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

Progress of the *Government of Wales Bill 2005-06*

Abstract
The *Government of Wales Bill 2005-06* has completed its passage though the House of Commons and now proceeds to the House of Lords. This paper provides an overview of the key issues that emerged during the Committee Stage, Report Stage and Third Reading.

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Cynulliad Cenedlaethol Cymru
National Assembly for Wales

Progress of the Government of Wales Bill 2005-06

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National Assembly for Wales

Executive Summary

- The *Government of Wales Bill 2005-06* was scrutinised by a Committee of the whole House of Commons on the 23, 24 and 30 January 2006. It received its Report Stage and Third Reading on the 27 and 28 February 2006.

- There was some concern expressed by the Conservative Opposition that there had been insufficient time to properly scrutinise the Bill.

- The paper highlights a number of issues which were raised and debated during the Bill's passage through the House of Commons. These are:

  - Assembly Measures
  - Pre-legislative Scrutiny
  - Requirement for a Referendum
  - Legislative competence
  - Role of the Counsel-General
  - Powers of the Secretary of State
  - Size of the Assembly
  - Taking the Oath in Public
  - Dual Candidacy
  - Political Balance
  - Name of the Government
  - Ministers and Deputy Ministers
  - Power of Well-being
  - Statutory Business Scheme

- The House of Lords Constitution Committee and the House of Lords Delegated Legislation Committee are concerned about "an apparent Government wish to move from the traditional way of legislating to Orders in Council". This is in relation to the *Legislative and Regulatory Reform* Bill which is currently in the Lords and in relation to Part 3 of the *Government of Wales Bill*. The Secretary of State for Wales, the Rt. Hon. Peter Hain MP, gave evidence to the Constitution Committee and argued that the case of Wales was not comparable with delegating powers to a Secretary of State.

- The *Government of Wales Bill* is now in the House of Lords and will receive its Second Reading on 22 March 2006.

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1 Introduction

The Members Research Service has produced papers on the *Government of Wales Bill 2005-06*[1] and a paper on the Second Reading Debate on the Bill in the House of Commons[2]. This paper covers the subsequent stages of the Bill: the Committee Stage which, as the Bill is a constitutional Bill, was considered by a Committee of the Whole House and the Report and Third Reading stages.

The paper highlights key issues which were raised during the passage of the Bill.

2 The Committee Stage

The Bill was considered a committee of the whole House in the House of Commons on 23, 24 and 30 January 2006.

At the end of the Committee stage on 30 January 2006, the Shadow Secretary of State, Cheryl Gillan MP, raised a point of order, drawing attention to the lack of time that had been allotted for consideration of the Bill.

> On a point of order, Sir Michael. You have spent the past six minutes reading out a raft of clauses and amendments that the House has not had the opportunity to consider. I calculate that a full Committee of the House has been unable to scrutinise some 133 clauses. I would like you to advise me, Sir Michael, on whether there is anything that I can do about it, given that my right hon. Friend the Member for Maidenhead (Mrs. May) raised the matter with the Leader of the House last Thursday during business questions and requested extra time for the Committee stage. The Leader of the House failed even to acknowledge her request.[3]

3 The Report and Third Reading

The Conservatives re-iterated their criticisms of the limited time allowed for scrutiny prior to the Report stage during a discussion on the amendment of the Programme Motion for the consideration of the Bill. The Parliamentary Under Secretary for the Wales Office, Nick Ainger MP, stated:

> The programme motion seeks to ensure adequate debate on parts of the Bill that have attracted amendments to be considered on Report. It follows three days in Committee on the Floor of the House, during which the Bill received thorough and particularly of the parts that are genuinely new enhanced primary powers and of proposals for reforming the electoral system.
>
> The House will be aware that 93 of the 165 clauses are based closely on sections of the Government of Wales Act 1998. A further 48 clauses relate to the separation of the legislature from the Executive, a policy that has all-party support. Only 24 clauses are concerned with the new provisions relating to the Assembly's enhanced—and, subject to a referendum, primary—legislative powers. It was thus right and proper for the

[1] MRS, *The Government of Wales Bill 2005-06*, Research Paper 06/001, January 2006.
[2] MRS, *The Government of Wales Bill 2005-06: Second Reading Debate*, Research Paper 06/003, January 2006
[3] HC Debates, 30 January 2005, c.137

House to focus on scrutinising parts of the Bill that are novel and which it has not previously considered, while devoting less time to aspects that have cross-party support, such as the separation of the Executive and the legislature.[4]

4 Issues

4.1 Assembly Measures

During the Committee Stage on the 23 January 2006, the Shadow Attorney-General Dominic Grieve MP, tabled amendments arguing that the proposed system of legislation by Assembly Measure constitutes primary legislation by the back door and that the transference of primary legislation to the Assembly should be subject to a referendum. He also raised concerns about the level of scrutiny undertaken in Westminster:

> [T]he Government intend to take the detailed scrutiny of the legislation away from this House and to give it to the Welsh Assembly. Not only that, but the process that they are proposing to the Committee to get around the problem of not enacting primary legislation entails a diminution of scrutiny and a raising of the power of the Secretary of State—the Executive—to interfere with the legislative process. Throughout the procedure in part 3, it is the Secretary of State who will be exercising a form of tutelage over the way in which the Welsh Assembly carries out its functions. He has the power to block and to interfere and, in many cases, he will be able to exert influence because he can threaten to stop the procedure.

He went on to express concern about the powers of the House of Commons:

> The difficulty that I am describing is that the House will be asked to vote on an Order in Council that cannot be amended but which sets out the parameters of what the Welsh Assembly legislates on. After that, the House has no further role in the process.
>
> The problem arises once the House has voted on the proposal and the Secretary of State has approved it: after its own scrutiny process, the Assembly might produce a Measure substantially different in detail from the draft proposal on which this House votes.[5]

The Secretary of State responded that:

> I stress that nothing will be decided other than as a result of this House's express authority, which will confer on the Assembly the ability to promote Measures in the area designated by the Order in Council. The House and Parliament will remain in charge. [6]

Mr Grieve continued by stating that:

> What is lost in part 3, as it is drafted, is our ability as Members of Parliament to serve the people of this country properly by carrying out our normal scrutiny role. I am prepared to go along with that, but only if we have the opportunity of looking at the end product as well as the proposal.[7]

Mr Grieve also requested an explanation as to what Clause 92(3), which states "The validity of an Assembly Measure is not affected by any invalidity in the proceedings of the Assembly leading to its enactment." would mean in practice.[8]

Nick Ainger MP responded that:

[4] HC Debates, 27 February 2006, c.21.
[5] HC Debates, 23 January 2006, c.1178-9
[6] Ibid.,c.1179
[7] Ibid.,c.1184
[8] Ibid., c.1185

> If his amendment were accepted, legislation that the Assembly had been given the power to develop by primary legislation passed in this House would have to come back to this place for further approval. That is nonsensical. We are trying to give the Assembly enhanced powers, but if his amendment were accepted, the Assembly would have to come back here for approval of such legislation, yet secondary legislation undertaken by the Assembly would not be affected. That, too, is nonsensical.[9]

He went on:

> Parliament will decide case by case the areas in which the Assembly can legislate. If Parliament decides that it does not want to give the Assembly powers to legislate in a clearly defined area, Parliament will not do that. We have to accept that the Order in Council will not change the law: it will be the Assembly Measure that will change the law. [10]

4.2 Pre-legislative Scrutiny

Other points were made regarding pre-legislative scrutiny. For example, Ian Lucas MP highlighted the work of Joint Committees:

> Bearing in mind that the Order in Council procedure does not allow amendments to be made at a late stage, it is extremely important that there be widespread consideration of proposed Assembly Measures by Members of this House. …….I think that a Joint Committee approach has worked extremely well in the past, because it promotes a positive atmosphere of Assembly Members and Members of Parliament working together. I hope that that will develop as the process in the Bill develops.

