

# GOVERNMENT OF WALES ACT 2006

## EXPLANATORY NOTES

### INTRODUCTION

1. These explanatory notes relate to the Government of Wales Act 2006, which received Royal Assent on 25 July 2006. They have been prepared by the Wales Office in order to assist the reader in understanding the Act. They do not form part of the Act, and have not been endorsed by Parliament.

2. The notes need to be read in conjunction with the Act. They are not, and are not intended to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.

### BACKGROUND

#### *The Government of Wales Act 1998*

3. In July 1997 the Government published a White Paper, “A Voice for Wales” (Cm 3718), setting out its proposals for the creation of a Welsh Assembly. Following endorsement of those proposals in a referendum held on 18 September 1997, a Government of Wales Bill was introduced into the House of Commons in December 1997. The Bill as amended received Royal Assent in July 1998.

4. The Government of Wales Act 1998 (“GoWA”) provides for the establishment of a National Assembly for Wales consisting of 60 Assembly Members (AMs). 40 AMs are elected on a first past the post basis from constituencies identical with Parliamentary constituencies and a further 20 AMs are elected from five electoral regions, four from each region<sup>1</sup>. These additional AMs are drawn from party regional lists<sup>2</sup>, and seats are allocated having regard both to the votes given for each party’s list in a region and the number of constituency seats which the party has secured in that region; the effect is to provide compensation, in the form of regional seats, for parties which secure a significant number of votes across an electoral region without obtaining an equivalent proportion of the constituency seats in that region<sup>3</sup>. The first elections to the National Assembly were held in May 1999.

<sup>1</sup> In the event that a review of Parliamentary constituency boundaries in Wales resulted in an increase in the number of constituencies, provisions in Schedule 1 to the Act allow for an increase in the number of regional Members in order to maintain the overall 2:1 ratio.

<sup>2</sup> The Act allows an individual to stand for election for an electoral region, but in practice no individual candidates were elected from an electoral region in either 1999 or 2003.

<sup>3</sup> The results of the elections in 1999 and 2003 are set out in the Table below:

	1999		2003	
	Constituency seats won	Regional seats won	Constituency seats won	Regional seats won
Labour Party	27	1	30	0
Plaid Cymru	9	8	5	7
Conservatives	1	8	1	10

5. Unlike the devolution arrangements put in place at the same time in Scotland and Northern Ireland, GoWA does not provide for a separation of the legislature from the executive. By section 1, the National Assembly is established as a corporate body, which exercises its functions on behalf of the Crown. The Government’s policy, as set out in “A Voice for Wales”, was that the Assembly should assume the statutory powers and duties which the Secretary of State for Wales had hitherto exercised. Provision was made for Orders in Council to transfer these predominantly executive responsibilities to the Assembly<sup>4</sup> and subsequent Acts of Parliament have conferred additional powers on the Assembly. The Assembly’s powers, whether transferred by Orders in Council or conferred directly by Act of Parliament, include a large number of subordinate order-making powers (including some powers enabling the Assembly to amend primary legislation), but the Assembly is not empowered by GoWA to make primary legislation for Wales; this remains Parliament’s responsibility.

6. Although its statutory functions are in law made the responsibility of the Assembly as a corporate body, in practice most of the Assembly’s powers (excluding those of a predominantly legislative character) are exercised on its behalf by Assembly Ministers<sup>5</sup> under delegation arrangements approved by the Assembly in plenary session<sup>6</sup>. The Assembly holds Ministers to account for exercise of these functions, and, under standing orders, has the function of approving the Assembly’s Budget. Financial provision for the Assembly is made available to it by the Secretary of State for Wales, out of moneys voted by Parliament<sup>7</sup>.

***The Act in Operation***

7. In February 2002, in debating its Review of Procedure, the Assembly unanimously approved a motion calling for “the clearest possible separation between the Government and the Assembly which is achievable under current legislation”. Since March 2002, those (Ministers and civil servants) exercising executive powers on behalf of the Assembly have used the title “Welsh Assembly Government” to distinguish themselves from the wider Assembly, and the Assembly’s support service has adopted the title “Assembly Parliamentary Service”.

8. In July 2002 the Welsh Assembly Government appointed a Commission, under the chairmanship of Lord Richard of Ammanford, to review the operation of the devolution arrangements<sup>8</sup>.

9. Having analysed the consequences for development and implementation of distinctive policies for Wales of the Assembly’s limited legislative powers, the Richard Report recommended that the Assembly should be able to make primary legislation for Wales

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Lib Democrats	3	3	3	3
Other	0	0	1	0
	40	20	40	20

<sup>4</sup> GoWA, ss. 22-26. See eg National Assembly for Wales (Transfer of Functions) Order, SI 672 of 1999, which came into force on 1 July 1999.

<sup>5</sup> GoWA, s.53, refers to an Assembly First Secretary and Assembly Secretaries, but in practice the holders of these offices are referred to as Ministers.

<sup>6</sup> GoWA, s.62, makes provision for delegation of the Assembly’s functions to the First Secretary and subsequently to other Assembly Secretaries.

<sup>7</sup> GoWA, ss. 80-81.

<sup>8</sup> The Report of the Commission on the Powers and Electoral Arrangements of the National Assembly for Wales (“the Richard Report”) was published in March 2004.

(although Parliament would continue to have important legislative responsibilities for Wales as well).

10. The Commission therefore concluded, in the light of both this and of its analysis of the implications of the Assembly's corporate body status, that the status quo was not a sustainable basis for the future development of the Assembly. It recommended that the existing Assembly should be "replaced by two separate bodies – an executive and a legislature".

11. On 6 October 2004, the Assembly adopted a resolution calling for early legislation to amend GoWA.

12. In June 2005 the Secretary of State for Wales published a White Paper<sup>9</sup> "Better Governance for Wales", setting out proposals for new legislation to:

- a) effect a formal separation between the executive and the legislative branches of the Assembly;
- b) reform existing electoral arrangements;
- c) enhance the legislative powers of the Assembly..

***Formal separation between the executive and legislative arms of the Assembly***

13. Under the proposals:

- a) the Welsh Assembly Government would be established as an entity separate from, but accountable to, the National Assembly. The First Minister would be appointed by Her Majesty on the nomination of the Assembly, and the First Minister would appoint other Ministers and Deputy Ministers with Her approval. All these Ministers would act on behalf of the Crown, rather than as delegates of the Assembly as now (but would have to resign if they lost the confidence of the Assembly). A new statutory office of Counsel General would be created, the post holder being responsible for providing legal advice to the Assembly Government on matters relating to their devolved functions. Ministers would, as now, be supported by staff who would be civil servants;
- b) most of the statutory functions which currently are exercised in the name of the Assembly would formally become the responsibility of Assembly Ministers. The Assembly's current order-making powers would in future generally be exercised by Ministers, although procedures would be in place either for drafts of orders to be approved by the Assembly before they are made (affirmative procedure) or for orders to be annulled after having been made (negative procedure). Ministers would also be subject to duties relating to sustainable development and promotion of equality of opportunity which GoWA currently places on the Assembly as a whole;
- c) Ministers would be accountable to the Assembly for the exercise of their powers, and for the use made of the budgetary resources voted each year by the Assembly out of a new Welsh Consolidated Fund (into which the Secretary of State would make payments out of moneys voted by Parliament. The requirement for Ministers to be members of the Assembly's subject committees would end, and the Assembly would in general have more freedom to determine its own "internal architecture" of committees. The Assembly rather than Ministers would be authorised to advise Her Majesty on

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<sup>9</sup> Cm 6582

appointments to the offices of the Auditor General for Wales and the Public Services Ombudsman for Wales.

***Enhanced legislative powers for the Assembly***

14. The White Paper proposed increasing the Assembly's legislative powers in three ways:

- a) as a first stage, by conferring wider powers on the Assembly to make subordinate legislation. The White Paper noted that this proposal would not require legislative amendment (and so there is no provision relating to this in the Government of Wales Act 2006). The first example of a "framework" provision of this kind is contained in the NHS Redress Bill, which was introduced in the House of Lords on 12 October 2005;
- b) secondly, by providing an Order in Council mechanism which would allow Parliament to confer enhanced legislative powers on the Assembly in relation to specified subject matter within devolved fields (i.e. fields in which the Assembly Ministers have or are about to obtain executive functions). The Order in Council would enable the Assembly to pass its own legislation within the scope of the powers delegated by Parliament (as defined by the Order in Council);
- c) thirdly, and following a referendum, by authorising the Assembly to make law on all the matters within its devolved fields of competence without further recourse to Parliament. A referendum could only be triggered with the approval of both Houses of Parliament and of two-thirds of all Assembly members. In the event of a vote in favour of "primary legislative powers", Parliament would nonetheless continue to be able to legislate for Wales, and the White Paper mentioned the possible need in this circumstance to develop procedures akin to the Sewel motions to regulate the relationship between the Westminster and Holyrood Parliaments.

15. The White Paper stated that the new (first stage) approach to the drafting of power-conferring clauses could begin immediately<sup>10</sup>. If Parliament approved the proposals, the (second stage) Order in Council mechanism could be in place from immediately after the next Assembly elections in 2007. The third stage in the process could however only be introduced following endorsement of that proposal in a referendum. The White Paper noted that the Government had no current plans to hold such a referendum, but the Bill implementing its proposals should nevertheless provide the powers for one to be held, so as to avoid the need to have to return to Parliament to secure the necessary legislation if it was ever decided to hold one at some future time.

***Reforming the Assembly's electoral arrangements***

16. The White Paper contained three proposals relating to this:

- a) individuals should henceforth no longer be able to be candidates in constituency elections and at the same time be eligible for election as regional members from party lists.
- b) while there should be no change to the requirement that Assemblies are elected for fixed four-year terms, new provision (equivalent to that made for the Scottish Parliament) should be made for extraordinary elections within a four-year term, to

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<sup>10</sup> See as the first example of this approach, NHS Redress Bill 2005, clause 17.

apply in those exceptional circumstances where it was clear that an Assembly as presently constituted could not perform its functions properly;

- c) the Assembly should have a new power to allow it to arrange for public information campaigns to promote participation in its elections.

### ***The Act***

17. The Act, which contains 6 Parts, 166 sections and 12 Schedules, gives effect to the White Paper proposals. Its provisions are further described below. Many of these are re-enacted, with amendments, from GoWA.

### **TERRITORIAL EXTENT AND APPLICATION**

18. The Act's substantive provisions extend (with limited exceptions) to the whole of the United Kingdom although its practical application will be confined almost entirely to Wales. The provisions which do not extend to the whole of the United Kingdom are section 36(7) to (9), section 39 and section 40(2) and (3). These provisions create criminal offences and extend only to England and Wales. Where the Act makes consequential amendments, these have the same extent as that of the statutes amended.

### **COMMENTARY ON SECTIONS AND SCHEDULES**

#### ***General Overview of the Act***

19. The Act is organised in six Parts.

20. Part 1, together with Schedules 1 and 2, makes provision for the election and remuneration of Assembly Members; for the offices of Presiding Officer, Deputy Presiding Officer, and Clerk; for the establishment of an Assembly Commission (to be responsible for providing the Assembly with staff and support services); for committees; and for the Assembly's powers to summon witnesses and call for documents.

21. Part 2, with Schedule 3, establishes the Welsh Assembly Government as an entity separate from, but accountable to, the National Assembly. It deals with the appointment and remuneration of the First Minister and other Ministers and Deputy Ministers; creates the office of Counsel-General to the Welsh Assembly Government and makes provision for appointment to it; and authorises the appointment of staff (who are civil servants) in support of the Assembly Government. It provides for the exercise of statutory functions by Ministers in their own right (rather than as delegates of the Assembly), and places duties on them in respect of carrying out regulatory impact assessments in connection with Welsh subordinate legislation, and duties in respect of equality of opportunity, sustainable development and the Welsh Language. Ministers will also be required to engage with stakeholders through consultation mechanisms with business, local government, and the voluntary sector.

22. Part 3, with Schedule 5, introduces the new mechanism, proposed in the White Paper<sup>11</sup>, by which legislative competence will be conferred on the Assembly, with Parliament's approval, in respect of specified matters set out in the Schedule as amended by Orders in Council. The Assembly's legislation in exercise of these powers will be known as Assembly Measures.

23. Part 4 and Schedules 6 and 7 make provision for the holding of a referendum on whether the Assembly should have more extensive ("primary") legislative powers, and

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<sup>11</sup> "Better Governance for Wales", paras. 3.14-3.21.

specify the subject-matter on which the Assembly would be able to legislate without further recourse to Parliament if such a proposal was approved in a referendum. Provision is made in the Act for the subject-matter on which the Assembly could legislate, following approval in a referendum, to be adjusted and updated to reflect the circumstances of the time when any referendum is held.

24. Part 5, with Schedule 8, deals with Finance. It provides for the creation of a Welsh Consolidated Fund, which will receive payments from the Secretary of State out of moneys voted by Parliament. Payments out of the Fund to meet the costs of Welsh Assembly Government programmes, will be authorised by Annual and Supplementary Budget Motions adopted by the Assembly. No payment out will be made unless approved by the Auditor General for Wales, who will need to be satisfied that it is in line with a Budget Resolution (or otherwise lawful under the Act). Provision is made for preparation of the accounts of the Welsh Ministers, and of the Assembly Commission, and the Act appoints Accounting Officers to have personal responsibility for these accounts. Schedule 8 re-enacts with modifications the existing provisions relating to the office of the Auditor General for Wales; in particular, appointments to that office will in future be made by Her Majesty on the nomination of the Assembly.

25. Finally, Part 6, with Schedules 9-12, deals with Miscellaneous and Supplementary matters. The provisions in the 1998 Act dealing with Welsh public records are re-enacted to reflect the new circumstances created by this Act. Provision is also made for legal proceedings in relation to “Devolution Issues”. Schedule 11 contains transitional provisions to cover the transfer in May 2007 (when the next Assembly elections take place) from the legal and governmental regime created by the 1998 Act to that envisaged by this Act.

