and Trade Marks (Offences and Enforcement) Act

Copyright (Visually Impaired Persons) Act

Divorce (Religious Marriages) Act

Education Act

Employee Share Schemes Act

Employment Act

Enterprise Act

European Communities (Amendment) Act

European Parliamentary Elections Act

Export Control Act

Football (Disorder) (Amendment) Act

Homelessness Act

Industrial and Provident Societies Act

International Development Act

Land Registration Act

Mobile Telephones (Re-programming) Act

National Health Service Reform and Health Care Professions Act

National Heritage Act

National Insurance Contributions Act

Nationality, Immigration and Asylum Act

Office of Communications Act

Police Reform Act

Private Hire Vehicles (Carriage of Guide Dogs etc.) Act

Proceeds of Crime Act

Public Trustee (Liability and Fees) Act

**ACT**

**2002**

Sex Discrimination (Election Candidates) Act

State Pension Credit Act

Tax Credits Act

Tobacco Advertising and Promotion Act

Travel Concessions (Eligibility) Act

**2001**

Anti-terrorism, Crime and Security Act

Armed Forces Act

Capital Allowances Act

Children's Commissioner for Wales Act

Criminal Defence Service (Advice and Assistance) Act

Criminal Justice and Police Act

Elections Publications Act

Elections Act

European Communities (Finance) Act

Health and Social Care Act

House of Commons (Removal of Clergy Disqualification) Act

Human Reproductive Cloning Act

International Criminal Court Act

Private Security Industry Act

Rating (Former Agricultural Premises and Rural Shops) Act

Regulatory Reform Act

Social Security Contributions (Share Option) Act

Social Security Fraud Act

Special Educational Needs and Disability Act

Vehicles (Crime) Act

**ACT**

**2000**

Armed Forces Discipline Act

Care Standards Act

Carers and Disabled Children Act

Census Amendment Act

Children (Leaving Care) Act

Child Support, Pensions and Social Security Act

Countryside and Rights of Way Act

Criminal Justice and Court Services Act

Crown Prosecution Inspectorate Act

Disqualifications Act

Electronic Communications Act

Financial Services and Markets Act

Football Disorder Act

Freedom of Information Act

Fur Farming (Prohibition) Act

Government Resource and Accounts Act

Health Service Commissioners (Amendment) Act

Insolvency Act

Learning and Skills Act

Licensing (Young Persons) Act

Limited Liability Partnerships Act

Local Government Act

Nuclear Safeguards Act

Political Parties, Elections and Referendums Act

Postal Services Act

Powers of Criminal Courts (Sentencing) Act



**ACT**

**2000**

Protection of Animals (Amendment) Act

Race Relations (Amendment) Act

Regulation of Investigatory Powers Act

Representation of the People Act

Sea Fishing Grants Act

Sexual Offences (Amendment) Act

Television Licences (Disclosure of Information) Act

Terrorism Act ACT Venue

Transport Act

Trustee Act

Utilities Act

Warm Homes and Energy Conservation Act

**1999 (1 July onwards)**

Protection of Children Act

Trustee Delegation Act

Disability Rights Commission Act

Adoption (Intercountry Aspects) Act

Company and Business Names (Chamber of Commerce, Etc.) Act

Commonwealth Development Corporation Act

Football (Offences and Disorder) Act

Access to Justice Act

Youth Justice and Criminal Evidence Act

Pollution Prevention and Control Act

Criminal Cases Review (Insanity) Act

Employment Relations Act

ACT

**1999 (1 July onwards)**

Local Government Act

Food Standards Act

Welfare Reform and Pensions Act

Contracts (Rights of Third Parties) Act

Immigration and Asylum Act

House of Lords Act



# Acts of the first session of the Scottish Parliament, 1999-2003

Name of Act	Size
<b>2003</b>	
Local Government in Scotland Act	62 sections
Land Reform (Scotland) Act	100 sections 2 schedules
Water Environment and Water Services (Scotland) Act	38 sections 4 schedules
Public Appointments and Public Bodies etc. (Scotland) Act	21 sections 4 schedules