The Rt. Hon. Paul Murphy MP used the experience of Orders in Council in Northern Ireland to emphasise the importance of pre-legislative scrutiny:

> I think that we achieved a balance when providing for Orders in Council. Another possibility would have been primary legislation every time the Assembly wished to deal with an issue. That would have been entirely impracticable.
>
> It was pointed out that in Northern Ireland, in the absence of a functioning elected Assembly, direct rule must rely on Orders in Council. As everyone knows, Orders in Council are unamendable, and the time taken for consideration is very short. In Northern Ireland the problem has been partly overcome through a decent system of pre-legislative scrutiny, and I think that that is what should happen in this instance.

Nick Ainger recognised the importance of pre-legislative scrutiny in the proposal for Orders in Council but added that:

> I should say immediately that I do not think that it is right that the Government should prescribe in the Bill how such scrutiny must be conducted, but that is what amendment No. 187 suggests. That would not allow parliamentarians the proper discretion to determine the most appropriate arrangements.[11]

He outlined the procedure that the Government envisaged for the scrutiny of such proposals:

> When the Assembly has a proposal, it will discuss it with the UK Government. If broad agreement were reached, the Assembly would produce a proposed draft Order in Council….

[9] Ibid., c.1197
[10] Ibid., c.1199
[11] HC Debates 24 January 2006, c.1329

> The proposed draft Order in Council would be accompanied by an explanatory memorandum… It is worth pointing out that the proposed draft Order in Council could be amended, which would mean that more weight would be given to pre-legislative scrutiny than would be the case if the process of scrutiny did not allow amendments to be made.
>
> The Secretary of State would forward the proposed Order in Council to the appropriate parliamentary body—for example, the Welsh Affairs Committee—in the same way as is the case when draft Bills receive pre-legislative scrutiny. It would be open for any other Select Committee to scrutinise the proposal. When draft Bills receive pre-legislative scrutiny, the Wales Office announces that the public may give their views and, if they wish, contact their Member of Parliament, who may wish to contribute to the process. Pre-legislative scrutiny would thus not be restricted to Members of the House because members of the public could contribute their views.
>
> The practice of joint scrutiny between the Welsh Affairs Committee and Assembly Committees has worked well in the past. Depending on the type of Order in Council, the Welsh Affairs Committee could choose to continue with that arrangement, or decide to examine the proposal separately. That would be a matter for the Committee, but such a process would assist in gathering the widest possible input into the consideration of the proposal.
>
> As part of the pre-legislative scrutiny of draft Bills, reports of the Welsh Affairs Committee have regularly been debated in the Welsh Grand Committee. We would encourage such debates on proposed Orders in Council. If it were felt that such a debate in the Welsh Grand Committee would help the process, we certainly would not put any obstacles in the way of that. I also agree that it is important that all hon. Members have the opportunity to comment on a proposed draft Order in Council, to ask questions about its scope and to propose ways in which amendments could be made.[12]

The Dominic Grieve replied that, "if the House is to have a proper role in deciding whether the Welsh Assembly should legislate, there is no reason why the scrutiny procedure should not be laid down in primary legislation''.

4.3 Requirement for a Referendum

The Conservatives put down amendments that would require a referendum to be held before Part 3 of the Act came into force. Cheryl Gillan MP stated:

> Our amendments are designed to give the people of Wales a voice before that new, complex and—dare I suggest—cunning legislative device comes into force. Let me make it clear that we are not seeking a referendum because we believe that it would fail, or that it would succeed. We are keen to ensure that the Assembly develops in the way that the people of Wales want it to develop. Their wants and needs should be paramount.
>
> ….There is no doubt that if the people of Wales think that they are getting one thing when they are, in fact, getting another, it would be incorrect not to consult them or give them the opportunity to have a say on that specific matter. [13]

Nick Ainger responded that:

> The Bill is extremely transparent and conceals nothing. There will be pre-legislative scrutiny of all the relevant Orders in Council, the Assembly will use its own procedures to give proper scrutiny to Assembly Measures, and this House and the House of Lords will be able to decide whether the powers defined in the Order in Council should be given to the Assembly. That is a much more transparent system than what we have now. Under the present system, the

[12] Ibid , c.1329-30
[13] op.cit. HC, 23 Jan.,c. 1212

> Assembly can make a request for primary legislation, but there is no real discussion about why that legislation gets delayed or is prevented from reaching the statute book. [14]

4.4 Legislative competence

During the Committee Stage the Liberal Democrats and Conservatives tabled amendments regarding the legislative competence of the Assembly, the extension of functions and powers to the Assembly, including policing and energy, and the scope of the fields in Schedule 5.

Nick Ainger responded that:

> It is far clearer for someone who is not versed in the intricacies of our constitution for us to set out in schedule 5 the exact areas on which the Assembly can legislate, rather than to produce a list of the things that it cannot do. A judgement must be made. [15]

He went on:

> As I made clear earlier, this Bill is not about broadening the terms of devolution but deepening it. The two amendments would broaden devolution into areas such as energy, police and the probation and Prison Service, with which the Assembly does not currently have the Executive functions to deal. That goes against the basic premise for the way in which we have established the fields in schedule 5. Those fields, as they are set out, are exclusively those areas in which the Assembly currently has Executive functions. The proposals for which hon. Members have argued—that energy, police and so on should be included—would contradict the premise that the only matters that appear in schedule 5 are those in which the Assembly has an Executive function. [16]

He later stated:

> Under clause 58, further Executive functions may be transferred to Welsh Ministers. If at some point in future the Welsh Assembly Government assume Executive functions in a new field, it will be possible for schedule 5 to be amended to add that. The Bill is not intended to alter the boundaries of the current devolution settlement. It changes the structures and mechanisms, but the appropriate means of transferring new responsibilities in new fields from UK Ministers to the Welsh Assembly Government is either an Act of Parliament or an Order in Council. Under clause 58, that could include a transfer of functions order. In those circumstances, schedule 5 could be updated to enable legislative competence in respect of that field to be conferred on the Assembly. However, it should be for Parliament to agree at the time whether those responsibilities are such that it would be appropriate to enable the Assembly to acquire legislative competence in that field, too.[17]

Nick Ainger went on to explain how the Orders in Council would be used to amend schedule 5.

> If a transfer of functions order transfers Executive power from a UK Minister to a Welsh Assembly Minister, hon. Members may ask why there should not be a requirement to add that field to schedule 5. I do not propose this, but let us bear in mind the earlier debate about energy. If Executive functions were to be transferred from the Department of Trade and Industry to the Assembly Minister responsible for that issue—I imagine that it would be Andrew Davies—the transfer of functions order would clearly set out what was being transferred to the Assembly.[18]

[14] Ibid., c. 1226-7
[15] Ibid., c. 1248-9
[16] Ibid., c. 1254
[17] Ibid., c. 1256
[18] Ibid., c. 1264

4.5 Role of the Counsel-General

During the Committee Stage Hywel Williams MP tabled an amendment under clause 95 of the Bill to:

> enable not just the Counsel-General and the Attorney-General but the Assembly itself to appeal to the Supreme Court on disputes about whether the Assembly has acted within its powers. It seems entirely reasonable for the elected Assembly to have that power, and unreasonable that it should not. The Bill proposes a separation of the Assembly from the Government, which is very welcome, of course. But the two are being treated differently, with the elected body coming off worse. [19]
>
> Given the Assembly's status as the elected body and as something separate from the Executive, and given those potential problems, we think that there is reason for the Assembly to have direct recourse to the Supreme Court.