## **PART 1: NATIONAL ASSEMBLY FOR WALES**

### ***Overview of Part 1***

26. Part 1 of the Act re-enacts many of the 1998 Act’s provisions relating to the establishment of the Assembly, but additional provision is made, in part because the Assembly will no longer be a “corporate body”.

27. By virtue of sections 1 and 2, 40 constituency members will continue to be directly elected from constituencies identical with Parliamentary constituencies, and 20 Assembly regional members from Assembly electoral regions. (Schedule 1 effectively re-enacts provision in the 1998 Act for the areas of those regions to be adjusted to reflect changes from time to time in Assembly/Parliamentary constituency boundaries so that electoral regions will always consist of a number of whole constituencies; and for additional regional members to maintain the 2:1 ratio if there is an increase in the number of Assembly constituencies). Under the 1998 Act, Welsh general elections to the Assembly are held every four years, and that continues generally to be the case under the new Act; but new provision, equivalent to s.3 of the Scotland Act 1998, is made by section 5 of the Act to allow for an extraordinary (early) Welsh general election to be held if not less than two-thirds of all Assembly Members (i.e. 40) vote for a resolution to that effect. Such circumstances might arise if, for example, it became clear that, given the existing composition of the Assembly, no Assembly Government could be formed that would be likely to enjoy the confidence of the Assembly.

28. Provisions on the entitlement to vote, and the voting arrangements, whereby electors are able to vote for a constituency candidate and separately for a party list (or independent candidate) at regional level, are carried forward from the 1998 Act. Assembly elections will be held in accordance with an order to be made by the Secretary of State under section 13

(and new provision will be made for the 2007 Welsh general election, taking into account the provisions of the Electoral Administration Act 2006). On candidacy, section 7 includes the provision so that a person may not appear on a party list as a candidate for a regional seat if that individual is also an Assembly constituency candidate. Provisions on the allocation of regional seats at a general election, and the filling of casual constituency or regional vacancies, are carried forward from the 1998 Act. Provisions relating to the disqualification from Assembly membership of the holders of specified offices are also carried forward, with amendments to reflect changes in legislation since 1998. On becoming Assembly Members, individuals are by section 23 required to take an oath or make an affirmation of allegiance, as was required by the 1998 Act.

29. Arrangements for determining Assembly Members' remuneration are set out in sections 20-22, broadly in line with what was provided for in the 1998 Act. Section 22 provides for the publication of information about the salaries and allowances paid to individual Assembly Members. Provision is also made in section 24 for the Assembly to make payments by way of assistance to groups of Assembly Members to assist them to perform their functions; this is the Assembly equivalent of what is known in Parliament as "Short money". The Assembly's standing orders must make provision about the publication of information on the use made of this power in each financial year.

30. Sections 25, 26 and 27 make provision respectively for the offices of Presiding Officer and Deputy Presiding Officer, the Clerk, and the establishment of an Assembly Commission to be responsible for providing the Assembly with staff and support services. The offices of Presiding Officer and Deputy Presiding Officer were created by the GoWA, but the Act sets out their responsibilities in fuller detail. Statutory recognition, by section 26, of the office of Clerk of the Assembly is new, and broadly follows s.20 of the Scotland Act 1998; by paragraph 17 of Schedule 11, the member of staff currently serving as Clerk to the Assembly will become the first holder of the office from the 2007 election.

31. Provision for the Commission broadly follows that made in the Scotland Act 1998 for the Scottish Parliamentary Corporate Body. It is a consequence of the fact that the Assembly will no longer be a corporate body and will not therefore have the benefit of legal personality. The Commission, whose membership, duties and powers are set out in fuller detail in Schedule 2, will be a body corporate, capable of entering into contracts and holding property etc in its own right in pursuance of its functions. In recruiting staff, the Commission is to ensure that its procedures, including its selection procedures, and the terms of conditions of employment it offers, are to be broadly in line with those of the Welsh Assembly Government. Paragraphs 5 and 6 of Schedule 2 confer specific powers on the Assembly Commission to promote public awareness of the current or any pending system of Assembly elections, and of devolved government in Wales.<sup>12</sup> The Commission is specifically empowered to provide financial assistance to the Electoral Commission for these purposes, but will also be able to take other such action as it thinks fit in pursuit of these objectives.

32. Sections 28-30 are about Assembly Committees. Generally speaking it will be for the Assembly in future to decide what committees it wishes to establish via its standing orders, but there is a requirement for an Audit Committee. Section 29 makes new provision for determining the membership of such committees as the Assembly may wish to establish after May 2007, so that (as far as reasonably practicable) the allocation of places on committees secures that the membership of each committee reflects the overall representation of political

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<sup>12</sup> See "Better Governance in Wales", para.4.8, for the background to this proposal.

groups in the Assembly. It includes provision for determining the allocation of places in the event that there is not a consensus (that is, if there is no resolution to allocate committee places which is supported by two-thirds of those voting) and provision to secure that – subject to the total number of places available on committees – members who do not belong to a political group are each offered at least one place and all political groups are offered at least as many places as they have members, thus protecting the position of independent members and small political parties and groups.

33. The Assembly’s proceedings generally are to be regulated by its standing orders. By virtue of paragraph 20 of Schedule 11, the Secretary of State is to make standing orders to be in place when the Assembly first meets after the May 2007 elections. In making those standing orders, the Secretary of State must give effect (subject to a power to modify them to make them precisely fit for purpose) to any draft standing orders adopted by the Assembly on a two-thirds vote. After the Assembly is elected in 2007, it will be able to revise any provisions of its standing orders as it sees fit, subject, as now, to two-thirds of Members voting to support such revisions; but any such revisions will need to be compatible with the Act’s requirements that certain matters (e.g. integrity and the need for a register of interests, see section 36), are provided for in standing orders.

34. Sections 32-34 of the Act provide variously for the Secretary of State for Wales to participate (but not to vote) in Assembly proceedings; for other Ministers of the Crown to participate, to the extent that is permitted by standing orders; and for the Counsel General, who need not necessarily be an Assembly Member, also to participate as standing orders allow. The Secretary of State for Wales’ duty under s.31 of the GoWA to consult the Assembly on the UK Government’s legislative programme is carried forward into the new Act as section 33. Assembly proceedings generally are, by virtue of section 35, to reflect equal opportunity principles and equal treatment of the Welsh and English languages. Statements in Assembly proceedings are absolutely privileged for the purposes of the law of defamation (section 42).

35. Finally in this Part, sections 37- 40 make revised provision enabling the Assembly, or any of its committees, to summon witnesses or call for documents, “concerning any matter relevant to the exercise by the Welsh Ministers of any of their functions”. Section 40 envisages that a witness giving evidence in such circumstances may be required to do so on oath (or affirmation). It will still be open to an Assembly committee to invite witnesses to give evidence on any matter in which the committee has an interest. There are exceptions to the power to compel attendance or the production of documents. For example, it will not be open to the Assembly to summon to give evidence someone who has been a Minister of the Crown, or has served as a civil servant in support of a Minister of the Crown, in relation to the exercise of any functions of a Minister of the Crown (section 37(3)). On the other hand, Welsh Ministers’ officials will be summonable; although provision is made for a Welsh Minister to appear themselves, or to nominate a different official to represent them to the one summoned by the Assembly committee, if the Minister considers that appropriate in the particular circumstances (section 37(5),(6)).

### ***Detailed Comments on Part 1***

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

##### **Section 1: The Assembly**

36. This section provides for establishment of the legislative body called the National Assembly for Wales (“the Assembly”) and the Assembly Members who comprise its membership. The corporate body which was set up under the Government of Wales Act 1998



with legislative and executive powers, and which was also called the “National Assembly for Wales”, will cease to exist.

37. Membership of the Assembly is to consist of Assembly Members of two descriptions: Assembly constituency members and Assembly regional members. Each Assembly constituency elects one Assembly constituency member. Each Assembly region, of which there are five, elects four regional members.

38. Assembly Members will be elected in general elections (in which all Assembly seats are up for election), in by-elections (for Assembly constituency members only), or by application of the rules for filling vacant regional seats. The rules for all these processes are to be found in this Act, in subordinate legislation made under it and in other legislation relating to elections

39. When a seat in the Assembly becomes vacant (for example, because of the death or resignation of an Assembly constituency or regional member), the fact that there is a vacancy does not invalidate anything done by the Assembly, or by its committees or sub-committees.

## **Section 2: Assembly constituencies and electoral regions**

40. This section and Schedule 1 to the Act provide for the Assembly constituencies (for which Assembly constituency members are returned), and the Assembly electoral regions (for which Assembly regional members are returned).

41. Assembly constituencies have the same boundaries as the parliamentary constituencies for which Members of the UK Parliament are returned. Therefore, at the passing of this Act, there are 40 Assembly constituencies. If the parliamentary constituencies change (by Her Majesty making an Order in Council under the Parliamentary Constituencies Act 1986, following a report of the Electoral Commission), the Assembly constituencies will also change accordingly.

42. At the outset, the 5 electoral regions in Wales are: North Wales, Mid and West Wales, South Wales West, South Wales Central and South Wales East. The boundaries of these electoral regions are laid down by the Parliamentary Constituencies and Assembly Electoral Regions (Wales) Order 2006, which was made under the Parliamentary Constituencies Act 1986.

43. The boundaries of the electoral regions and the numbers of Assembly regional seats allocated to each region will be able to be altered by an Order in Council made by Her Majesty under the Parliamentary Constituencies Act 1986, following a report of the Electoral Commission into parliamentary constituencies. Schedule 1 to the Act makes detailed provision in relation to the procedures for proposals for such alterations.

## ***General Elections***

### **Section 3: Ordinary general elections**

44. This section provides that Assembly ordinary general elections are to take place every four years, on the first Thursday in May, subject to a power under which the Secretary of State may change the date of an ordinary general election by order under section 4.

45. In advance of an ordinary general election the Assembly is to be dissolved a specified number of days before that Thursday. This number of days (“the minimum period”) will either be specified in an Order made by the Secretary of State under section 13, or calculated in accordance with rules set out in the Order. This is the minimum period to which subsection (3) refers.

46. The section also provides that the Assembly must meet within seven days after the day of the poll (excluding certain days such as Saturdays, Sundays and Bank Holidays).

#### **Section 4: Power to vary date of ordinary general election**

47. This section allows the Secretary of State, by Order, to vary the date of an ordinary general election (i.e. one that is scheduled to occur on the first Thursday in May, every four years) by up to one month either way, if, for example, holding the general election on the first Thursday in May would mean it would coincide with some other important event. Such an Order must also make provision as to when the Assembly is to be dissolved in advance of the varied date of the election and for it to meet within seven days after the day of the poll, again excluding certain days from the calculation. The Order may also apply the Representation of the People Acts, or other legislation that applies to the election of Assembly Members, with any modifications that are necessary because of the change of the date of the general election.

48. Before making an Order under this section, the Secretary of State must first consult the Welsh Ministers and an Order must be laid before Parliament and is subject to being annulled by resolution of either House of Parliament.

#### **Section 5: Extraordinary general elections**

49. Section 5 provides a mechanism for an *extraordinary* general election to take place before the next scheduled ordinary general election in certain circumstances.

50. If the Assembly resolves that it should be dissolved (provided Assembly Members representing at least two-thirds of Assembly seats, i.e. 40 Assembly Members voted for the resolution), or if the Assembly fails to nominate an Assembly Member to be the First Minister within the period laid down by section 47 (usually 28 days), then the Secretary of State must propose a date for the holding of an extraordinary general election. Arrangements for the holding of the extraordinary general election are then to be made by Order in Council.

51. If an extraordinary general election is held less than six months before the date on which an ordinary general election would normally be held, that ordinary general election is not to be held. The date of subsequent ordinary general elections would not however be affected, i.e. they would still normally take place on the first Thursday in May at intervals of four years after that in which the ordinary general election which did not take place was due to have been held

#### **Section 6: Voting at general elections**

52. This section provides that persons voting in Assembly general elections can cast two votes. One vote (“the constituency vote”) may be cast for a named candidate to be the Assembly constituency member. The other (“the electoral region vote”) is for a registered political party which has put forward a list of candidates or for an individual candidate and, in either case, is for the purpose of electing the Assembly regional members for the region.

#### **Section 7: Candidates at general elections**

53. This section lays down rules in relation to entitlement to be a candidate for Assembly constituencies and electoral regions at a general election.

54. For example, a person may not be a candidate for more than one constituency. A person may not be included by a registered political party in its list of candidates for more than one electoral region. Nor may a person who is a candidate for any constituency be included in any of a party’s regional lists. Similarly, a person may not be an individual

candidate for an electoral region if that person is also a candidate for any constituency or on any list of candidates submitted by any registered political party for any electoral region.

**Sections 8 and 9: Calculation of Electoral Region Figures and Allocation of seats to electoral region members**

55. These sections set out the method for determining the allocation of the four electoral region seats for each electoral region, using a “d’Hondt” calculation.

56. The starting point is the calculation, for each electoral region, of the initial “electoral region figure” for each registered political party and individual candidate. Section 8 explains how this is to be calculated.

57. In each Assembly region, the successful Assembly constituency members are to be identified before the electoral region figures are calculated. The electoral region figure is then calculated in *each* electoral region, for *each* registered political party that has submitted a list of candidates to be elected as the Assembly regional members in that region, by the following formula:

$$X = A/(B + 1)$$

where:

A = the total number of electoral region votes cast for that party across all the constituencies in that electoral region;

B = the total number of constituency seats won by that party in that electoral region;  
and

X = the electoral region figure.

58. For an individual electoral region candidate the electoral region figure is the total number of votes cast for that candidate.

59. The electoral region figures of all parties and of any individual regional candidates are compared. The first electoral region seat is allocated to the political party or individual regional candidate with the highest electoral region figure. The candidate elected is the one at the top of that party’s list.