Protection of Children (Scotland) Act	22 sections 2 schedules
Budget (Scotland) Act	11 sections 5 schedules
Criminal Justice (Scotland) Act	89 sections 5 schedules
Building (Scotland) Act	59 sections 6 schedules
Title Conditions (Scotland) Act	129 sections 15 schedules
Homelessness etc (Scotland) Act	14 sections 1 schedule
Agricultural Holdings (Scotland) Act	95 sections 1 schedule
Dog Fouling (Scotland) Act <sup>b</sup>	18 sections
Mental Health (Care and Treatment) (Scotland) Act	333 sections 6 schedules
Council of the Law Society of Scotland Act <sup>b</sup>	3 sections
Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act	71 sections 4 schedules
National Galleries of Scotland Act <sup>c</sup>	3 sections
Commissioner for Children and Young People (Scotland) Act <sup>a</sup>	17 sections 2 schedules

## annex 6: Acts of the first session of the Scottish Parliament, 1999-2003

Name of Act	Size
<b>2002</b>	
Scottish Local Government (Elections) Act	7 sections
School Education (Amendment) (Scotland) Act	3 sections
Water Industry (Scotland) Act	72 sections 7 schedules
Criminal Procedure (Amendment) (Scotland) Act	2 sections
Community Care and Health (Scotland) Act	27 sections 2 schedules
Protection of Wild Mammals (Scotland) Act <sup>b</sup>	12 sections 1 schedule
Budget (Scotland) Act	10 sections 5 schedules
Marriage (Scotland) Act	2 sections
Sexual Offences (Procedure and Evidence) (Scotland) Act	11 sections 1 schedule
Fur Farming (Prohibition) (Scotland) Act	6 sections
Scottish Public Services Ombudsman Act	27 sections 7 schedules
Education (Disability Strategies and Pupils' Educational Records) (Scotland) Act	7 sections
Freedom of Information (Scotland) Act	76 sections 4 schedules
Scottish Qualifications Authority Act	6 sections
University of St. Andrews (Postgraduate Medical Degrees) Act <sup>b</sup>	2 sections
Scottish Parliamentary Standards Commissioner Act <sup>a</sup>	21 sections 1 schedule
Debt Arrangement and Attachment (Scotland) Act	64 sections 3 schedules
<b>2001</b>	
Abolition of Poidings and Warrant Sales Act <sup>b</sup>	4 sections 1 schedule
Transport (Scotland) Act	84 sections 2 schedules
Salmon Conservation (Scotland) Act	3 sections
Budget (Scotland) Act	10 sections 5 schedules
Leasehold Casualties (Scotland) Act <sup>b</sup>	11 sections 2 schedules

Name of Act	Size
<b>2001</b>	
Education (Graduate Endowment and Student Support) (Scotland) Act	5 sections
Convention Rights (Compliance) (Scotland) Act	15 sections 1 schedule
Regulation of Care (Scotland) Act	81 sections 4 schedules
Scottish Local Authorities (Tendering) Act	2 sections
Housing (Scotland) Act	113 sections 10 schedules
Mortgage Rights (Scotland) Act <sup>b</sup>	7 sections 1 schedule
Erskine Bridge Tolls Act	2 sections
International Criminal Court (Scotland) Act	30 sections
Protection from Abuse (Scotland) Act <sup>a</sup>	8 sections
Police and Fire Services (Finance) (Scotland) Act	3 sections
<b>2000</b>	
Public Finance and Accountability (Scotland) Act	30 sections 4 schedules
Budget (Scotland) Act	8 sections 5 schedules
Census (Amendment) (Scotland) Act	2 sections
Adults with Incapacity (Scotland) Act	89 sections 6 schedules
Abolition of Feudal Tenure etc. (Scotland) Act	77 sections 13 schedules
Standards in Scotland's Schools etc. Act	61 sections 3 schedules
Ethical Standards in Public Life etc. (Scotland) Act	37 sections 4 schedules
Education and Training (Scotland) Act	4 sections
Bail, Judicial Appointments etc. (Scotland) Act	13 sections 1 schedule
National Parks (Scotland) Act	37 sections 5 schedules
Regulation of Investigatory Powers (Scotland) Act	32 sections
Sea Fisheries (Shellfish) Amendment (Scotland) Act <sup>b</sup>	2 sections

annex 6: Acts of the first session of  
the Scottish Parliament, 1999-2003

Name of Act	Size
<b>1999</b>	
Mental Health (Public Safety and Appeals) (Scotland) Act	4 sections
<b>Notes</b>	
a. Committee Bill	
b. Member's Bill	
c. Private Bill	