Mr Grieve added:

> There is some lack of clarity in the Bill's text about whether the Counsel-General is the servant of the Executive and the Ministers or of the Assembly, or of both.[20]

Another Conservative, Rt. Hon.John Gummer MP also called upon the Minister to "convince us that the Counsel-General will not be a creature of the Government but a proper servant of the Assembly." [21]

The Minister responded:

> Clause 95 gives a specific power to the Counsel-General and the Attorney-General to make a reference to the Supreme Court, where they would like a decision on whether a particular matter specified in a proposed Order in Council actually relates to a field listed in part 1 of schedule 5.
>
> We think that this should be a power for the Counsel-General or Attorney-General to exercise, because it is all about legal interpretation…. In most cases, it should be clear whether a matter relates to a specified field or not, so in most cases it will not be necessary to use this power. However, in the less clear-cut cases, the Counsel-General or Attorney-General will need to make a judgement as to whether a decision is required from the Supreme Court so that there is clarity on whether a matter is relevant or not.
>
> On a technical point, the Assembly will be an unincorporated association of 60 members. As such the Assembly itself could not institute proceedings in court, but it is possible that the Assembly Commission could act on its behalf.[22]

He continued:

> I hope that I have been able to reassure him that the amendments are not necessary, that the Counsel-General will be able to ensure that advice is given to the Assembly and that if there is a question as to whether the issue relates to part 1 of schedule 5, he will refer the matter to the Supreme Court.[23]

Mr Grieve questioned "whether it would be possible for the Welsh Assembly to move a motion for someone's salary to be reduced or, indeed, extinguished, which is the way we

[19] op.cit. HC, 24. Jan. 2006, c.1344-5
[20] Ibid., c.1346
[21] Ibid
[22] Ibid.
[23] Ibid.,c.1347

in this House normally go around these things if we wish to register our displeasure with a Minister's conduct." [24]

The Minister replied that:

> The Assembly would have the power to vote for a reduction in salary. As clause 49 makes clear, proceedings are laid out in the Bill that would have to be followed either to appoint or to remove the Counsel-General. [25]

The Conservatives sought clarification on the relationship of the Counsel-General vis á vis the Assembly and the Government. The Rt. Hon. John Gummer MP stated:

> The thing that concerns me is the role of the Counsel-General. If he can be shown to be an independent figure able to take a proper legal view of what the Assembly wants, there may be an argument for saying that the Assembly, separate from the Counsel-General, should not have an application to the Supreme Court. The Minister must convince us that the Counsel-General will not be a creature of the Government but a proper servant of the Assembly. If he can so convince us, it would be perfectly proper to leave the Counsel-General that access, because of his legal position, but the Minister would have to be significantly more convincing than either the explanatory notes or what we have heard so far from him. I hope that he will help me.[26]

The Minister replied:

> On a technical point, the Assembly will be an unincorporated association of 60 members. As such the Assembly itself could not institute proceedings in court, but it is possible that the Assembly Commission could act on its behalf. However, that is just a technical point. On the principle that I think the hon. Member for Caernarfon (Hywel Williams) is proposing, I still believe that it is inappropriate and unnecessary for a legal representative of the Assembly, as a legislature, to have such a role. The Counsel-General would be acting to represent Welsh devolution interests in proceedings involving devolution issues. It would seem odd to have two people able to carry out this role.
>
> The position of Counsel-General means that there is someone with status similar to that of Attorney-General—this touches on the points that the hon. Member for Beaconsfield (Mr. Grieve) and the right hon. Member for Suffolk, Coastal (Mr. Gummer) made—to represent devolution interests in proceedings.[27]

John Gummer, sought further clarification about the Counsel-General's status:

> Would the Counsel-General be required to give advice to the Assembly? In other words, if the Assembly were to say to the Counsel-General, "We think this is a matter you ought to look at," will he be required to give the reasons for his decision not to refer it to the Supreme Court or would he be like the Attorney-General, who never gives the reasons for his advice?

The Minister responded:

> I assume, bearing in mind that the Counsel-General is a member of the Welsh Assembly Government, that when he is approached—we are talking about whether an Order in Council fits in with part 1 of schedule 5—he will be open in giving his opinion as to whether he thought that it did or did not fit in.

[24] Ibid.
[25] Ibid.
[26] Ibid.,c.1346
[27] Ibid., c.1346-7

4.6 Powers of the Secretary of State

Elfyn Llwyd MP proposed amendments to Clause 100, which refers to the powers of the Secretary of State to intervene in certain cases, during the Committee Stage. He stated:

> The reason why the amendments have been tabled is very simple. The first amendment would deal with subsection (1)(a), which says:
> "if a proposed Assembly Measure contains provisions which the Secretary of State has reasonable grounds to believe—
> (a) would have an adverse effect on any matter which is not specified in Part 1 of Schedule 5".
> That is terrifically broad to a point that it is almost nonsense. I hope that in responding the Minister will give us some detail, because in the hands of an unsympathetic Secretary of State it could be a tool to stamp on the Assembly and prevent it from proceeding in its normal democratic way. The notes on clauses are more obtuse than usual, so there is no help there. I press the Minister for as much detail as possible on that paragraph. I am sure that he will do his best to enlighten us in due course.
>
> Amendment No. 126 relates to paragraph (c), which effectively gives the Secretary of State the same veto. It refers to whether a Measure "would have an adverse effect on the operation of the law as it applies in England".
>
> Again, my objection is that that is nebulous. We would like to know more. From all the various reports and the notes on clauses that I have read, I have seen nothing of any great help. The provision is extremely broad and, again, an unsympathetic holder of the office could easily pray in aid such a power to prevent any legislation.[28]

John Gummer MP supported Elfyn Llwyd's view:

> Under the clause, a Secretary of State, by diktat, would be able to say that a Measure that has a passing or glancing effect on some matter of importance—sufficiently important for the Assembly to feel that a Measure is needed—should be stopped because he has "reasonable grounds to believe" that it would have an "adverse effect". It is difficult to imagine that a Secretary of State would not be able to stop anything that he did not like. The condition of having "reasonable grounds" does not help, so vague is the wording used in the following paragraphs.[29]

The Minister, Nick Ainger MP, responded:

> Clause 100 contains powers for the Secretary of State, by order, to prevent a proposed Assembly Measure from being submitted for approval by Her Majesty in Council. These powers are rightly constrained. The Secretary of State would be able to block a proposed measure only in certain prescribed circumstances. Moreover, the Secretary of State must have reasonable grounds to believe that those circumstances exist.[30]

Mr Llwyd pressed the Minister further in relation to clause 100 1 (b) relating to the Secretary of State's powers over water resources:

[28] Ibid.c.1356-7
[29] Ibid., c.1359
[30] Ibid.,c.1361

> May I take the Minister back to clause 100(1)(b), which deals with water resources? What would happen if the National Assembly wanted to pass a measure to outlaw any further drownings of valleys because it believed that water needed to be conserved and that a certain percentage of water was being wasted through leaking pipes every day of the year? Could the Secretary of State say, "No, we are not having that, because we might need compulsorily to acquire land to drown in the future." I believe that Parliament would prevail in those circumstances and that the voice of the Assembly would be drowned.[31]

John Gummer MP, who was Secretary of State for the Environment in the 1980s also questioned the motives behind the clause.