60. If a seat is allocated to a party, its electoral region figure must be re-calculated by adding the seat allocated to figure B and dividing figure A by (new figure B + 1). This re-calculated electoral region figure then replaces that party’s initial electoral region figure.

61. The electoral region figures of all parties and of any individual regional candidates (other than an individual candidate to whom a seat has already been allocated) are then compared again and the next electoral region seat is allocated to the party or individual candidate with the highest electoral figure. In the case of a party the candidate elected is the one at the top of that party’s list, disregarding any candidate already elected. If a seat is allocated to a party, the electoral figure of that party is again re-calculated by adding a further seat to figure B, and re-applying the formula  $X = A/(B + 1)$ .

62. The process is repeated until all four regional seats have been allocated.

63. If all the candidates on a political party's regional list have been elected before all four regional seats have been filled, that party is disregarded in subsequently assessing which party or individual has the highest electoral region figure.

64. Provision is made for situations in which, at any comparison of electoral figures, the highest electoral figure is shared by two or more parties or individual candidates. If the number of unallocated seats is equal to or greater than the number of parties or individual candidates sharing the highest electoral figure then a seat is allocated to each. If not, the tie is to be broken, if possible, by increasing figure A by 1 and comparing the electoral figures again. If there are still two parties or individual candidates with equal electoral figures and not enough unallocated seats for all of them, the regional returning officer is to decide the matter by the drawing of lots.

### ***Vacancies***

#### **Section 10: Constituency Vacancies**

65. Section 10 provides for the filling of a constituency seat which becomes vacant (for example, because of the resignation or death of the Assembly constituency member). A by-election must be held, on a date fixed by the Assembly's Presiding Officer, which must be within 3 months of the vacancy arising, unless it appears to the Presiding Officer that the latest day on which the poll could be held would be within 3 months of the date when the next ordinary general election is due to take place (in which case the seat will remain vacant until the general election.)

66. At a by-election, electors cast only one vote, for a named constituency candidate, (as opposed to the two votes at a general election, when electors are electing both a constituency member and regional members).

#### **Section 11: Electoral Region Vacancies**

67. Section 11 provides the machinery for filling a regional seat which becomes vacant (for example, because of the resignation or death of the Assembly regional member). If the seat which has fallen vacant was held by a candidate drawn from the list which a party had submitted at the previous general election, the vacancy is filled by the next candidate on that list, provided that person still wishes to be elected, and, in the case of a person who has ceased to be a member of the party, the party has not given notice that it does not wish that person to fill the vacancy.

68. A person who has, since that general election, been a candidate in a constituency by-election, is barred from taking up a regional vacancy as is a person who has previously been allocated a regional seat (and has, for example, ceased to hold that seat by reason of having resigned).

69. If, for any reason, the vacant seat cannot be filled from a party's list (for example because all the candidates on the list have been exhausted or the only candidates who are left are barred from filling the vacancy) then the seat remains vacant until the next ordinary or extraordinary general election.

70. If the Assembly regional member whose seat has become vacant was elected as an individual candidate, as opposed to being drawn from a party list, there is no procedure for filling the seat and it remains vacant until the next ordinary or extraordinary general election.

### ***The Franchise and conduct of elections***

#### **Section 12: Entitlement to Vote**

71. This section provides that the persons entitled to vote in any Assembly general or by-election in a constituency are those entitled to vote in a local government election in an electoral area included in the constituency. Electors may not cast more than one constituency vote or more than one regional vote at a general election or more than one vote at a by-election.

#### **Section 13: Power to make provision about elections etc**

72. This section empowers the Secretary of State to make provision by secondary legislation in relation to Assembly elections. This includes provision:

- a) about the registration of electors;
- b) for disregarding alterations in registers of electors;
- c) about limitations on election expenses;
- d) to allow Assembly elections and other elections, such as local government elections, to be held on the same day; and
- e) to allow sections 6 and 8(2) of the Act to operate differently if an election for an Assembly constituency member at a general election is abandoned.

73. The need to be able to modify the effect of the Act where an election in a particular constituency is abandoned (for example because of the death of a candidate) arises because normally no regional members can be elected until all constituency seats in the region have been filled.

74. Subsection (6) provides that the only method by which the return of an Assembly Member may be challenged (for example, on the ground that the election was not conducted lawfully) is by election petition under Part 3 of the Representation of the People Act 1983 as applied or incorporated by an Order under this section.

75. The Secretary of State must lay a draft of an Order under this section before each House of Parliament and may not make the Order unless approved by resolution of each House.

### ***Duration of membership***

#### **Section 14: Term of office of Assembly members**

76. This section provides that the term of office of an Assembly member begins when the member is declared to be returned and ends with the dissolution of the Assembly.

#### **Section 15: Resignation of members**

77. An Assembly member may resign by giving notice in writing to the Presiding Officer.

### ***Disqualification***

#### **Section 16: Disqualification from being Assembly member**

78. This section specifies the persons who are disqualified from becoming or continuing to be a member of the Assembly, including:

- a) those disqualified from being a member of the House of Commons under section 1(1)(a) to (e) of the House of Commons Disqualification Act 1975 (judges, civil servants, members of the armed forces, members of police forces, members of foreign legislatures);
- b) holders of offices designated by Order in Council (which must be laid before and approved by the Assembly);
- c) the Auditor General for Wales and the Public Services Ombudsman for Wales;
- d) members of the staff of the Assembly.

79. In addition, those disqualified from membership of the House of Commons, other than under the House of Commons Disqualification Act 1975, are also disqualified from membership of the Assembly. This covers common law and other statutory disqualifications and has the effect of excluding from membership:

- a) persons under the age of 21 who are disqualified by the Parliamentary Elections Act 1995, section 7;
- b) aliens who are disqualified at common law and by virtue of the Act of Settlement 1700, section 3, as amended by the British Nationality Act 1981, Schedule 7. Irish or Commonwealth citizens are not regarded as aliens for this purpose. Section 17(2) also excepts EU citizens who are resident in the UK;
- c) local authority employees in politically restricted posts, who are disqualified from candidature for election to the House of Commons by the Local Government Officers (Political Restrictions) (Amendment) Regulations 1998 (SI 1998/3116), Schedule 1 para 1(a);
- d) persons who are mentally ill and who are disqualified at common law. The procedure for the vacation of their seats is specified in section 141 of the Mental Health Act 1983;
- e) persons in respect of whom a bankruptcy restrictions order has effect are disqualified under section 426A of the Insolvency Act 1986;
- f) persons guilty of corrupt or illegal practices at Parliamentary elections are disqualified under the Representation of the People Act 1983;
- g) convicted prisoners serving a sentence of more than one year's detention (or an indefinite sentence) in the UK or Ireland, who are disqualified by the Representation of the People Act 1983; Section 16(3) extends this disqualification to prisoners serving a sentence of more than one year's detention in any EU member State.

80. Members of the House of Lords are disqualified from being members of the House of Commons, but section 17(1) lifts these disqualifications in relation to membership of the Assembly.

81. Anyone who holds office as a Lord Lieutenant, Lieutenant or High Sheriff for any area in Wales is disqualified from membership but only for any constituency or electoral region wholly or partly included in that area.

### **Section 17: Exceptions and relief from disqualification**

82. Section 17 provides for certain persons to be exempt from certain of the provisions in section 16 disqualifying certain persons from membership of the Assembly.

83. A citizen of the European Union resident in the UK is not disqualified from membership of the Assembly under section 3 of the Act of Settlement 1700. Such persons would otherwise be disqualified under section 16(2).

84. Subsection (3) permits the Assembly, by resolution, to disregard the disqualification (or alleged disqualification) of a person on any ground falling within section 16(1) or section 16(4). To do so it must consider that the grounds for disqualification have been removed and that it is proper to disregard the disqualification.

85. Any Assembly resolution to disregard a disqualification under subsection (3) is not to affect any proceedings under Part 3 of the Representation of the People Act 1983, as applied by an Order under section 13. Nor can such a resolution enable the Assembly to disregard any disqualification established in proceedings under section 19 (which permits an action to be raised in the High Court seeking a declaration that a person who has been returned as an Assembly member is disqualified).

### **Section 18: Effect of disqualification**

86. This section sets out the consequences of disqualification in relation both to persons who are disqualified before they are returned as Assembly members, and to members who become disqualified during their term of office

87. If a person is returned as an Assembly member and that person is disqualified from being an Assembly member, either generally or in relation to the particular constituency or region, that return is void and the seat is vacant. A seat also becomes vacant where a person has been validly returned, but then becomes disqualified. These provisions are subject to the power of the Assembly to give relief from disqualification under section 17.

88. Subsections (5), (6) and (7) make special provision as to Assembly members who are detained in mental institutions or are declared bankrupt.

89. Subsections (6) and (7) provide that where the provisions in subsection (5) apply, the disqualified member's seat will not be vacated immediately and therefore, they do not cease to be a member of the Assembly until the seat is vacant. However, in the meantime, the member cannot participate in any proceedings of the Assembly, and the Assembly may resolve to withdraw other rights and privileges.

90. Subsection (8) protects the validity of any Assembly proceedings where a member is or becomes disqualified.

### **Section 19: Judicial proceedings as to disqualification**

91. This section provides for a procedure before the High Court for establishing whether an Assembly member is disqualified or has been disqualified from membership. It is similar to the procedure before the Judicial Committee of the Privy Council provided in relation to disqualification from membership of the House of Commons by section 7 of the House of Commons Disqualification Act 1975, and to the procedure before the Court of Session in relation to disqualification from the Scottish Parliament under section 18 of the Scotland Act 1998.

92. Subsection (1) provides that a person who claims that a member of the Assembly is, or has (since being elected) been, disqualified may apply to the High Court for a declaration to that effect (i.e. a court order which establishes and declares that to be the case). No declaration may be made, however, on grounds which subsisted at the time of the election if an election petition is pending or has been tried in which the disqualification on those

grounds is or was an issue or if a resolution has already been passed by the Assembly under section 17(3) to the effect that the disqualification is to be disregarded.

93. An applicant to the court under this section must such give security for the costs of the proceedings as the court directs, up to a maximum sum of £5000 (the same maximum sum that an election court may order in relation to a Parliamentary election petition under Part 3 of the Representation of the People Act 1983). The maximum sum may be varied by order made by the Welsh Ministers (and which would be subject to annulment in pursuance of a resolution of the Assembly).

### ***Remuneration, oaths etc.***

#### **Section 20: Remuneration of Assembly members**

94. This section provides for the payment of salaries and allowances to current Assembly members, and for the payment of pensions, gratuities and allowances to former members and office-holders.

95. Subsection (1) imposes a duty on the Assembly to provide for the payment of salaries to Assembly members. The Assembly is free to determine the amount of any salary.

96. Subsection (2) permits the Assembly to provide for the payment of allowances to Assembly members. It is for the Assembly to decide what allowances are payable.

97. Subsection (3) allows the Assembly to make provision for the payment of pensions, gratuities or allowances to former Assembly members, and to the former holders of certain offices (such as the Presiding Officer and Deputy Presiding Officer) even though they may still remain Assembly members.

98. Subsection (4) permits the Assembly to include in any provision under subsection (3) provision for contributions or payments towards pensions, gratuities and allowances. The Assembly can also make arrangements for the establishment and administration of one or more pension schemes. It can do this through the Assembly Commission or by such other means as the Assembly decides.

99. Payments of salaries, allowances and pensions, etc. to current and past Presiding and Deputy Presiding Officers are to be charged on the Welsh Consolidated Fund (so that payment will not need to be authorised annually by the Assembly).

100. Provision for payments under this section may be made either by the Assembly's standing orders or by Assembly resolution and may also be the subject of an Assembly Measure under Part 3 of the Act. Functions may be conferred on the Assembly Commission.

101. Paragraph 12 of Schedule 11 provides for pay etc, determinations made under sections 16 and 18 of the Government of Wales Act 1998 to continue in force post-repeal of those section as if they had been made under this section.

#### **Section 21: Limit on salaries of members**

102. This section requires the Assembly to reduce the salary of any Assembly member who also receives a salary as a Member of Parliament or a Member of the European Parliament. The amount by which the salary is reduced is a matter for the Assembly. Expenses paid to Members of the House of Lords do not give rise to a reduction since they are not a salary. The reduction must be either of a particular proportion of the Assembly member's salary, or the whole, or a proportion of the other salary or some other amount.



103. Provision for the reduction may be made either by the Assembly's standing orders or by Assembly resolution and may also be the subject of an Assembly Measure under Part 3 of the Act. Functions may be conferred on the Assembly Commission.

#### **Section 22: Remuneration: Supplementary**

104. This section makes supplementary provisions about the remuneration of Assembly members. These include requiring the Assembly to publish annually information on the total amount paid, and the amounts paid to individual members, by way of salary and allowances, and also requiring the Assembly Commission, if it has had conferred on it the function of determining the levels of salaries, allowances, pensions and gratuities, to publish any determinations it makes as soon as is reasonably practicable.

#### **Section 23: Oath or affirmation of allegiance**

105. Every Assembly member is required by this section to take an oath of allegiance or to make a corresponding affirmation. Standing orders must specify the person before whom the oath is to be taken or the affirmation made. If an Assembly member has already, since being returned as a member at the last election, taken the oath of allegiance (or affirmed) in the capacity of a Welsh Minister or Counsel General (see section 55) then the oath or affirmation need not be repeated.

106. Until a member has taken the oath (or affirmed) that member may not take part in any proceedings of the Assembly other than those at which the oath is taken (or affirmation made) or earlier proceedings to elect a Presiding Officer or Deputy Presiding Officer. Neither may any salary, allowances, pension or gratuity be paid to the member.

#### **Section 24: Assistance to groups of Assembly members**

107. This section requires the Assembly Commission to make payments to (or in respect of) political groups, where the Assembly has so determined, in order to assist Assembly members belonging to those groups to perform their functions as Assembly members. Corresponding provision is made in section 34A of the Government of Wales Act 1998 (as inserted by section 158(1) of the Political Parties, Elections and Referendums Act 2000).