# Acts of the Northern Ireland Assembly, 1999-2002

Name of Act	Size
<b>2002</b>	
Industrial Development Act (Northern Ireland)	8 sections 1 schedule
Game Preservation (Amendment) Act (Northern Ireland)	4 sections 1 schedule
Budget Act (Northern Ireland)	7 sections 4 schedules
Local Government (Best Value) Act (Northern Ireland)	7 sections
Personal Social Services (Preserved Rights) Act (Northern Ireland)	8 sections 1 schedule
Carers and Direct Payments Act (Northern Ireland)	12 sections 1 schedule
Budget (No. 2) Act (Northern Ireland)	6 sections 3 schedules
Railway Safety Act (Northern Ireland)	9 sections 2 schedules
Health and Personal Social Services Act (Northern Ireland)	5 sections 1 schedule
Social Security Act (Northern Ireland)	10 sections 2 schedules
Children (Leaving Care) Act (Northern Ireland)	9 sections
Limited Liability Partnership Acts (Northern Ireland)	16 sections 1 schedule
Open-Ended Invested Companies Act (Northern Ireland)	5 sections
State Pension Credit Act (Northern Ireland)	21 sections 3 schedules
<b>2001</b>	
Dogs (Amendment) Act (Northern Ireland)	6 sections
Planning (Compensation, etc.) Act (Northern Ireland)	7 sections 3 schedules
Health and Personal Social Services Act (Northern Ireland)	61 sections 5 schedules

Name of Act	Size
<b>2001</b>	
Fisheries (Amendment) Act (Northern Ireland)	9 sections
Ground Rents Act (Northern Ireland)	33 sections 3 schedules
Government Resources and Accounts Act (Northern Ireland)	29 sections 2 schedules
Budget Act (Northern Ireland)	5 sections 3 schedules
Street Trading Act (Northern Ireland)	30 sections 3 schedules
Electronic Communications Act (Northern Ireland)	5 sections
Defective Premises (Landlord's Liability) Act (Northern Ireland)	6 sections
Adoption (Intercountry Aspects) Act (Northern Ireland)	16 sections 1 schedule
Family Law Act (Northern Ireland)	5 sections
Product Liability (Amendment) Act (Northern Ireland)	3 sections
Trustee Act (Northern Ireland)	46 sections 4 schedules
Department for Employment and Learning Act (Northern Ireland)	1 section
Budget (No. 2) Act (Northern Ireland)	6 sections 3 schedules
Social Security Fraud Act (Northern Ireland)	18 sections 1 schedule
<b>2000</b>	
Financial Assistance for Political Parties Act (Northern Ireland)	4 sections
Appropriation Act (Northern Ireland)	5 sections 2 schedules
Allowances to Members of the Assembly Act (Northern Ireland)	5 sections 1 schedule
Child Support, Pensions and Social Security Act (Northern Ireland)	69 sections 9 schedules
Weights and Measures (Amendment) Act (Northern Ireland)	5 sections 1 schedule

# Letter to the Chair

William Smith Building  
High Street  
Merthyr Tydfil  
CF47 8AT

27 February 2004

Dear Ivor,

At our concluding meeting on January 30th, I suggested, and Commissioners agreed, that I should put, in a letter to you, the reservations I expressed at the meeting.

I now do so.

I do not believe that the experience and evidence of just four years of the devolution settlement justifies concluding, at this stage, that it should be supplanted by an alternative model, which was not adopted in 1997/1998 by the elected government and Parliament of the day.

However, the experience of operating the settlement over the coming years may justify such a change. If so, I believe our report will make a major contribution to an informed debate. It offers to the political parties and the public a coherent alternative model for a legislative Assembly, which, if supported by the Welsh people in a referendum, could form the basis for further constitutional change.



Ted Rowlands

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