> I agree with the hon. Member for Meirionnydd Nant Conwy. Either we trust the Welsh people or we do not. It is extremely difficult for me to accept that the Welsh people have to be singled out and measures taken to ensure that, where water is concerned, they should not in any way or in any circumstances be able to do anything that might upset the plans of English Ministers.[32]

The Minister replied:

> Let us examine the hypothetical case that the hon. Gentleman has raised, in which the Assembly said that there would be no increase in the amount of water available. As I read clause 100(1)(b), such a proposal would have a serious adverse impact on water resources, water supply or the quality of water in England. The proposal does not specify an increase; it describes the current situation and states that it should not be made any worse. Hon. Members were seeking an example of an Assembly Measure would have such an impact, but I cannot think of one. However, there might be a measure affecting a major forestry issue, for example, that would have an impact on the water resources that are supplied to England. The provision might apply in that kind of area. [33]

4.7 Size of the Assembly

Jenny Willott MP tabled amendments about the future capacity of the Assembly.

> There are two points behind our amendments in the group, both of which are crucial to the future capacity and legitimacy of the Welsh Assembly. The first refers to the fundamental point of how big we want the Assembly to be. The Government seem deeply opposed to increasing the size of the institution. Our primary concern is the quality of the scrutiny to which legislation in the Assembly will be subjected.[34]

She went on:

> Numerous voices, including the Richard Commission, have warned the Government that if extra powers are given to the Assembly, it will need to expand. The vision laid out by the Richard Commission two years ago was an 80-Member Assembly with primary powers. [35]

The Secretary of State responded that the amendment:

> would provide for 80 Assembly Members for Wales, rather than 60 as at present. The main argument for the increase is the extra work load that will accompany the Assembly's additional powers. However, as the hon. Lady and the House know, the Assembly meets in plenary session only two days a week. Indeed, it meets only on two afternoons a week,

[31] Ibid.,c.1362
[32] Ibid.,c.1360
[33] Ibid., c.1362
[34] HC Debates, 30 January 2006, c. 70
[35] Ibid., c. 71

between 2 pm and 5.30 pm on Tuesday and Wednesdays, and for rather fewer weeks in the calendar year than the House. Indeed, the Presiding Officer, Lord Elis-Thomas, has suggested that the Assembly's timetable could easily be based on a much longer working year, rather than the 33 weeks that appear to be current practice. He suggested that the Assembly sit on Monday afternoons and Thursday mornings as well as Tuesdays and Wednesdays. Indeed, he was admirably frank in an interview published on Boxing day in the *Daily Post*:

"I agree with the Secretary of State, we all have to work harder here. There should be three to four days of proper scrutiny . . . we should sit for at least 40 weeks a year . . . we finished for Christmas at least a fortnight before Parliament".

He is therefore making a powerful case for dealing with the problem of the extra work load and the scrutiny responsibilities that will fall on the Assembly after May 2007. That work load will be even greater after primary powers are implemented, if a successful referendum is called in the next decade or thereafter. I agree with Lord Elis-Thomas. The existing 60 Members are perfectly well-placed to perform their functions both effectively and well in the interests of Wales, so there is no need for further elected politicians. [36]

4.8 Taking the Oath in Public

The issue of Assembly Members taking the oath in public was discussed during the committee stage on 27 February. Lembit Öpik MP stated:

> On the point made by the hon. Member for Dumfriesshire, Clydesdale and Tweeddale (David Mundell), it is interesting and valid to suggest that the oath be taken in public. Many of us have benefited from the interest that taking the oath generates at the beginning of a parliamentary term. I cannot see why that would not be allowed. I seek the Minister's guidance on whether there is anything to prevent the oath being taken in public. Perhaps an etiquette could be established. Obviously, it is not for us but for the Assembly to decide whether it is a matter of etiquette, but it would be helpful to hear an assurance from the Minister that there is nothing in law to prevent the Assembly from ensuring that the oath be taken in public.[37]

The Government Whip, Kevin Brennan MP, replied:

> it is possible for the oath to be taken in public by Members of the National Assembly. In fact, if what I read in the newspapers is anything to go by, it will be extremely difficult for anyone not to take the oath in public in the National Assembly since all the walls are made of glass in the new building, but there is no reason why the oath should not be taken in public. In fact, at the Assembly Committee that considered the Bill on 1 February, there was a discussion of the oath and a similar amendment was moved by the Conservative Member David Melding. He agreed to withdraw that on the basis of the Minister's promise that the matter would be considered when the Assembly's Standing Orders were discussed in the near future. Therefore, there is no reason why Assembly Members could not take the oath in public.[38]

[36] Ibid., c. 75
[37] HC Debates, 27 February 2006, c. 61
[38] Ibid., c. 63

4.9 Dual Candidacy

During the Committee Stage the Opposition parties put down a number of amendments on the dual candidacy issue. Many of the arguments that had been put forward during the Second Reading debate were rehearsed.

The issue of dual candidacy was again discussed during the Report stage. Since the Second Reading debate the Arbuthnott Report[39] has been published in Scotland. Commission considered a wide range of issues relating to boundaries and voting systems in Scotland. The Final Report noted the proposals to end dual candidacy in the Welsh White Paper, *Better Governance for Wales* , but observed that:

> There is no survey evidence to suggest that dual candidacy is an issue for voters, or a disincentive to their participation in the political process. Few of our consultation responses raised dual candidacy as an issue, nor was it raised spontaneously in our focus groups.[40]

It concluded that:

> The Commission believes that preventing dual candidacy would be undemocratic and agrees that it would place "*an unnecessary restriction on the democratic rights of potential candidates, parties and local electors to have as unrestricted a choice as possible in an election*."[41]

Sir John Arbuthnott, gave evidence to the Scottish Affairs Committee on the 14 February[42]. The Shadow Secretary of State for Wales, Cheryl Gillan MP referred to earlier comments made by the Secretary of State for Wales, the Rt. Hon. Peter Hain MP in the relation to the Arbuthnott Commission in Scotland, and made reference to Sir John's oral evidence:

> I am sorry that the Secretary of State is not present as he dealt with these matters in Committee. He said that the Arbuthnott commission would have reached the same conclusion that has resulted in the Government's proposal for a change in the legislation if it had considered what he has called the systematic abuses carried out by list members in Wales.
>
> It was the hon. Member for Inverness, Nairn, Badenoch and Strathspey (Danny Alexander) who drew Sir John Arbuthnott on the point. He said
>
> "I should also point out that the Secretary of State for Wales has said that if the Commission had considered what he called the systematic abuses carried out by list members in Wales, he would have reached the same conclusion that we have, namely that a ban on dual candidacy is the only effective solution. Do you agree with his line of thinking? Is the Welsh situation one you have studied in coming to this conclusion?"
>
> Professor Sir John Arbuthnott responded
>
> "Of course we read the material on Wales. The points the Commission took into account on this important issue are as follows: first of all we actually found no evidence that there was a problem for voters in having dual candidacy, nor incidentally, did the Electoral Commission, who have done their own study of this. The idea that a loser is