108. Any determination by the Assembly that political groups should receive such payments, and fixing the amount which each is to receive, must, in order to have effect, be supported by at least two-thirds of the Assembly members voting.

109. Standing orders must provide the means of determining to which group, if any, a member belongs. They can require a political group to have a minimum number of Assembly Members belonging to it before it is recognised as such.

110. Standing Orders must provide for publication of every determination under this section and of information about sums paid to political groups during each financial year.

#### ***Presiding Officer and administration***

#### **Section 25: Presiding Officer etc.**

111. This section provides for the election by the Assembly, at its first meeting after each general election, of a Presiding Officer and a Deputy Presiding Officer. Unless the Assembly by a two-thirds majority of those voting resolves otherwise, the Presiding Officer and the Deputy Presiding Officer must not both belong to the same political group nor must they both be members of political groups with an executive role (i.e. groups to which Ministers belong).

112. The Presiding Officer's functions under this Act include:

Section 10(4)	Fixing the date of an election in the event of a constituency vacancy.
Section 11(2)	Receiving notification of the filling of a regional member vacancy.
Section 15	Receiving notification of a member's resignation.
Section 24(5)	Deciding questions arising under the standing orders about the political group (if any) to which a member belongs.
Section 27(2)(a)	Membership of the National Assembly for Wales Commission ("the Assembly Commission").
Section 29(10)	Deciding questions arising under provision made in compliance with section 29 regarding the composition of committees.
Section 38(5)(a)	Receiving notification of the issue of a direction by a Welsh Minister or the Counsel General to a current or former member of staff of the Welsh Assembly Government (or person with an equivalent status) that the person need not give evidence or produce documents to the Assembly, its committees or sub-committees.
Section 40(1)	Administering the oath or affirmation to anyone giving evidence in Assembly proceedings.
Section 46(5)	Designating a person to act as First Minister (on the recommendation of the Welsh Ministers) if the First Minister's office is vacant, the First Minister is unable to act or the First Minister has ceased to be an Assembly Member.
Section 47(4)	Recommending to Her Majesty the Assembly's choice

	as First Minister.
Section 97(3)	Stating whether the provisions of a proposed Assembly measure are, in the view of the Presiding Officer, within the Assembly's legislative competence.
Section 110(3)	Stating whether the provisions of an Assembly Bill are, in the view of the Presiding Officer, within the Assembly's legislative competence.
Schedule 2, Paragraph 1(1)	Membership of the Assembly Commission.
Schedule 2, Paragraph 7(a)	Such functions as the Assembly Commission delegates to the Presiding Officer.
Schedule 2, Paragraph 11(2)	Presiding at meetings of the Assembly Commission.
Schedule 8, Paragraph 8(4)(a)	Certifying to the Assembly that the Auditor General is unable to certify or report on accounts (or statements) in person.

113. The Presiding Officer holds office until a new Presiding Officer is elected under subsection (1). The effect is that the Presiding Officer does not cease to hold office merely because of the dissolution of the Assembly before a Welsh general election. The Deputy Presiding Officer, on the other hand, holds office only until dissolution of the Assembly. Either may, however, resign, and each would also cease to hold office upon ceasing to be an Assembly member otherwise than by virtue of a dissolution (e.g. by resignation as an Assembly member) or by being removed from office by resolution of the Assembly.

114. The Presiding Officer's functions may be exercised by the Deputy Presiding Officer if the Presiding Officer's office is vacant, or if the Presiding Officer is for any reason unable to act and the Presiding Officer may, subject to standing orders, authorise the Deputy Presiding Officer to exercise functions of the Presiding Officer. However, the requirement in paragraph 11 of Schedule 2 that the Presiding Officer presides over meetings of the Assembly Commission may not be delegated. If there is no Presiding Officer in post, or if the Presiding Officer is unable to act, then it is for the Assembly Commission to appoint another of its members to preside over its meetings.

115. Under subsection (12) the Assembly may include in its standing orders provision for another person to exercise the Presiding Officer's functions in the event that both the Presiding Officer and Deputy Presiding Officer have either vacated their offices or are unable to act, but again this provision does not extend to the function of presiding over Assembly

Commission meetings, which is governed by paragraph 11 of Schedule 2 (as set out above). Standing orders are to determine how such a person is to be chosen.

116. Standing orders may regulate the participation in Assembly proceedings of the Presiding Officer and the Deputy Presiding Officer (and anyone exercising the functions of the Presiding Officer by virtue of provision made under subsection (12)).

117. No defect in the appointment of a person as Presiding Officer or Deputy Presiding Officer (or under provision made under subsection (12)), is to affect the validity of any act of that person in that capacity.

**Section 26: Clerk of the Assembly**

118. This section requires the Assembly Commission to appoint a person to be Clerk of the Assembly. The Commission may authorise any other member of the Assembly staff can act in place of the Clerk if the Clerk’s office is vacant or if the Clerk is for any reason unable to act. The Clerk can also authorise any other member of the staff of the Assembly to exercise functions on behalf of the Clerk.

119. The Clerk’s functions under this Act include:

Section 31(8)	Responsibility for publishing standing orders.
Section 38(1)	Giving notice to persons who are by virtue of Section 37 required to attend the Assembly, its committees or sub-committees or to produce documents.
Section 99(3)	Receiving notification from the Counsel General or from the Attorney General that a proposed Measure is not to be referred to the Supreme Court.
Section 100(2)(a)	Notifying the Counsel General and the Attorney General that the Assembly has resolved to reconsider a proposed Measure which has been referred to the Supreme Court and in relation to which the Supreme Court has made a reference to the European Court of Justice.
Section 101(5)	Receiving notification from the Secretary of State that no order is to be made prohibiting the Clerk from submitting a proposed Measure for approval by Her Majesty in Council.
Section 102(1)	Submission of proposed Assembly Measures which have been passed by the Assembly for approval by Her

*These Notes refer to the Government of Wales Act 2006 (c. 32)  
which received Royal Assent on 25 July 2006*

	Majesty in Council.
Section 102(5)	Recording the date of the approval by Her Majesty in Council of an Assembly Measure on the text of the Measure.
Section 102(6)	Publishing the Order in Council by which an Assembly Measure is approved.
Section 112(3)	Receiving notification from the Counsel General or from the Attorney General that an Assembly Bill is not to be referred to the Supreme Court.
Section 113(2)(a)	Notifying the Counsel General and the Attorney General that the Assembly has resolved to reconsider an Assembly Bill which has been referred to the Supreme Court and in relation to which the Supreme Court has made a reference to the European Court of Justice.
Section 114(5)	Receiving notification from the Secretary of State that no order is to be made prohibiting the Clerk from submitting an Assembly Bill for Royal Assent.
Section 115(1)	Submitting Assembly Bills for Royal Assent, receiving notification of Royal Assent
Section 115(5)	Recording the date of Royal Assent on the text of Acts of the Assembly.
Section 115(6)	Notifying the Assembly of the date of Royal Assent to an Act of the Assembly.
Section 138	Principal accounting officer for the Assembly Commission.
Schedule 2, Paragraph 7(b)	Such functions as the Assembly Commission delegates to the Clerk.

## **Section 27: Assembly Commission**

120. This section provides for the establishment, membership and functions of the National Assembly for Wales Commission (“the Assembly Commission”) which provides the Assembly (or arranges for the Assembly to be provided) with the staff, property and services required for the Assembly’s purposes, and which, by virtue of section 41(1) represents the Assembly in legal proceedings.

121. The Assembly Commission follows the pattern of arrangements in place at Westminster and in Scotland. The Assembly itself is not a body corporate and the establishment of the Assembly Commission, which is, enables administrative and legal arrangements to be made for employing staff, holding property, purchasing services, and generally entering into contracts for the benefit of the Assembly. It will be required to comply with any directions given by the Assembly.

122. The Commission will consist of the Presiding Officer and four other members, who must all be Assembly members. Standing orders must make provision about the appointment of the four other members and these provisions must, so far as it is reasonably practicable to do so, secure that none of those members belong to the same political group. Detailed arrangements for the Assembly Commission are set out in Schedule 2.

123. The Assembly will have power to pass Assembly Measures under Part 3 of the Act conferring further functions on the Assembly Commission in order to facilitate the exercise of the Assembly’s own functions.

124. Part 5 of the Act deals with how the Assembly Commission is to be financed.

### ***Committees, etc.***

## **Section 28: Committees and sub-committees**

125. This section allows the Assembly by its standing orders, to make provision for the establishment of committees, and for such committees to establish sub-committees. Only Assembly members may be members of committees or sub-committees.

126. Standing orders must make provision about the membership, chairing and procedure of committees and sub-committees and may make provision for excluding an Assembly member from the proceedings of a committee or sub-committee if the Assembly member is not a member of the committee or sub-committee.

127. Subsection (5) provides that the validity of any proceedings of a committee or sub-committee is not affected by vacancies in membership, defects in appointment, or non-compliance with standing orders relating to procedure.

## **Section 29: Composition of committees**

128. Section 28(3) provides that standing orders must, among other things, contain provision about the membership of committees. Such provision must meet the requirements of section 29.

129. Section 29(2) requires the provision in standing orders to secure that appointments to the places on each committee are, if possible, to be determined by a resolution of the Assembly which secures that the membership of that committee reflects, so far as is reasonably practical, the overall representation of political groups in the Assembly. The standing orders must also secure that, if such a resolution is passed on a vote, it will only have effect if two – thirds or more of the Assembly members voting support it.

130. Section 29(3) requires the provision in standing orders to secure that, in the event that the membership of a committee is not determined by a resolution of the Assembly which meets the criteria in section 29(2) (a) and (b), then appointments to each committee are made in accordance with the provisions of sub-sections (3) to (7), which are designed to ensure that places on each committee are allocated to political groups to reflect their overall representation in the Assembly

131. Under those provisions, the allocation of places on committees between different political groups must be made according to the d'Hondt formula, (another example of which is that used in section 9 in order to determine the allocation of electoral region seats in the Assembly for each region). The d'Hondt formula is also used in section 29 of the Northern Ireland Act 1998 to allocate committee chairs and deputy chairs. The formula is set out below.

132. No requirements (other than to make provision in standing orders) are imposed in relation to the composition of sub-committees, the chairing or the procedure of committees or sub-committees. Standing orders may make whatever provision is appropriate in relation to these matters.

133. The political group (if any) to which each Assembly member belongs is a matter to be determined by standing orders (section 24(5)) and questions arising as to the application of standing orders made in pursuance of this section are to be decided by the Presiding Officer (subsection (10)).

134. The first place on each committee is allocated to the political group with the largest number of Assembly members.

135. The second place is then allocated by comparing the figure X produced in relation to each political group by the formula:

$$X = A/(B + 1)$$

where:

A = the number of seats in the Assembly currently held by members of the political group; and

B = the number of places on the committee that are already allocated to members of that political group.

136. After the first place is allocated to the largest political group X will be equal to A /2 for that group and will be equal to A for all the others. The second place on the committee is to be allocated to the political group which has the highest value for X at this stage.

137. B is then adjusted for the party to which the second place has been allocated and X is re-calculated for each political group and the revised value of X for each group is compared. Once more the political group with the highest value of X is allocated the next place on the committee.

138. The process is repeated until all the places on the committee have been filled. (The size of committees is not regulated by this section and is a matter to be decided in accordance with standing orders.)

139. Subsection (8) requires standing orders to specify how ties (i.e. cases where the calculation produces the same figure for X for two or more political groups) are to be resolved.

140. Provision must, under subsection (9), be made in the standing orders for securing, so far as is reasonably practicable having regard to the total number of committee places available, that a place on at least one committee is available for every Assembly member who does not belong to a political group, and that the total number of committee places allocated to each political group is at least equal to the number of Assembly members belonging to that group.

### **Section 30: Audit Committee**

141. While generally it will be for the Assembly to decide what committees it wishes to establish, this section requires the Assembly to have an Audit Committee (or Pwyllgor Archwilio) in order to discharge certain statutory functions under this Act (such as taking evidence from any of the persons mentioned in section 143(3) if requested to do so by the House of Commons Committee of Public Accounts) and other legislation (such as the Public Audit (Wales) Act 2004). The section allows the Assembly to rename the Audit Committee and provides that, in the event that the Assembly does so, references to the Audit Committee in enactments, instruments or documents are to be read as if they referred to the renamed committee.

142. This section requires standing orders to specify how many members the Audit Committee is to have. Provision made in standing orders in accordance with section 29, to aim to secure that the political composition of committees reflects the political composition of the Assembly, will apply to the Audit Committee. Seats on the Audit Committee may not be allocated to the First Minister (or anyone acting as such), any Welsh Minister or Deputy Welsh Minister or to the Counsel General (or anyone acting as such), and it may not be chaired by an Assembly member belonging to the largest government party.

### ***Proceedings etc.***

### **Section 31: Standing orders**

143. This section requires Assembly proceedings (which include the proceedings of committees and sub-committees) to be regulated by standing orders.

144. Amongst matters for which standing orders must, under provisions of the Act other than this section itself, expressly make provision are the following:

Section 10(8)	Determining the date on which a constituency vacancy is treated as occurring.
Section 23(2)	Specifying the person before whom Assembly members are to take the oath or make the affirmation of allegiance.
Section 27(3)	Appointment of the four members (other than the Presiding Officer, who is appointed automatically) of the Assembly Commission.
Section 28(3)	Provision about the membership, chairing and procedure of the



	Assembly's committees and their sub-committees – note that such provision must, in relation to committees, meet the requirements of section 29.
Section 36	Provisions in relation to registration and declaration of members' interests, prohibition of paid advocacy and for defining (or providing for the definition by code or protocol) the respective roles and modes of description of constituency and regional Assembly members.
Section 98	Procedures for scrutinising proposed Assembly Measures.
Section 111	Procedures for scrutinising Assembly Bills.

145. The Act also empowers (but does not oblige) standing orders to be made covering, amongst others, the following matters:

Section 20(6)(a)	Provisions for remuneration of Assembly members (including provisions conferring functions on the Assembly Commission).
Section 21(3)(a)	Provisions for limiting the salaries of Assembly members (including provisions conferring functions on the Assembly Commission).
Section 25	Provisions for the exercise of the Presiding Officer's functions by the Deputy Presiding Officer, or by any other person where both the Presiding Officer and Deputy Presiding Officer are unable to act or their offices are vacant; and participation by the Presiding Officer and Deputy Presiding Officer in Assembly proceedings.
Section 28(1)	Provision for the appointment of committees to the Assembly, and for those committees to have the power to appoint sub-committees.
Section 28(4)	Exclusion from the proceedings of Assembly committees and their sub-committees of Assembly members who are not

	members of those committees and sub-committees.
Section 31	Exclusion of members from Assembly proceedings, and withdrawal of members' rights and privileges.
Section 34	Participation of the Counsel General (if not an Assembly member) in Assembly proceedings.
Section 37(7)(b)	Power of committees or sub-committees to call for witnesses and documents.
Section 40(1)	Administration of the oath or affirmation to witnesses in Assembly proceedings.
Section 40(4)	Payment of allowances and expenses to witnesses in Assembly proceedings and those producing documents for Assembly proceedings.
Section 53(7)(a)	Remuneration of Welsh Ministers, Deputy Welsh Ministers and the Counsel General (including provisions conferring functions on the Assembly Commission).

146. Because of the change in the structure and functions of the Assembly the standing orders relating to the Assembly constituted under GoWA will not be suitable for use in relation to the Assembly constituted under this Act. Consequently, new standing orders will need to be provided in readiness for use by the Assembly at its first meeting after the May 2007 election.

147. Paragraph 20 of Schedule 11 sets out how the new standing orders are to be made. In summary, the new standing orders must be made by the Secretary of State by no later than 31<sup>st</sup> March 2007. In making the standing orders, the Secretary of State must give effect to proposals submitted to the Secretary of State by the Assembly (as currently established) no later than 28<sup>th</sup> February 2007, provided that those proposals have been approved by a two-thirds voting majority in the Assembly. As a minimum, the standing orders have to include the mandatory provisions required by the Act. Both the standing orders made by the Secretary of State, and the Assembly's proposals as to what provisions they should include, must be made in both English and Welsh.

148. The standing orders are to have effect as the standing orders for the reconstituted Assembly at and from its first meeting after the ordinary election in May 2007, unless and until they are remade or revised by the Assembly in accordance with section 31(7), which requires any changes to the standing orders to be approved by a two-thirds voting majority in the Assembly.

149. Standing orders must make provision for preserving order in Assembly proceedings, including provision for preventing conduct that could constitute a criminal offence or

contempt of court and provision for a *sub judice* rule to prevent matters which are the subject of ongoing court proceedings to be raised in questions or debate.

150. Standing orders may include provision for excluding Assembly members from proceedings and for withdrawing from an Assembly member rights and privileges of membership.

151. Standing orders must make provision for Assembly proceedings normally to be held in public, but allows standing orders to specify circumstances where committee proceedings may be in private. They may set out conditions with which members of the public who are attending Assembly proceedings must comply, and can provide for the exclusion of a member of the public who does not comply with those conditions.

152. Standing orders must provide for those Assembly proceedings that are held in public to be reported, and for reports to be published as soon as practicable.

153. The Assembly may, by resolution supported by at least two-thirds of the members voting, remake or revise the standing orders. The Clerk of the Assembly must publish standing orders from time to time.

### **Section 32: Participation by UK Ministers etc.**

154. This section entitles the Secretary of State for Wales to participate, but not to vote, in proceedings of the Assembly, and to have access to documents relevant to those proceedings. Standing orders may make provision for the participation of other Ministers of the Crown and of civil servants in proceedings, and for them to have access to documents and information relevant to their participation. Again there is to be no entitlement to vote.

### **Section 33: Consultation about UK Government's legislative programme**

155. This section requires the Secretary of State for Wales, as soon as is reasonably practicable after the beginning of each Parliamentary session, to consult the Assembly about the UK Government's legislative programme, except to the extent that it appears to the Secretary of State that consultation on a particular Bill is inappropriate. As part of such consultation, the Secretary of State must participate in a plenary session of the Assembly at least once in the session. The Secretary of State can participate by actually attending the plenary session, or by video link. Where, after the beginning of the session, it is decided that a Bill should be introduced into Parliament and that Bill has not been included in the Secretary of State's initial consultation with the Assembly, then the Secretary of State must consult the Assembly about it (unless it appears to the Secretary of State to be inappropriate to do so).

### **Section 34: Participation by Counsel General**

156. Section 49 makes provision about the appointment of the Counsel General to the Welsh Assembly Government. It does not require the Counsel General to be an Assembly member. This section makes provision about the participation of the Counsel General, if not an Assembly member, in the proceedings of the Assembly, including committees and sub-committees.

157. The section also allows the Counsel General to decline to answer questions or produce documents about the operation of the criminal prosecution system in any particular case, if the Counsel General considers that to do so might prejudice criminal proceedings in the case or otherwise be contrary to the public interest.

### **Section 35: Equality of treatment**

158. This section requires the Assembly, in the conduct of its proceedings, to give effect, so far as is both appropriate in the circumstances and is reasonably practicable, to the principle that the English and Welsh languages should be treated on a basis of equality.

159. It also requires the Assembly to make appropriate arrangements with a view to securing that Assembly proceedings are conducted with due regard to the principle that there should be equality of opportunity for all people.

### **Section 36: Integrity**

160. This section requires standing orders to make various kinds of provision to safeguard standards of integrity in relation to Assembly proceedings, namely:

- a) for Assembly members to be required to register certain interests defined by standing orders in a compulsory public register of Assembly members' interests;
- b) for an Assembly member who has a financial or other interest, as defined in standing orders, in a matter to which Assembly proceedings relate, to declare that interest before taking part in those proceedings;
- c) for preventing or restricting the participation in proceedings of an Assembly member who has an interest (as defined in standing orders) in the matter to which those proceedings relate;
- d) prohibiting Assembly members, from advocating or initiating any cause or matter, or urging another member to do so, in return for a payment or benefit in kind.

161. A failure to comply with these provisions of standing orders constitutes a criminal offence which can be punished, on summary conviction, with a fine not exceeding level 5 on the standard scale (at present up to £5,000). Consent of the Director of Public Prosecutions is required before a prosecution can be brought.

162. The provisions of standing orders under this section are to apply to the Counsel General even if not an Assembly member.

163. The Assembly will be able to pass Assembly Measures under Part 3 of the Act on matters relating to registration of members' interests.

164. Subsection (6) requires standing orders to make provision, either directly or by a code or protocol, about the different roles and responsibilities of Assembly constituency and regional members.

165. Assembly regional members are to be prohibited from describing themselves in a way which suggests that they are Assembly constituency members, and vice versa.

### ***Witnesses and documents***

### **Section 37: Power to call**

166. This section, together with the associated sections 38, 39 and 40, provides the Assembly with powers to require witnesses to appear to give evidence before, or to produce documents to the Assembly, its committees or their sub-committees.

167. The Assembly may, under subsection (1), require any person to attend Assembly proceedings to give evidence, or to produce documents which are in that person's possession or control, concerning any matter relevant to the exercise by the Welsh Ministers of any of their functions and provided the person in question is involved in the exercise of functions or the carrying on of activities in relation to Wales. It is anticipated that persons will almost

always attend or produce documents to the Assembly voluntarily, and that this power will only need to be used very rarely.

168. “Assembly proceedings” includes any proceedings of the Assembly, its committees, or sub-committees.

169. “Document” is defined by section 40(6) as anything in which information is recorded in any form. It would therefore include, e.g., a video recording, a computer hard drive, a floppy disk, or CD-Rom. Section 40(6) also provides that a person is taken to comply with a requirement to produce a document on production of a copy of, or an extract of the relevant part of, the document. The information recorded in the document must be produced in a visible and legible form.

170. “Person” is intended to have the same meaning as in the Interpretation Act 1978, i.e. it applies to public bodies and officers, as well as to private bodies such as companies, trusts etc..

171. The Assembly cannot impose a requirement under subsection (1) on a current or former Minister of the Crown, or on anyone serving, or who has served, in a Minister of the Crown’s department, in relation to the exercise of the functions of a Minister of the Crown.

172. Under subsection (4) current full-time judges are immune from being required to give evidence or produce a document under subsection (1). Other current and former members of courts (e.g. lay magistrates and Recorders), and current or former members of tribunals, are immune only in relation to the exercise of their functions as such.

173. Subsections (5) and (6) make special provision in relation to persons who are current or former members of staff of the Welsh Assembly Government, or are current or former secondees. Where such a person is required to give evidence or produce documents under subsection (1), then any of the Welsh Ministers, the First Minister or the Counsel General can issue a direction that the person summoned need not comply, and that a specified replacement is to comply instead. This means that it is for the Welsh Ministers to decide which of their staff should appear before the Assembly or its committees. Welsh Ministers will ultimately be answerable to the Assembly for their decisions to direct that a different member of staff from the one identified by the Assembly is to appear.

174. The power under subsection (1) may be exercised by the Audit Committee or, with the authority of the Assembly, by any other committee or sub-committee.

175. No-one is obliged by this section to answer any question or produce any document which they would be entitled to refuse to answer or produce in court proceedings in England and Wales, for example under the privilege against self-incrimination or on grounds of legal privilege.

176. Subsection (9) entitles prosecutors to decline to answer questions or produce documents about particular criminal prosecutions if authorised by the appropriate officer on the grounds that to do so might prejudice criminal proceedings in that case, or would be contrary to the public interest. The appropriate officer for the purpose of subsection (9) is the Counsel General in cases where the criminal proceedings were instituted by or on behalf of the Welsh Ministers, the First Minister or the Counsel General and in all other cases is the Attorney General.

### **Section 38: Notice**

177. This section sets out the procedure by which the Assembly exercises its power under section 37(1) to require persons to attend and give evidence at proceedings, or produce documents.

178. Subsections (1) and (2) require the Clerk of the Assembly to give written notice to those who are made subject to a requirement under section 37(1), specifying the following matters:

- a) in all cases, whether they are being required to attend to give evidence or produce documents to the Assembly itself, or to a specified committee or sub-committee;
- b) in cases of witnesses required to give evidence, the time and place at which they must attend, and the subjects about which they are required to give evidence;
- c) in cases of people required to produce documents, the documents which they need to produce, the deadline for producing them, the person to whom they are to produce them and the subject concerning which the documents are required.

179. Notice is to be sent by registered or recorded delivery post. In the case of an individual, it is to be sent to that person's usual or last known address or to an address for service, where one has been given. In any other case (e.g. a limited company, a health board or another public body) the notice is to be sent to the person's registered or principal office.

180. Subsection (5) provides that where the Welsh Ministers, the First Minister, or the Counsel General issue a direction under section 37(6) that a particular person is not to attend or produce documents in response to a requirement under section 37(1), then the person issuing the direction must give notice of having done so. Where the requirement to give evidence or produce documents was imposed for the purposes of the Assembly, notice of a direction under section 37(6) must be given to the Presiding Officer. In other cases, notice of the direction must be given to the chair of the committee or sub-committee for the purposes of which the requirement was imposed.

### **Section 39: Offences**

181. Subsection (1) of this section makes it a criminal offence for a person to whom a notice under section 38(1) has been given to:

- a) refuse, or fail, without reasonable excuse, to attend proceedings as required by the notice;
- b) refuse, or fail, without reasonable excuse, to answer any question concerning the subjects specified in the notice;
- c) refuse, or fail, without reasonable excuse, to produce a document which the notice required to be produced; or
- d) intentionally alter, suppress, conceal or destroy any such document.

182. Subsection (1) is subject to the various grounds on which a person may decline to answer a question or produce a document (sections 34(3) and 37(5), (6), (8) and (9)).

183. If a person charged with an offence under subsection (1)(a), (b) or (c) can adduce evidence of a reasonable excuse for the refusal or failure, then it is for the prosecution to prove that the person did not have such an excuse.

184. The penalty in the case of a person found guilty of an offence under subsection (1) is a fine not exceeding level 5 on the standard scale (currently £5,000) or of imprisonment for

up to 51 weeks, or both. (Under transitional provisions in paragraph 21 of Schedule 11 the maximum term of imprisonment will be three months until section 281(5) of the Criminal Justice Act 2003 is brought into force.) Offences are triable summarily.

185. Certain senior officers of a body corporate (e.g. a company) are personally liable (in addition to the body corporate itself) to prosecution where they have consented to or connived at the commission of an offence or the offence is attributable to their neglect.

#### **Section 40: General**

186. Under this section the Presiding Officer, or any other person authorised by standing orders, may require anyone giving evidence in Assembly proceedings to take an oath (or make an affirmation), and to administer such an oath or affirmation. This section applies both to a person who has been required to attend and to a person who attends by invitation.

187. Subsection (2) creates an offence where a person who has been required by notice under section 38(1) to attend to give evidence in Assembly proceedings refuses to take the oath or make an affirmation when required to do so. Anyone found guilty of such an offence will be liable, on summary conviction, to a fine not exceeding level 5 on the standard scale (currently £5,000) or up to 51 weeks' imprisonment (again, subject to a transitional provision limiting the term to three months until section 281(5) of the Criminal Justice Act 2003 comes into force) or both.

188. Standing orders may provide for the payment of expenses and allowances to people who attend to give evidence to, or produce documents to, the Assembly, its committees and their sub-committees, whether or not they were required to do so by a notice under section 38(1). Standing orders can confer functions in relation to these matters on the Assembly Commission.