[39] Arbuthnott Commission on Boundary Differences and Voting Systems , Final Report, January 2006. http://www.arbuthnottcommission.gov.uk/FinalReport.htm
[40] Ibid., para.4.57
[41] Ibid., para.4.60
[42] Select Committee on Scottish Affairs, *Putting Citizens First: The Report from the Commission on Boundary Differences and Voting Systems*, Uncorrected transcript of evidence from Sir John Arbuthnott and Dr Nicola McEwan, 14 February 2006. http://www.publications.parliament.uk/pa/cm200506/cmselect/cmscotaf/uc924-i/uc92402.htm

> then elected by another aspect or another branch of the proportional representation system is actually a hangover from the first-past-the-post thinking: those coming second are only losers, the only losers in a majoritarian system. The logic of PR is that you actually use the best people as voted for by the electorate and under a proportional system that will not only be the first-past-the-post candidate. As you are aware, I am pretty concerned that we do this on behalf of citizens. Banning dual candidacy would, if you think about it, actually restrict voter choice and potentially diminish the quality of constituency contests."
>
> I think that Sir John has put to bed the myth that he would have arrived at a different conclusion on Wales if he had studied the situation. He obviously did study the situation and I think that the Secretary of State was wrong to put words into his mouth.[43]

Another publication that was an issue of contention between the Opposition and Government benches was the Bevan Foundation Report, *Public attitudes to dual candidacy in elections to the National Assembly for Wales*.[44] This had been referred to by Wayne David MP during the Committee Stage on 30 January 2006.[45] It had found that:

> slightly more of the total number of respondents said that dual candidacy was unfair compared with those who felt candidates should be free to stand in both.
>
> This suggests that any proposals about dual candidacy – whether to change or retain the current system - need to be based on sound evidence and be mindful of differing views amongst the public.
>
> We found strong evidence that constituency members are regarded as the legitimate representative of an area and would be approached for help by the great majority of those interviewed.
>
> This suggests that there should be clarification of the roles of the two types of Assembly member.[46]

The Opposition questioned the impartiality of the Report, given that Mr David was its sponsor, and its reliability, given that it was based on a sample of 47 interviewees.[47]

Cheryl Gillan stated:

> Let us consider the Bevan Foundation's research. I shall concentrate on the summary and I hope that the hon. Gentleman [*Wayne David MP*] has a copy because I should like to remind him of its conclusions. It was not based on an enormous sample—indeed, there was
> "a predominance of people aged over 45 and of those who were either retired or not working for other reasons."
> The relative absence of people under 45 and those working full-time means that the results are not statistically representative—they were not intended to be. One wonders why the hon. Gentleman sponsored work that has such a caveat. [48]

Later in the debate Mr David responded:

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[43] op.cit. HC, 27 Feb. 2006, c.37
[44] Bevan Foundation, *Public attitudes to dual candidacy in elections to the National Assembly for Wales*, Occasional Paper No.5, January 2006. http://www.bevan-foundation.org.uk/
[45] HC, 30 January 2006, c.112.
[46] Op.cit, Bevan Foundation, 2006, p.3
[47] op.cit. HC, 27 Jan. 2996, c.50,51
[48] Ibid., c.32

> I am very pleased that the hon. Lady has taken the trouble to read the Bevan Foundation's report. As she knows, I placed a copy in the Library for her to see. As the report states, it is an indicative report that is intended simply to give an indication of the public's attitudes. However, the hon. Lady cannot get away from the fact that its central point is that a majority of the respondents think that the current system is unfair.[49]

Labour members also made the point that that its proposal to end dual candidacy was a manifesto commitment, although Lembit Öpik MP[50] and Elfyn Llwyd MP[51] suggested that the Labour Government had not adhered to its manifesto commitments in respect of other issues such as tuition fees. The former Secretary of State for Wales, the Rt. Hon. Paul Murphy MP stated:

> There is a much more significant point, however, which my hon. Friends have already raised: this was a manifesto commitment. It was clear as day, in black and white. All of us who were Labour candidates in Wales at the last general election fought on a manifesto that said that we would change the position on dual candidacy.
>
> When the Bill goes to the other place, I hope that Members of the House of Lords will reflect on that issue, too. This proposal has not come out of the blue. The reason for the change is that, initially, the Labour party conference agreed by an overwhelming majority that the change had to take place. That was put in a manifesto to the people of Wales. We won on that manifesto. Therefore, it is the duty of Labour Members in this House of Commons to put that forward. When the proposal goes up the Corridor to the House of Lords, I hope that it will realise that, if it rejects it, it will reject a Labour party manifesto commitment that was crystal clear at the last general election.[52]

4.10 Political Balance

The Opposition put down amendments to assure political balance on the Assembly Commission and on Assembly Committees. This prompted a detailed discussion of clause 29 which requires the d'Hondt system to be used for selecting committee membership. Elfyn Llwyd MP stated:

> According to the best evidence that I have been able to garner and the advice that I have taken, even if Labour were narrowly beaten in the National Assembly next summer—as I hope—it would still be in the majority on all the Committees. That cannot be right for a democratic institution and I urge the Minister to look again at the whole matter.[53]

He went on to suggest that this might cause problems for the passage of Bill in the House of Lords:

> I have had private discussions with the Minister about the clause and hope that he will reflect on it, because it has caused outrage across the Assembly and I feel sure that their lordships will take a dim view of it. Much of the Bill is commendable and acceptable and I want it to proceed quickly, but I fear that the clause will be a sticking point in the other place. The Minister said that he had been discussing it with officials over the past three or four weeks. Obviously, I am not privy to discussions between Ministers and civil servants so I do not know how far they have gone. Suffice it to say that if clause 29 is retained, it will be a red rag to a bull in the other place. It will reflect badly on the whole Bill and make its passage far more difficult and—I regret to say—rightly so.[54]

[49] Ibid., c.33
[50] Ibid., c.40
[51] Ibid.
[52] HC Debates, 23 January, 2006, c.39
[53] op.cit., HC, 27 Feb. 2006, c.68
[54] Ibid., c.69

Lembit Öpik MP suggested that:

> The Government are increasingly schizophrenic. They have introduced some incredibly complicated arrangements, such as the d'Hondt system, while saying that they want to keep things simple. Surely, the Minister must accept that, with something as important as the commission, the Government have a responsibility to ensure statutory cross-party representation. Of all things, the commission should be above party politics. [55]

With regard to the Assembly Commission, the Minister answered that:

> If the Assembly wishes to ensure that the members of the Assembly Commission all belong to different political groups, that can be specified in the Standing Orders. There is no reason why a requirement should be included in the Bill to establish that the Assembly must ensure that each political party is represented. As the arrangements in the Scottish Parliament have been cited at length during the debate, it might be of interest to note that the position is the same in Scotland under the Scotland Act 1998—that is, there is no equivalent requirement in that Act to that proposed in the amendment. Such a provision has not been applied in Scotland; nor is there a requirement to make such provision in the Standing Orders.[56]

In reference to Opposition criticism of Clause 29, he stated that "the express purpose of clause 29 is to provide a stable fall-back for calculating the political balance of the Committees." He went on:

> We must recognise that the electoral arrangements discussed earlier today are likely to result in a very close balance between the political groups in the Assembly, as we have seen in the past two Assembly elections. There is nothing partial about the reality that the electoral system will produce very close results. All clause 29 will do is to ensure that, if deadlock were to occur, disagreement about Committee membership should not be allowed to create a stranglehold on the rest of the Bill's provisions. There are important flexibilities in clause 29. In fact, the Assembly will have more flexibility over the number and purpose of Committees as a whole under the Bill than under the 1998 Act.
>
> First, clause 29 will enable parties to reach a consensus. The formula can be overridden by a two-thirds vote in the Assembly. I would expect consensus to be the norm, with agreement reached through the Assembly's equivalent of our usual channels. The d'Hondt arrangements will provide a secure fall-back if agreement cannot be reached. Secondly, clause 29 will ensure that every Assembly Member—whether independent Members or those who belong to smaller parties—is entitled to a place on a Committee, subject to there being enough Committee places to make that possible.[57]

The Minister conceded that "the d'Hondt system does not work for Committees with small numbers. In that case, there are distortions". He noted that the First Minister, the Rt. Hon. Rhodri Morgan AM, had put it on the record that, if the Assembly wanted to set up a Committee of six, he would not force through d'Hondt on any Committee that small.[58] He added that

> If it was felt that a Committee of six was wanted, for whatever purpose, I hope that the usual channels would be able to agree the numbers in the way in which they will in 99 per cent. of cases—hopefully 100 per cent. In most cases, agreement will be reached

[55] Ibid.,c.71
[56] Ibid., c.72
[57] Ibid, c.71-73.
[58] RoP, 14 February 2006, p.3.

> through the usual channels, recognising the political balance. Again, it is up to the Assembly to determine the size of Committees.[59]

The Opposition questioned whether an undertaking from the incumbent First Minister could commit his successors to ensure that the d'Hondt system will not apply if there are six or fewer members on a Committee. Lembit Öpik MP stated:

> In effect, the Minister has given us a promise from his mate that as long as his mate is the First Minister, everything will be all right. That is no way to frame legislation.[60]

4.11 Name of the Government

The Opposition tried to amend the clause relating to the title "Welsh Assembly Government". During the Report stage, Adam Price MP stated:

> The problem is terminological inexactitude, which was cobbled together… An informal arrangement was cobbled together in about 2000, but it is now being formalised, unfortunately. The phrase is inelegant, infelicitous and inaccurate, and it does not allow us to clarify for the Welsh electorate where political responsibility lies. There is an important principle at the heart of accountability.[61]

The Minister responded that:

> the Government do not agree that using the title "Welsh Assembly Government" will perpetuate confusion over the different roles of the Executive and the Legislature. Rather, changing the title at this stage is likely to cause even more confusion than keeping the names with which people are already familiar. As the hon. Member for Carmarthen, East and Dinefwr (Adam Price) said, the name has been in place for five or six years. People understand what the Welsh Assembly Government is, and a change to another name would cause confusion.[62]

4.12 Ministers and Deputy Ministers

The Conservatives put down an amendment seeking to limit the number of Ministers to no more than 8 and the number of Deputy Ministers to no more than 4. David Mundell MP set out the reasoning behind the amendment:

> The amendment and the new clause are designed to engender a debate about the appropriate number of Ministers in the Welsh Assembly Government and the difference between full Ministers and Deputy Ministers. We also need to consider how many Assembly Members are not members of the Welsh Assembly Government. If the Assembly contains 12 Ministers, the First Minister and Presiding Officers, then the number of Members available to carry out non-governmental functions in the Assembly is reduced. We must be confident that the number of Members who do not hold Government office is sufficient to scrutinise the work of the Assembly Government.
>
> No such limit was stipulated in the Scotland Act 1998, and it is clear from experience in Scotland that following the arrival of an institution the number of Ministers can grow exponentially. Scotland had five Ministers under the Conservative Government, but it now has 22 Ministers performing the same functions—at a significantly greater cost.[63]

[59] Ibid. c.74
[60] Ibid. c.
[61] HC Debates, 28 January 2006, c.134
[62] Ibid., c.135
[63] Ibid.,c.137

He stressed the need to focus on

> whether the proposed number of Ministers is appropriate in light of the value that they bring to the role and the ability of the Assembly's Committees to function satisfactorily. The ability of Committees to function with a number of non-governmental or Presiding Officer's Members would leave in the mid-40s the number of Members who are available for Committee work. The provision does not differentiate the role of Minister from that of Deputy Minister, so we could end up with 12 fully paid Ministers.[64]

He added that:

> Throughout the debate, there has been inconsistency about what should be in the Assembly's Standing Orders and what should be in the Bill. We must be clear about whether the Assembly should determine through its own procedures how many Ministers it has. If we are going to determine the number, we must ensure that the ministerial cohort is effective. There is no point in having 12 Ministers simply because the Bill says that there can be that number.[65]

The Minister responded that:

> The Presiding Officer has said that the Assembly should sit for four days a week rather than two. I think that that will cover the extra work load, and will go a long way towards meeting the understandable concerns of many Members about whether 60 Assembly Members will be able to perform the scrutiny role.[66]

There was also some discussion about the constitutional status and role of deputy ministers which elicited this response from the Minister, Nick Ainger MP:

> I would expect the definition in Standing Orders to apply to Deputy Ministers, and given that Deputy Ministers will clearly be part of the Executive, I would not expect them to have the same role as an ordinary Back-Bench Assembly Member; but that is a matter for the Standing Orders.[67]

4.13 Power of Well-being

Clause 60 empowers the Welsh Ministers to do anything which they consider is likely to achieve the promotion or improvement of the economic, social or environmental well-being of Wales. Local authorities have similar powers under section 2 of the *Local Government Act 2000*. During the Report stage the Conservatives put down amendments aimed at finding out "exactly what the provisions mean" and "to explore the ambit of the subjects that the clauses cover."[68] The Shadow Secretary of State for Wales, Cheryl Gillan MP questioned the Minister on the apparent wide remit and broad drafting of the clause.

The Minister responded:

> Clause 60, on the promotion of well-being, has been included so that, together with clauses 70 and 71, Welsh Ministers will have available to them the wide general powers that UK Ministers have inherently as Ministers of the Crown. That is known as

[64] Ibid.
[65] Ibid.
[66] Ibid., c. 140
[67] Ibid., c. 141
[68] Ibid., c. 143

> the Ram doctrine, which was established, if my memory serves me right, on 2 November 1945.
>
> Given the nature of the Welsh devolution settlement, we believe that those clauses are the best way to give Welsh Ministers comparable general powers within their responsibilities. That will remove the uncertainty that relates to section 40 of the Government of Wales Act 1998. The provisions will empower the Welsh Assembly Government to pursue a range of actions for which there is no specific statutory power.
>
> The hon. Lady asked for certain examples of how such powers will be exercised. They could include, for example, taking action to promote sustainable development and joint working with other public bodies to improve public services.[69]

More information on the "Ram Doctrine" can be seen in **Annex A.**

4.14 Statutory Business Scheme

The Government supported an amendment put down by Labour back bench MP Huw Irranca-Davies, placing a requirement for a Business Scheme to be agreed with the Welsh Assembly Government along the lines of the existing schemes for Local Government and the Voluntary Sector. The partnership will involve both business and unions and will report on a biennial rather than yearly basis. The Liberal Democrats and Plaid Cymru supported the amendment.[70] However, Conservative support was qualified:

> **Mrs. Gillan:** I am grateful to the Minister for giving way again. He says that the cost will be minimal and I presume, given that he is going to accept the new clause, that he has had a chance to calculate in detail the costs and staffing necessary to implement it. Will he agree to place in the Library of the House those detailed calculations, which would be helpful? Will he also justify to the House the two-year period, so that I can satisfy myself that another period would not be more optimal?
>
> **Nick Ainger:** I am assured that the costs are minimal as most of this work is already being done by Assembly officials. All sides of business and industry have decided that they want a scheme that can be reviewed every two years. The new clause takes on board their views and I would be amazed if the hon. Lady disagreed with them.[71]

5 Issues relating to Orders in Council

The Delegated Legislation Committee of the House of Lords and the House of Lords Constitution Committee have expressed concern about the increasing trend for the Government to award delegated powers to Ministers in primary legislation that allow them to make secondary legislation without parliamentary scrutiny. During the Second Reading debate on the Bill on 9 January 2006, the Secretary of State, sought to highlight the distinction between powers to legislate delegated by Parliament to Ministers and legislative powers delegated to a democratic body such as the Assembly. He stated:

> I have discussed this matter with the Chairs of both the Delegated Powers and Regulatory Reform Committee and the Constitution Committee of the House of Lords. They agree that there is an important distinction to be made between powers conferred on an elected legislature and those delegated to a Secretary of State. There should therefore not be the same concerns expressed over powers conferred on an elected,

[69] Ibid., c. 146
[70] Ibid., c.156-160
[71] Ibid., c. 159.

> accountable law-making body such as the Assembly, with its own scrutiny processes, as have been expressed over powers delegated to Ministers.[72]

This prompted the chairs of the Committees, Lord Dahrendorf and Lord Holme, to write to the Secretary of State underlining the fact that they had not yet given full consideration to the Bill or made any definitive pronouncements. Their letters are attached as **Annexes B** and **C**. The Secretary of State's response can be seen at **Annex D**.

Another Bill currently before Parliament is the *Legislative and Regulatory Reform Bill* which extends the scope of the powers available to Ministers to amend statute law by Order and at the same time relaxes the constraints of parliamentary scrutiny on the Order making process. This is attracting criticism from the Opposition parties and from the two Lords Committees in question. The Constitution Committee of the House of Lords has expressed its concern at the "unprecedentedly wide powers" the Bill seeks to confer on Ministers. When the Secretary of State for Wales appeared in front of the House of Lords Constitution Committee on 15 February 2006, the Chair drew parallels between the Order in Council procedures in the *Government of Wales Bill* and the *Legislative and Regulatory Reform Bill*, expressing a growing "edginess" in the Committee about the reduction that both would have on the potential for legislative scrutiny by Parliament.

> You should know, Secretary of State, there is a certain edginess in this Committee about moving to things which used to be the sphere of parliamentary legislation, moving to Orders in Council as a result of the Legislative and Regulatory Reform Bill, which is in the Commons now, and it has produced considerable edginess about an apparent Government wish to move from the traditional way of legislating to Orders in Council. I think this Committee understands very well, being the Constitutional Committee, that there is the other half of the equation, which is the Welsh Assembly. I think we do understand that very well, but I wonder, since we have got a senior member of the Government here, whether you would care to comment not on the regulation part of that Bill (which I can see a strong case for) but on what apparently are very wide powers envisaged to move from parliamentary legislation to Orders in Council, because I am afraid it is casting a little bit of a shadow over this Bill?[73]

The Secretary of State replied:

> I understand that, and that was one of the reasons why I was very keen, if I was invited, to talk to you about what underlies the Bill. I think whatever concerns, legitimate perhaps, which the House of Lords has had about Orders in Council and regulatory reform orders, delegating powers to ministers, whatever those concerns, it is a very different proposition in this Bill, which is to confer powers by parliamentary decision, express parliamentary decision in both Houses, on an elected legislature, itself accountable to the Welsh people, itself by this Bill required to have detailed scrutiny procedures of a familiar kind to us in Parliament. It is a very different proposition, and I think that is the difference. If we were proposing a wholesale Orders in Council over to Welsh ministers and, as it were, bypassing the legislature and the accountability and scrutiny involved in that, then I think we would lay ourselves open to enormous trouble at this end of Parliament, if not at that end at well.[74]

Looking ahead to the *Government of Wales Bill's* passage through the Lords, the Chair, Lord Holme, stated:

> I fear that when the Bill comes here the issues of these two Bills may begin to run together. I think you have been extremely candid and very helpful, if I might say so, in explaining just what you have, but there will be a certain caution, I think, in this

[72] HC Debates, 9 January 2006, c.38
[73] HL Constitution Committee, Uncorrected Minutes of Evidence, 15 February 2006, Q.33.
[74] Ibid.

> House anyhow (and maybe in the other House also) about this being part of a larger pattern rather than being a specific solution, in the way you have explained, to the evolution of devolution in Wales.[75]

The Secretary of State responded:

> I understand that, and I can accept that that might happen and that this Bill might run into choppier waters than otherwise, because of nothing to do with Wales or actually what is in the Bill, but I just hope that the Bill will be scrutinised by the House of Lords on its own merits as dealing with the interests of Wales rather than concerns about delegating powers to UK Government ministers, and I hope that Wales will not be prejudiced by any concerns, as I say legitimate perhaps, which the House of Lords might have about that problem.[76]

6 Progression to the House of Lords

The *Government of Wales Bill 2005-6* is now in the House of Lords and will receive its Second Reading on 22 March 2006.[77]

The legislative process in the House of Lords is broadly similar to that in the House of Commons. Important differences are:

- after Second Reading, bills are routinely committed to a Committee of the whole House.
- there is no guillotine and debate on amendments is unrestricted.
- amendments can be made at Third Reading as well as at Committee and Consideration stage.

The Lords and Commons must finally agree a text of each bill. If the Lords have not amended a Commons bill they inform the Commons of the fact.

If the Lords amend a Commons bill, their amendments are printed and considered by the Commons. Here, the Commons can do three things – firstly, they may agree to the Lords amendments, secondly, they may agree to them with amendments, or, thirdly, they may disagree to them.

If the Commons agree to the Lords amendments but with amendments of their own, they ask the Lords to agree to those amendments. If they disagree to the Lords amendments, they send a Message giving the reasons for their disagreement and the Lords consider the matter further. [78]

The Welsh Assembly Government's assessment is that the Bill remains on course to receive Royal Assent in July.[79]

[75] Ibid., Q.34.
[76] Ibid.
[77] HL, Minutes and Order Papers - Orders and Future Business: Notices and Orders of the Day, 6 March 2006.
[78] Op.cit HC Factsheet L5, 2003.
[79] Op.cit. WAG, CAU.

A Annex: The "Ram Doctrine"

Below is a House of Lords Written Answer provided by Baroness Scotland of Asthal on 25 February 2003 which provides an explanation of the "Ram Doctrine".[80]

Lord Lester of Herne Hill asked Her Majesty's Government:

> Whether they consider it to be in accordance with contemporary principles of British parliamentary democracy for legislation to be necessary (in a political, if not a legal sense) to authorise an extension of Ministers' powers; and, if not, why not; and[HL1275]
> Further to the Written Answer by Baroness Scotland of Asthal on 22 January (WA 98), whether reliance on the so-called Ram doctrine is compatible with a modern system of public law, including the principles of legality and legal certainty; and, if so, how; and[HL1302]
> In what circumstances and upon how many occasions during the past five years Ministers of the Crown and their departments have relied upon the Ram doctrine as the legal basis for the exercise of their public powers; and[HL1598]
> What were the circumstances that gave rise to the Ram doctrine.[HL1599]

The Parliamentary Secretary, Lord Chancellor's Department (Baroness Scotland of Asthal):

The Ram doctrine reflects a well-established principle of constitutional law. Like many other persons, Ministers and their departments have common law powers which derive from the Crown's status as a corporation sole. Ministers and their departments also exercise prerogative powers of the Crown. Common law and prerogative powers may be limited by statute either expressly or by necessary implication and in this respect are subject to direct parliamentary control. The courts have recognised the legitimacy of these principles.