#### ***Legal issues***

#### **Section 41: Proceedings by or against Assembly etc.**

189. This section makes provision in relation to legal proceedings by and against the Assembly.

190. Where proceedings are brought by or against the Assembly these are to be instituted by or against the Assembly Commission. Proceedings by or against the Presiding Officer, the Deputy Presiding Officer or any member of the staff of the Assembly are to be brought by or against the Assembly Commission on their behalf.

191. Where proceedings are brought against the Assembly the court may not grant a mandatory, prohibiting or quashing order or an injunction or make an order for specific performance. It may instead make a declaration.

192. A similar restriction applies to such remedies in legal proceedings against any Assembly member, the Presiding Officer or Deputy Presiding Officers, members of the staff of the Assembly or the Assembly Commission, if the effect of granting such a remedy would be to give relief against the Assembly which could not be given against the Assembly itself. This is intended to prevent the protection for the Assembly being circumvented by taking action instead against individual members or office-holders. The approach is similar to that taken in section 21(2) of the Crown Proceedings Act 1947.

193. The protection would not extend to proceedings taken against Assembly members arising for example out of their constituency work, since remedies granted in such proceedings would not be equivalent to remedies granted against the Assembly itself.

194. The effect of the equivalent provision in Scotland (section 40(4) of the Scotland Act 1998) was considered by the Scottish Court of Session in *Whaley v Lord Watson of Invergowrie* 2000 SLT 475 where it was held that it did not prevent an interdict (equivalent to an injunction) being granted against a MSP from introducing a Bill on the grounds that he would thereby be breaching some provision of the Scotland Act 1998 (Transitory and Transitional Provisions) (Members' Interests) Order 1999 (SI 1999/1350). As the Lord President stated at page 482:

*“... the subsection does not bar a remedy against a member simply because it may have some consequential effects on the working of the Parliament: the bar applies only where the interdict against the member would have the effect of granting relief, i.e. a legal remedy, against the Parliament.”*

195. Subsection (5) provides that the prohibition on certain remedies is not limited to final orders. So, for example, it would prohibit the granting of an interim injunction against the Assembly (or the Assembly Commission, in so far as it is acting on the Assembly's behalf).

#### **Section 42: Defamation**

196. This section replicates the provisions in section 41 of the Scotland Act 1998, rather than the more detailed provisions in section 77 of the Government of Wales Act 1998, which reflected the fact that the Assembly as a unitary corporate body had both legislative and executive functions. The protection afforded to the newly constituted Assembly by this section is intended to be the same as that afforded to the legislative and scrutinising arm of the current Assembly by the 1998 Act.

197. This section confers absolute privilege for the purposes of the law of defamation on any statement made in Assembly proceedings and on the publication of any statement under the authority of the Assembly.

198. The provision is intended to ensure that Assembly members are free to debate and the Assembly is free to report on matters of public interest without fear of an action for defamation being raised.

199. The privilege of freedom of speech is part of the law and custom of the UK Parliament. It is also reflected in Article 9 of the Bill of Rights 1688-9 which confers on “proceedings in Parliament” protection from being “impeached or questioned” in any court. No similar general privilege is conferred upon proceedings in the Assembly. However, this section and section 43 protect statements made in such proceedings and their publication against proceedings for defamation and contempt of court.

200. The regulation-making power in section 42(2) allows the Welsh Ministers to specify how it may be proved conclusively in legal proceedings that a statement was made in Assembly proceedings or published under the authority of the Assembly, and therefore attracts absolute privilege – for example, by the Clerk of the Assembly providing certification of the fact. The making of the regulations is subject to Assembly affirmative procedure.

201. The Act contains other provisions which make provision in relation to defamation.

202. The amendments made to the Defamation Act 1952 and the Defamation Act (Northern Ireland) 1955 by paragraphs 5 and 6 of Schedule 10 limit privilege in relation to defamation at elections of Assembly members.



203. Paragraph 40 of Schedule 10 amends paragraph 11(1)(c) of Schedule 1 to the Defamation Act 1996 to provide that the reports and statements of any commission, tribunal, committee or person appointed for the purposes of any inquiry by a Welsh Ministers or by the Counsel General attract qualified privilege subject to explanation or contradiction.

204. Paragraph 19 of Schedule 10 amends section 26(1) of the Public Order Act 1986 to protect reports of Assembly proceedings against offence under Part 3 of the 1986 Act relating to racial hatred.

### **Section 43: Contempt of court**

205. Assembly proceedings, unlike those of the UK Parliament, are subject to the law of contempt of court. No express provision is needed to make them so, because the law of contempt of court and particularly the strict liability rule in the Contempt of Court Act 1981 will apply automatically unless expressly disapplied.

206. This section disapplies the rule of strict liability for contempt of court in relation to publications made in or for the purposes of Assembly proceedings, or in certain reports of Assembly proceedings.

207. The strict liability rule is defined by section 1 of the Contempt of Court Act 1981 as that whereby conduct may be treated as a contempt of court regardless of intent to interfere with the course of justice in particular legal proceedings. In terms of section 2 of that Act the rule only applies to a publication which creates a substantial risk that the course of justice in active legal proceedings will be seriously impeded or prejudiced. Section 5 of the Act provides that the rule does not apply to publications made during a discussion in good faith of public affairs if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion.

208. This section is intended to ensure that the Assembly is not prevented from legislating on any matter merely because anything said or done in proceedings to consider an Assembly Measure, an Assembly Bill or subordinate legislation might be treated as a contempt of court under the “strict liability rule”. However, unlike section 42 of the Scotland Act 1998, the protection afforded by this section applies not just to proceedings relating to legislation, but to all proceedings of the Assembly, as currently does section 78 of the Government of Wales Act 1998. Section 31(2) requires standing orders to include provision “for preventing conduct which would constitute ... a contempt of court” and a *sub judice* rule.

### **Section 44: Corrupt practice**

209. The effect of the section is to make members and staff of both the Assembly and the Assembly Commission subject to liability for criminal offences under the Prevention of Corruption Acts 1889 to 1916. It does so by making both the Assembly and the Assembly Commission (by whom staff of the Assembly are employed) public bodies for the purposes of those Acts.

210. The Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916 are known together as the Prevention of Corruption Acts 1889 to 1916. The Acts create certain offences related to bribery and corruption of and by members, officers or servants of local authorities, government departments and other public bodies in connection with those bodies’ business.

211. The Welsh Ministers, Deputy Welsh Ministers, the Counsel General and their staff will also be covered by the Prevention of Corruption Acts 1889 to 1916 to the extent that Ministers of the Crown and Crown servants are covered.

## **PART 2: WELSH ASSEMBLY GOVERNMENT**

### ***Overview of Part 2***

212. Part 2 of the Act makes provision establishing the Welsh Assembly Government as a distinct entity in its own right, authorises Ministers to exercise statutory powers and places certain statutory duties on them. Ministers will discharge their responsibilities on behalf of the Crown.

### ***Ministers etc***

213. Sections 45-51 set out in detail the membership and appointment procedures of the Welsh Assembly Government. The members are the First Minister, who is appointed by Her Majesty on the nomination of the Assembly; the (other) Welsh Ministers and Deputy Ministers, who are appointed by the First Minister with Her Majesty's approval; and the Counsel General, who is appointed by Her Majesty on the recommendation of the First Minister, with the agreement of the Assembly. Ministers and Deputy Ministers (of whom together there may not be more than twelve) may be removed from office by the First Minister (or may resign) at any time. The First Minister may with the agreement of the Assembly recommend to Her Majesty at any time the removal of the Counsel General; the Counsel General may tender resignation to Her Majesty at any time. Sections 53-55 provide procedures for determining all these office-holders' remuneration, and for their taking an oath (or making an affirmation) on assuming office.

214. The Act makes detailed provision to cover circumstances:

- a) following a vote of no confidence in the Welsh Ministers (the First Minister remains in office until a successor is appointed, which must happen within the specified period of 28 days, but the other Welsh Ministers and Deputy Ministers are required to resign forthwith; the Counsel General remains in office until a new First Minister is nominated); or
- b) where the First Minister's office becomes vacant, the First Minister becomes unable to act or has ceased to be an Assembly Member (the Presiding Officer, acting on the recommendation of the other Welsh Ministers, designates another Assembly Member to exercise the functions of the office).

215. The Assembly Government will be supported by staff who (unlike the staff supporting the National Assembly itself) are civil servants (section 52).

### ***Exercise of Functions***

216. Under the Act, Ministers will exercise functions in their own right, rather than as delegates of the Assembly, and statutory functions will in future be expressed to be exercisable by the "Welsh Ministers", rather than conferred on the Assembly and then delegated. Any function conferred on the "Welsh Ministers" will be exercisable by the First Minister or any of the other Welsh Ministers individually (but not generally by the Counsel General, who will not have "portfolio" responsibilities); they will be assisted in the discharge of their responsibilities by the Deputy Ministers. Paragraphs 30-42 of Schedule 11 make detailed provision transferring the Assembly's existing (executive) set of functions, together with the associated property, rights and liabilities, to the Welsh Ministers, although Orders in Council may make alternative provision, for example transferring specific functions to the First Minister, the Counsel General, or the Assembly Commission, or leaving the function (particularly if it is of a predominantly legislative character) with the Assembly. Once the

new arrangements are in place following the May 2007 elections, Welsh Ministers may acquire further powers:

- a) by specific provision in future Acts of Parliament;
- b) by Transfer of Functions Orders (section 58 and Schedule 3 to the Act effectively re-enact s.22 and Schedule 3 of the 1998 Act, under which Transfer of Functions Orders have been made hitherto, and section 88 and Schedule 4 transfer the associated property, rights and liabilities attached to any such transferred function);
- c) by designation under s.2 of the European Communities Act 1972, in order to implement requirements of European law; or
- d) by specific provision in future Assembly Measures.

217. Sections 60-65, 69, 70-71 and 83 and 84 provide additional or supplementary powers enabling the Welsh Ministers to discharge their functions effectively. Most of these provisions derive from similar provisions in the 1998 Act, with the exception of section 60. Section 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. This does not reflect any specific provision of the 1998 Act although local authorities have similar powers under section 2 of the Local Government Act 2000 as does the Greater London Authority (in a slightly different form) under section 30 of the Greater London Authority Act 1999.

### ***Duties placed on Ministers***

218. Under the 1998 Act, the Assembly is required to establish a Partnership Council with Welsh local government, and establish close working or consultative relations with the voluntary sector and the business community respectively. Each of these duties will transfer to the Welsh Ministers under sections 72-75 of the Act, requiring the Assembly Government to establish stakeholder management relationships with these respective interests. In the same way, the 1998 Act places duties on the Assembly both to make arrangements with a view to securing that its functions are exercised with due regard to equality of opportunity, and to make a scheme setting out how it will promote sustainable development in the exercise of its functions. Sections 77 and 79 place analogous obligations on the Welsh Ministers, while section 78 places obligations on the Welsh Ministers in relation to the Welsh Language.

219. Sections 80, 81 and 82 set out limitations on the Welsh Ministers' powers deriving from international relations in the fields of Community Law, Human rights, and International Obligations. These carry forward the provisions of ss.106-108 of the 1998 Act, which place equivalent limitations on the Assembly.

## **DETAILED COMMENTARY ON SECTIONS IN PART 2**

### ***Government***

#### **Section 45: Welsh Assembly Government**

220. This section provides for the establishment of the Welsh Assembly Government, which comprises the First Minister (Prif Weinidog), the Welsh Ministers (Gweinidogion Cymru), the Counsel General to the Welsh Assembly Government (Cwnsler Cyffredinol i Lywodraeth Cynulliad Cymru) and the Deputy Welsh Ministers (Dirprwy Weinidogion Cymru).

**Ministers, staff, etc**

**Section 46: The First Minister**

221. This section provides for the First Minister to be appointed by Her Majesty. Section 47 deals with how the First Minister is chosen. The First Minister may tender resignation to Her Majesty at any time and ceases to hold office when the resignation is accepted. The First Minister would also cease to hold office on the appointment of another person as First Minister.

222. If the office of the First Minister is vacant (for example through resignation or death of the First Minister) or if the First Minister has ceased to be a Member of the Assembly or is for any reason unable to act, the functions of First Minister will be exercisable by a member of the Assembly designated for that purpose by the Presiding Officer. Except where the Assembly has been dissolved or where for any other reason all ministerial posts are vacant (e.g. because all the Welsh Ministers have resigned), the Presiding Officer must designate such a person on the recommendation of the Welsh Ministers. A person so designated as “acting” First Minister will be capable of continuing to exercise the functions of the First Minister even if the Assembly is subsequently dissolved.

**Section 47: Choice of the First Minister**

223. While section 46 provides for the First Minister to be appointed by Her Majesty, the person appointed will have been chosen in accordance with this section, which provides for the Assembly to nominate one of its members for appointment as First Minister and for the Presiding Officer to recommend the appointment of that person to Her Majesty.

224. Nomination of an Assembly member for appointment as First Minister is triggered by one of the events mentioned in subsection (2). These are:

- a) the holding of a poll at a general election;
- b) the Assembly resolving that the Welsh Ministers no longer enjoy the confidence of the Assembly;
- c) the First Minister tendering resignation to Her Majesty;
- d) the First Minister dying or becoming permanently unable to act or to tender resignation;
- e) the First Minister ceasing to be a member of the Assembly, other than on a dissolution (e.g. by resigning from the Assembly).

225. Once one of these events occurs, the Assembly must nominate a First Minister before the end of the period of 28 days after the occurrence of the event in question. If another such event occurs (for example if the holding of a poll at a general election were to take place within 28 days of a First Minister having tendered resignation) the period is extended to the end of the period of 28 days after that second event. If the Assembly, within the 28 day period, resolves under section 5(2) that it should be dissolved, then the 28 day period ceases and a further 28 day period for nomination of a First Minister will begin when the poll for the consequent extraordinary general election is held.

226. If the Assembly fails to make a nomination within the period allowed, then the Secretary of State is required by section 5 to propose a day for the holding of an extraordinary general election.

227. Where the Assembly resolves that the Welsh Ministers no longer enjoy the confidence of the Assembly, sections 48 and 50 provide that all Welsh Ministers and Deputy Welsh

Ministers resign with immediate effect. The First Minister remains in office with all the functions of that office and of the Welsh Ministers generally, until the Assembly nominates a First Minister (or re-nominates the same person as First Minister). The First Minister could therefore, during that period, appoint Ministers if this were necessary for the efficient and effective administration of government, for example in case of emergencies.

#### **Section 48: Welsh Ministers**

228. This section provides for the appointment of Ministers by the First Minister from among members of the Assembly. Appointments require the approval of Her Majesty. The Ministers appointed under this section, together with the First Minister, are known collectively as “the Welsh Ministers”.

229. A Minister may be removed from office by the First Minister and may resign at any time. A Minister must resign if the Assembly resolves that the Welsh Ministers no longer enjoy the confidence of the Assembly. Subsection (6) provides that a Minister ceases to hold office immediately upon resigning. A Minister also ceases to hold office upon ceasing to be a member of the Assembly other than by virtue of a dissolution (e.g. by resigning as an Assembly Member).

#### **Section 49: The Counsel General**

230. This section provides for there to be a Counsel General who is legal adviser to, and representative in the courts of, the Welsh Assembly Government. The Counsel General is appointed by Her Majesty on the recommendation of the First Minister but with the agreement of the Assembly. The person appointed need not be a member of the Assembly.

231. The Counsel General is a member of the Welsh Assembly Government but although the office is of “ministerial” status the holder is not one of “the Welsh Ministers”.

232. The Counsel General may resign at any time. Unlike Welsh Ministers and Deputy Welsh Ministers, the Counsel General can only be removed from office by Her Majesty and does not have to resign after a vote of no confidence in the Welsh Ministers. The Counsel General ceases to hold office on the nomination of a First Minister under section 47 (but could of course be re-appointed).

233. Section 34 deals with the participation of the Counsel General in the proceedings of the Assembly and includes provision enabling the Counsel General to decline to provide documents or to answer questions about particular criminal cases (the Counsel General may be conducting criminal proceedings on behalf of the Welsh Assembly Government) if the Counsel General considers that doing so might prejudice the proceedings in that case or would otherwise be contrary to the public interest. If the office of Counsel General is vacant, or if the Counsel General is for any reason unable to act, the functions of the office can, under subsection (6) be exercised by a person designated by the First Minister. There is no requirement for Her Majesty’s approval or the agreement of the Assembly to this designation. The period during which Counsel General functions can be exercised by virtue of a designation under subsection (6) is limited to a maximum of 6 months and a designation comes to an end if a person is nominated for appointment as First Minister. This ensures that a First Minister who has been newly appointed is not in a position where there is already an acting Counsel General in office.

234. A person who is appointed as Counsel General (or designated to exercise the functions of the office under subsection (6)) cannot also hold, or be appointed to the office of First Minister, or a Welsh Minister or Deputy Welsh Minister.

### **Section 50: Deputy Welsh Ministers**

235. This section provides for the appointment of Deputy Welsh Ministers by the First Minister, with the approval of Her Majesty, from among members of the Assembly. The function of Deputy Welsh Ministers is to assist the First Minister, Welsh Ministers or the Counsel General in the exercise of their functions. They may be removed from office by the First Minister, may resign at any time and must do so, with immediate effect, if the Assembly resolves that the Welsh Ministers no longer enjoy the confidence of the Assembly. A Deputy Welsh Minister also ceases to hold office on ceasing to be a member of the Assembly other than by reason of a dissolution.

### **Section 51: Limit on number of Ministers**

236. A limit of 12 is placed on the total number, together, of Welsh Ministers and Deputy Welsh Ministers (but not including the First Minister or the Counsel General).

### **Section 52: Staff**

237. This section makes provision as respects persons appointed by the Welsh Ministers to be members of the staff of the Welsh Assembly Government. Staff are members of the Home Civil Service and, accordingly, their appointment is subject to the provisions of the Civil Service Order in Council. Responsibility for the management of such staff will therefore ultimately remain with the Minister for the Civil Service (i.e. the Prime Minister) but provision is made enabling responsibility for their day to day management to be delegated in the same way as happens for government departments in the UK Government.

238. The Welsh Ministers are responsible for payment of salary and allowances to or in respect of the staff of the Welsh Assembly Government. Section 1(2) and (3) of the Superannuation Act 1972 have effect as if references to a Minister of the Crown (other than the Minister for the Civil Service) included the Welsh Ministers. This allows functions relating to civil service pensions to be delegated to the Welsh Ministers.

239. The Welsh Ministers are required to make payments to the Minister for the Civil Service of such amounts as the Minister for the Civil Service may determine in respect of the pensions etc. payable to persons who are or have been in service as staff of the Welsh Assembly Government and in respect of any expenses to be incurred in administering those pensions etc.. The Welsh Ministers may also, if they so wish, make payments towards the provision of pensions, allowances and gratuities to or in respect of any person who is or has been a member of staff of the Welsh Assembly Government.

240. Subsection (9) gives statutory effect, in relation to the staff of the Welsh Assembly Government to the application of the “Carltona” principle (see *Carltona Ltd. v. Commissioners of Works* [1948] 2 All ER 560) namely that the functions vested in the Welsh Ministers (or First Minister or Counsel General) may, in the absence of any express statutory prohibition, be exercised in their name and under their authority by officials.

### **Section 53: Remuneration**

241. This section is one of two on remuneration of members of the Welsh Assembly Government. It requires the Assembly to make provision for the payment of salaries to members of the Welsh Assembly Government. That is: the First Minister, Welsh Ministers, the Counsel General and Deputy Welsh Ministers. The amount of any salary is a matter for the Assembly to determine. The Assembly can also make provision for the payment of allowances, pensions and gratuities. In respect of pensions, the Assembly can provide for

contributions or payments towards such pensions or for the establishment and administration, whether by the Assembly Commission or otherwise, of a pension scheme or schemes.

242. Monies required to make payments under this section are payable out of the Welsh Consolidated Fund and therefore have to be authorised annually by a budget resolution passed by the Assembly.

243. Provision made by the Assembly under this section can be made in the Assembly Standing Orders or by resolutions of the Assembly and both the Standing Orders and any such resolutions can confer functions on the Assembly Commission.

244. The Assembly also has the option of making provision on this matter by way of an Assembly Measure under Part 3 of this Act.

#### **Section 54: Remuneration: supplementary**

245. Subsection (1) of this section allows for different provisions to be made under section 53 for different cases. This allows the Assembly to provide for different salaries to be paid to the First Minister, Welsh Ministers, the Counsel General and Deputy Welsh Ministers according to the office that they hold in the Welsh Assembly Government.

246. Subsection (2) places a duty on the Assembly to publish, for each financial year, the total amount paid to members of the Welsh Assembly Government by way of salaries and allowances, and the amount of salary and allowances paid to each such individual. It allows the Assembly to do so by requiring the Assembly Commission to publish the information, but places no restriction as to the means used by the Assembly to make this information available.

247. Subsection (3) places a duty on the Assembly Commission, where the Assembly has conferred the power to determine salaries, etc under section 53, to publish every determination of the Assembly Commission as to those matters as soon as possible after a determination is made.

248. Subsection (4) provides that provision made under section 53(3) in respect of pensions or allowances does not affect pensions or allowances in payment before the provision was made.

#### **Section 55: Oath or affirmation**

249. This section requires the First Minister, Welsh Ministers and the Counsel General, on appointment, to take the official oath under the Promissory Oaths Act 1868. It also requires all members of the Welsh Assembly Government to take the oath of allegiance unless they have already taken it as a member of the Assembly. No payment of salary or allowances may be made until the oath(s) is (are) taken. This section further provides for the oath(s) to be taken before one of the Presiding Judges of the Wales and Chester Circuit

#### **Section 56: Introduction**

250. This section provides that the Welsh Ministers (and the First Minister and the Counsel General where distinct functions are conferred or imposed specifically on them) are to have those functions which are conferred or imposed on them by or under the Act itself or by any other enactment or prerogative instrument.

### **Section 57: Exercise of functions**

251. This section provides that functions may be conferred or imposed on the Welsh Ministers by specifying that they are functions of the Welsh Ministers. When this is done, those functions will be exercisable by any of the Welsh Ministers (including the First Minister). Similarly, any act or omission by or in relation to the First Minister or the other Welsh Ministers is to be treated as an act or omission in relation to each of them, unless the act or omission relates to a function which is that of the First Minister alone. This rule also applies where a function is conferred or imposed on the Counsel General and that function is exercisable concurrently with the First Minister or the Welsh Ministers, so that an act or omission in relation to that function is to be treated as an act or omission of each of them.

252. Functions of the First Minister, the Welsh Ministers and the Counsel General are to be exercisable on behalf of the Crown.

### **Section 58: Transfer of Ministerial functions**

253. This section provides a mechanism for transferring to the Welsh Ministers (or specifically to the First Minister or to the Counsel General) functions in relation to Wales which are exercisable by a Minister of the Crown. The transfer is to be by Order in Council which will require approval by both Houses of Parliament and by the Welsh Ministers. (Any subsequent Order in Council varying or revoking such an Order would also require such approval).

254. The Order in Council transferring a function to the Welsh Ministers, to the First Minister or to the Counsel General may provide for the function to be exercised concurrently with any other of them.

255. An Order in Council under this section may, instead of transferring functions to the Welsh Ministers (etc.) provide for them to be exercisable, in relation to Wales, concurrently by the Welsh Ministers and by a Minister of the Crown. Where a function continues to be exercisable solely by a Minister of the Crown, an Order in Council may impose a requirement that the Minister in question, when proposing to exercise that function in relation to Wales, must first obtain the agreement of the Welsh Ministers or, alternatively, must first consult them.

256. A number of detailed provisions about the scope and operation of transfers of functions under this section are contained in Schedule 3.

### **Section 59: Implementation of Community law**

257. This section enables the Welsh Ministers to be designated under section 2(2) of the European Communities Act 1972, thereby empowering them to make provision within the scope of the particular designation, to implement Community obligations or to enable United Kingdom rights under the European Treaties to be enjoyed and for associated purposes. Unless such provision is made by a Minister of the Crown, or relates to an English border area or to a cross-border body (and does not relate solely to functions or activities of that body in relation to Wales), the statutory instrument in which the provision is contained is not required to be laid before Parliament and to be subject to annulment in pursuance of a resolution of either House, but it will instead have to be laid before the Assembly and will be subject to annulment in pursuance of a resolution of the Assembly.

258. The section also confers on the Welsh Ministers the power, with the consent of the Treasury, to make regulations prescribing, or providing for the determination of fees and charges in respect of services provided by them in pursuance of a Community obligation.



Unless they are made together with a Minister of the Crown, relate to an English border area or relate to a cross-border body (and do not relate solely to functions or activities of that body in relation to Wales) no Parliamentary procedures are to apply to such regulations but they will have to be laid before the Assembly instead and will be subject to annulment in pursuance of a resolution of the Assembly.

### **Section 60: Promotion etc. of well-being**

259. This section provides the Welsh Ministers with a power to do anything which they consider is appropriate to achieve the promotion of the economic, social or environmental well-being of Wales. The power may be exercised for the benefit of the whole or any part of Wales or of all or any persons resident or present in Wales. If the Welsh Ministers consider that it would promote the economic, social or environmental well-being of Wales it may also be exercised in relation to or for the benefit of areas outside Wales or persons resident or present in any area outside Wales.

### **Section 61: Support of culture etc.**

260. This section empowers the Welsh Ministers to do anything which they consider appropriate to support archaeological remains, ancient monuments, buildings and places of historical or architectural interest, historic wrecks, and museums, galleries, and libraries in Wales; to support arts and crafts, archives and historical records, other cultural activities and projects, and sport and recreational activities relating to Wales; and to support the Welsh language.

### **Section 62: Representations about any matter affecting Wales**

261. This section enables the Welsh Ministers, the First Minister and the Counsel General to make appropriate representations about any matter affecting Wales.

### **Section 63: Consultation about cross-border bodies**

262. This section requires any Minister of the Crown who exercises certain functions in relation to relevant cross-border bodies (i.e. bodies which exercise functions, or carry on activities, of a public nature both in relation to Wales and elsewhere) to consult the Welsh Ministers before doing so. The functions in question are the appointment or removal of the body or the members or office-holders of the body (unless they are not concerned in functions in or with respect to Wales) and other functions which might affect Wales in relation to any matters as respects which the Welsh Ministers may exercise functions. The requirement does not apply if it is not reasonably practicable to comply with it (for example because of the urgency of the matter) but in such a case the Minister of the Crown in question is required to inform the Welsh Ministers of the action as soon as reasonably practicable and to give reasons for it. A failure to comply with the requirement before taking an action does not affect the validity of that action.

### **Section 64: Polls for ascertaining views of the public**

263. This section gives the Welsh Ministers the power to hold a poll in the whole, or in any part of Wales, for the purpose of ascertaining the views of those polled as to whether or how the Welsh Ministers should exercise any of their functions (other than the function of making representations about matters affecting Wales). Orders making provision about the conduct of such polls may be made by the Welsh Ministers and are subject to annulment in pursuance of a resolution of the Assembly.

**Section 65: Private bills**

264. Under this section the Welsh Ministers will have the power to promote (or to oppose) any private bill in Parliament.

**Section 66: Provision of information to Treasury**

265. The Treasury is to have the power under this section to require the Welsh Ministers to provide the Treasury with information which is in the possession or under the control of the Welsh Ministers and which is required for the exercise of any of the functions of the Treasury.