Whether legislation is necessary or appropriate to authorise government actions depends on the circumstances and the matters in issue. Sometimes it will be clear that legislation is needed, for example, when the proposed action might substantially interfere with human rights. In such cases a clear and reasonably accessible legal framework is required in order to comply with human rights law. At other times, the legal necessity for legislation will not be clear, in which case a political as well as a legal judgment has to be made as to whether legislation is desirable. Such a judgment may take into account a number of factors, including whether the proposed action is a priority and whether authorising that action by legislating represents a good use of Parliamentary time.

The principles governing the use of the annual Appropriation Act to provide authority for the exercise of functions by government departments where such functions may involve financial liabilities extending beyond a year are stated in the Public Accounts Committee Concordant, 1932 (see Annex 2.1 of Government Accounting 2000).

During the past five years, as in previous periods, the common law powers of the Crown have often been relied upon as the legal basis for government action. Common law powers form the basis of such governmental actions as entering into contracts, employing staff, conveying property and other management functions not provided for by statute either expressly or by implication. To require parliamentary authority for every exercise of the common law powers exercisable by the Crown either would impose upon Parliament

[80] HL Debates, 25 January 2003, c. wa12-13.

an impossible burden or produce legislation in terms that simply reproduced the common law.

Finally, the circumstances that gave rise to the Ram doctrine are that the Ram opinion (the text of which was made available when an earlier Question [HL595] was answered on 22 January 2003) was given when the Ministers of the Crown (Transfer of Functions) Bill was being considered. This Bill later became the Ministers of the Crown (Transfer of Functions) Act 1946. The opinion addresses the need for legislation to confer power to add new functions to existing government departments by order. At that time Ministers were considering machinery of government changes following the Second World War.

B Letter from Chair of the House of Lords Constitution Committee

SELECT COMMITTEE ON THE CONSTITUTION
HOUSE OF LORDS
LONDON SW1A 0PW

13 January 2006

Government of Wales Bill

On return from a business trip overseas, I have only just read the second reading debate in the House of Commons on 9 January. I see you are reported as saying, at column 38:

> I have discussed this matter with the Chairs of both the Delegated Powers and Regulatory Reform Committee and the Constitution Committee of the House of Lords. They agree that there is an important distinction to be made between powers conferred on an elected legislature and those delegated to a Secretary of State. There should therefore not be the same concerns expressed over powers conferred on an elected, accountable law-making body such as the Assembly, with its own scrutiny processes, as have been expressed over powers delegated to Ministers.

I do of course recall the meeting on 1 December, at your invitation, when you briefed me personally, with an impressive array of your officials in support, on the proposals in the bill. The upshot of that meeting, which I welcomed, was that you agreed to appear before my Committee (now fixed for 15 February) to explain the measures in more detail once the bill had been published.

I do not disagree that distinctions of principle can be drawn between powers proposed to be conferred on an elected legislature and those delegated to a Secretary of State, and I said as much when reporting to my Committee on the substance of our discussion. But clearly both I and the Committee as a whole must reserve judgement on the constitutional merits of this particular proposal until after we have been able to study the bill in detail and questioned you about it.

It would therefore be unfortunate if some were to infer from your statement, and particularly the third sentence quoted above, that the Constitution Committee or its Chairman have expressed a definitive view on a bill they have not seen. This is manifestly not the case.

I am sending copies of this letter to the Leader of the House of Lords and to the Libraries of both Houses.

HOLME OF CHELTENHAM

The Rt Hon Peter Hain, MP
Secretary of State for Wales
Gwydyr House
Whitehall
London, SW1A 2ER

C Annex - Letter from Chair of the House of Lords Delegated Legislation Committee

12 January 2006

Government of Wales Bill

I have read with interest the Government of Wales Bill second reading debate in the House of Commons on 9 January. At column 38 you are reported as saying:

> I have discussed this matter with the Chairs of both the Delegated Powers and Regulatory Reform Committee and the Constitution Committee of the House of Lords. They agree that there is an important distinction to be made between powers conferred on an elected legislature and those delegated to a Secretary of State. There should therefore not be the same concerns expressed over powers conferred on an elected, accountable law-making body such as the Assembly, with its own scrutiny processes, as have been expressed over powers delegated to Ministers.

I accepted your invitation to meet on 10 November for what I thought was a personal briefing on your proposals. This is why I came by myself and was somewhat surprised to be faced by a large group of your officials (with you yourself joining us later after a Cabinet meeting). This means that I have to rely on my memory so far as the meeting is concerned. However, I am sure that I was careful to stress that neither I nor the Delegated Powers and Regulatory Reform Committee would express any view on your proposals until a bill was brought to the House of Lords. In relation to delegated powers, I never comment on powers in the abstract or on any matter which has not been considered by my Committee.

Although I do not recall making any such statement at our meeting, I agree that there is a distinction which can be drawn by the House between powers conferred on an elected legislature and those delegated to a Secretary of State; and this is the view taken by the Committee since 1998. When reporting on clause 17 of the NHS Redress Bill (6th Report of this session), for example, we said (paragraph 16):

> We consider that the power in clause 17 is so wide that, if conferred on a Minister of the Crown in relation to England, it would be inappropriate even if subject to affirmative procedure. It is however for the House as a whole to decide whether to delegate powers to the National Assembly for Wales which this Committee would advise were not appropriate to be delegated, for England, to a Minister.

I recall referring to the NHS Redress Bill and to this conclusion. Nothing I said will have departed from this view. It is therefore misleading to suggest that the Delegated Powers Committee or its Chairman have expressed a view on your proposals when they had not even seen the bill.

I am copying this letter to the Leader of the House of Lords and to the Libraries of both Houses.

DAHRENDORF

Rt Hon. Peter Hain MP
Secretary of State for Wales

D Annex: Letter from the Rt Hon Peter Hain MP, Secretary Of State For Wales, to Lord Holme, Chair Of The Select Committee on the Constitution of the House of Lords

23 January 2006

Government of Wales Bill

Thank you for your letter of 12 January about the Second Reading Debate in the Commons on the Government of Wales Bill.

At the outset let me say that I should regret it enormously if you see what I said in the debate as misrepresenting what we discussed in Gwydyr House. You were at pains in our meeting to emphasise that you were not speaking for your Committee and equally I sought to emphasise that I wanted to work with your Committee on our proposals. Indeed I am glad that arrangements have been made for me to meet the Committee on 15 February.

In my comments at Second Reading, I sought to convey the position I had outlined, that there should be a distinction between delegation to a Secretary of State and to a fully democratically elected body such as the National Assembly for Wales. I thought we had agreed on that point, but I cannot and would not presume on you or your Committee and so I look forward to our meeting so that we can review this issue further. I am grateful however that you say in your letter that you do not disagree that such distinctions of principle can be drawn.

I am copying this letter to the Leader of the House of Lords, and to the Libraries of both Houses.