**Section 67: Legal proceedings**

266. Under this section the Counsel General, as the representative of the Welsh Ministers in the courts, will be able to institute, defend or appear in any legal proceedings relating to matters with respect to which any functions of the Welsh Ministers, the First Minister of the Counsel General are exercisable, provided the Counsel General considers it appropriate to do so for the promotion or protection of the public interest.

**Section 68: Contracts**

267. This section allows the Secretary of State to make an order applying, subject to any appropriate modifications, the Local Government (Contracts) Act 1997 to contracts entered into by the Welsh Ministers, the First Minister or the Counsel General. A similar provision was contained in section 39 of GoWA. The effect of such an order would be to prevent it being argued in private law proceedings that a contract covered by the order is *ultra vires* and therefore unenforceable. This is intended to protect contractors and lenders dealing with the Welsh Assembly Government.

**Section 69: Charges for documents**

268. This section provides that (subject to any other specific enactment relating to charging for supplying copies of documents or for making documents available for inspection) the Welsh Ministers may charge for supplying copies of any document or any part of a document which they publish or make available for public inspection.

**Section 70: Financial assistance**

269. This section gives the First Minister, the Welsh Ministers and the Counsel General the power to give financial assistance (whether by grant, loan or guarantee) to any person engaged in any activity which the Welsh Ministers consider will secure, or help to secure, the attainment of any objective which they aim to achieve in the exercise of their functions. Conditions may be attached to such assistance.

**Section 71: Supplementary**

270. This section makes it clear that the Welsh Ministers, the First Minister and the Counsel General may do anything which is calculated to facilitate or is conducive or incidental to the exercise of any of their functions.

***“Inclusive” approach to exercise of functions***

**Section 72: Partnership Council**

271. The Welsh Ministers are required by this section to establish a Partnership Council for Wales whose members, to be appointed by the Welsh Ministers, are to comprise Welsh Ministers (or Deputy Welsh Ministers) and members of local authorities (including national park authorities, police authorities, fire and rescue authorities and other authorities which

may be added by order) in Wales. Before appointing local authority members the Welsh Ministers will be required to consult appropriate local government associations. The function of the Council will be to advise the Welsh Ministers on matters affecting their functions, to make representations on matters affecting, or of concern to, those involved in local government in Wales and also to give advice to those involved in local government in Wales.

### **Section 73: Local government scheme**

272. Under this section the Welsh Ministers are required to make, keep under review, and from time to time remake or revise, a local government scheme, setting out how they propose, in the exercise of their functions, to sustain and promote local government in Wales. When determining the content of the scheme the Welsh Ministers must have regard to any advice or representations on the part of the Partnership Council. The scheme, and any revisions to it must be published and laid before the Assembly as must an annual report by the Welsh Ministers setting out how the proposals in the scheme were implemented during the preceding financial year.

### **Section 74: Voluntary sector scheme**

273. Under this section the Welsh Ministers are required to make, keep under review, and from time to time remake or revise, a voluntary sector scheme, setting out how they propose, in the exercise of their functions, to promote the interests of relevant voluntary organisations. The Ministers are under a duty to consult any voluntary organisations they consider appropriate before they make, remake or revise a scheme.

274. Relevant voluntary organisations are organisations that are not local authorities or other public bodies, whose activities are not carried on for profit and which, directly or indirectly, benefit Wales or a part of Wales.

275. When determining the content of the scheme the Welsh Ministers must consider how they intend to exercise their functions in relation to matters which concern or affect voluntary organisations. The scheme must specify the Ministers proposals to assist voluntary organisations, their proposals to monitor assistance provided and how they will consult voluntary organisations about their functions.

276. The scheme, and any revisions to it, must be published and laid before the Assembly, as must an annual report by the Welsh Ministers setting out how the proposals in the scheme were implemented during the preceding financial year.

### **Section 75: Business scheme**

277. Under this section, the Welsh Ministers must make a business scheme setting out how they propose to take account of the interests of business in exercising their functions. The scheme must specify how the Welsh Ministers propose to carry out consultation about the exercise of their functions in relation to matters affecting the interests of business, and how they propose to consider the impact of the exercise of their functions on the interests of business.

278. The Welsh Ministers are obliged to keep the business scheme under review and may remake or revise it. Before making, remaking or revising the scheme, the Welsh Ministers are obliged to consult such organisations representing business (including trade unions) and such other organisations, as they consider appropriate. They are obliged to publish the scheme once made or remade, as well as revisions to the scheme, and must lay the same before the Assembly.

279. The Welsh Ministers must publish reports of how the proposals set out in the business scheme have been implemented. The first report must be published within the two year period beginning with the day on which the first business scheme is made. Subsequent reports must be published at intervals of no more than two years. These reports must be laid before the Assembly.

#### **Section 76: Regulatory impact assessments**

280. Under this section the Welsh Ministers are required to make, keep under review, and from time to time to remake or revise, a code of practice (“the regulatory impact assessment code”), setting out their policy on the carrying out of regulatory impact assessments in relation to Welsh subordinate legislation and on the carrying out of consultation in connection with regulatory impact assessments. The Ministers are under a duty to consult such persons as they consider appropriate before they make, remake or revise a code.

281. Regulatory impact assessments are assessments as to the likely costs and benefits of complying with the Welsh subordinate legislation in question.

282. The regulatory impact assessment code, and any revisions to it, must be published and laid before the Assembly.

#### **Section 77: Equality of opportunity**

283. Under this section the Welsh Ministers are required to make arrangements with a view to securing that their functions are exercised with due regard to the principle that there should be equality of opportunity for all people.

284. The Welsh Ministers are also required, after each financial year, to publish and lay before the Assembly a report containing a statement of the arrangements made under subsection (1) which had effect during that financial year and an assessment of how effective they were in promoting equality of opportunity.

#### **Section 78: The Welsh Language**

285. Under this section the Welsh Ministers are required to adopt a Welsh language strategy which sets out their proposals for promoting and facilitating the use of the Welsh Language. The Welsh Ministers are also required to adopt a Welsh language scheme. The scheme must specify the measures they are proposing to take, for the purpose of giving effect (as far is appropriate and reasonably practicable) to the principle that English and Welsh should be treated on a basis of equality in the conduct of public business in Wales. The scheme applies in relation to the use of Welsh in connection with the provision of services to the public by the Welsh Ministers or by those acting as servants or agents of the Crown, or by those who are public bodies within the meaning of Part 2 of the Welsh Language Act 1993.

286. The Welsh Ministers must keep both the strategy and scheme under review, and may revise or replace them with new versions as they deem appropriate. The Welsh Ministers must consult such persons as they think appropriate before they adopt or revise a strategy or scheme. They are also required to publish the scheme and strategy when they are first adopted, and any new versions or revisions which are subsequently adopted, and to lay that which is published before the Assembly.

287. At the end of each financial year the Welsh Ministers must publish a report of how the proposals in the strategy and scheme were implemented in that financial year. The report must also set out how effective the implementation of the proposals in the strategy has been in promoting and facilitating the use of Welsh. A copy of the report must be laid before the Assembly.

## **Section 79: Sustainable development**

288. Under this section the Welsh Ministers are required to make, keep under review, and from time to time remake or revise, a sustainable development scheme, setting out how they propose, in the exercise of their functions, to promote sustainable development. The Ministers are under a duty to consult such persons as they consider appropriate before they make, remake or revise a scheme.

289. The scheme, and any revisions to it, must be published and laid before the Assembly, as must an annual report by the Welsh Ministers, setting out how the proposals in the scheme were implemented during the preceding financial year.

290. The Welsh Ministers are also required, in the year after an ordinary general election is held, or was due to be held under section 3, to publish and lay before the Assembly a report containing an assessment of how effective the proposals contained in their scheme have been in promoting sustainable development.

## **Section 80 : Community law**

291. This section makes it clear that a European Community obligation of the United Kingdom is also an obligation of the Welsh Ministers, the First Minister or the Counsel General if (and so far as) the obligation could be implemented or complied with by the exercise by the Welsh Ministers etc. of their functions.

292. Where, however, the obligation in question is to achieve a result defined by reference to a quantity and that quantity relates to the whole of the United Kingdom or some part of the United Kingdom which includes a part, or the whole, of Wales this rule does not apply unless a Minister has, after consultation with the Welsh Ministers, made an order under this section apportioning the obligation so as to define what contribution the Welsh Ministers must make to the achievement of that result.

293. This section also provides that the Welsh Ministers, First Minister and Counsel General have no power to make subordinate legislation, or to do any other act, if the subordinate legislation or act is incompatible with Community law or with an obligation imposed by an order of a Minister of the Crown made under this section.

## **Section 81: Human Rights**

294. This section provides that the Welsh Ministers, First Minister and Counsel General have no power to make subordinate legislation, or to do any other act, if the subordinate legislation or act is incompatible with the European Convention of Human Rights.

295. The section also provides that the only persons (apart from the Attorney General, the Counsel General, the Advocate General for Scotland, Advocate General for Northern Ireland or the Attorney General for Northern Ireland) who can bring proceedings on the ground that an act of the Welsh Ministers etc. is incompatible with Convention rights or rely on Convention rights in proceedings are persons who are “victims” for the purposes of Article 34 of the Convention. (Article 34 of the convention requires applications to the European Court of Human Rights to be from “any person, non-governmental organisation or groups of individuals claiming to be a victim of a violation of a Convention right”).

296. The section also makes clear that an act of the Welsh Ministers etc. is not outside their powers by reason of being incompatible with Convention rights if that act is not unlawful under section 6 of the Human Rights Act 1998, i.e. if the act in question was inevitable as a result complying with an Act of Parliament.

297. Further, the section restricts the damages which a court or tribunal may award in respect of an act incompatible with Convention rights to the damages which could be awarded if the act was found to be unlawful under section 6 of the Human Rights Act.

**Section 82: International obligations etc.**

298. This section relates to international obligations of the United Kingdom which impinge on functions of the Welsh Ministers (and of the First Minister or Counsel General).

299. It firstly gives the Secretary of State a power to intervene in order to restrain and if necessary reverse action by the Welsh Ministers etc. which the Secretary of State considers to be incompatible with such an obligation. The Welsh Ministers etc. can be directed by order not to take a proposed action (including the making of subordinate legislation) and any subordinate legislation which has been made by the Welsh Ministers etc. (or which was made under powers since transferred to the Welsh Ministers etc. so that they now have the power to revoke it) may be revoked by order made by the Secretary of State, which may have retrospective effect.

300. The Secretary of State may also by order direct the Welsh Ministers etc. to take action which is within their powers if this is necessary in order to give effect to an international obligation.

301. If an international obligation requires a result to be achieved by reference to a quantity and that quantity relates to the United Kingdom as a whole, or to a part of the United Kingdom which includes Wales, the Secretary of State may make an order apportioning the obligation so as to define what contribution the Welsh Ministers must make to the achievement of that result.

302. Orders under this section, with the exception of orders under subsection (1) directing that a proposed action should not be taken may only be made after the Secretary of State has consulted the Welsh Ministers, and the orders must state the reason why they are being made.

303. Orders directing the Welsh Ministers etc. not to act in a way which they propose and those apportioning international obligations are subject to annulment in pursuance of a resolution of either House of Parliament. Those requiring the Welsh Ministers to take action and those revoking subordinate legislation require affirmative resolutions of each House of Parliament before they can be made.

**Section 83: Agency arrangements and provision of services**

304. This section empowers the Welsh Ministers (and the First Minister and Counsel General) and any Minister of the Crown, government department, public authority or holder of a public office in England and Wales, to enter into an arrangement under which each (including their respective staffs) exercises functions of the other. Functions to which such arrangements may relate may not, however, include functions of making, confirming or approving subordinate legislation contained in a statutory instrument. The fact that a party to such an arrangement has made arrangements under it for the other party to exercise a function on its behalf does not relieve the former of its legal responsibility in relation to the exercise of that function.

**Section 84: Different exercise of functions by Welsh Ministers etc.**

305. Where an enactment (usually an Act of Parliament) confers a power in relation to England and to Wales (or in relation to England and Wales and also to some other territory, such as Scotland) and the power is exercisable in relation to Wales by the Welsh Ministers (or the First Minister or Counsel General) but in relation to England by a Minister of the

Crown, this section makes it clear that the fact that the power is exercisable under the same provision does not require it to be exercised in the same way in relation to both countries or indeed require it to be exercised at all by the Welsh Ministers etc. in relation to Wales. In other words the Welsh Ministers etc. may exercise their discretion as to how to exercise such functions differently from the way in which the relevant Minister of the Crown exercises the same discretion in relation to England. However, the provision made by this section is subject to any different provision which might be made by the enactment etc which gave the power to the Welsh Ministers, First Minister or Counsel General.

### **Section 85: Construction of references to Ministers and Departments**

306. This section requires references in Acts of Parliament and other enactments or other documents to a “Minister of the Crown” or to a “government department” to be construed, where necessary (i.e. where relevant functions have been transferred to the Welsh Ministers, the First Minister or Counsel General) as references to the Welsh Ministers etc.. Similarly, references in such Acts or other enactments or other documents to property vested in or held for the purposes of a “government department” are to be construed as including references to property vested in or held by the Welsh Ministers etc..

### **Section 86: Laying of reports and statements**

307. Some Acts of Parliament impose requirements on Ministers of the Crown (and others) to lay reports or statements before Parliament. This section makes provision for those cases where the report or statement to be laid relates to matters in respect of which functions are exercisable by the Welsh Ministers, the First Minister, the Counsel General or the Assembly Commission, but the function of making or receiving the report or statement is not one which the Welsh Ministers, the First Minister etc have by virtue of this Act. If no functions in relation to the matters to which the report relates are exercisable any longer by Ministers of the Crown, the requirement to lay the document before Parliament is to be construed as a requirement to lay it before the Assembly instead. If a Minister of the Crown still has functions in relation to those matters, the document must be laid both before Parliament and before the Assembly.

### ***Property, rights and liabilities***

#### **Section 87: Property, rights and liabilities of Welsh Ministers etc.**

308. This section deals with the holding of property, rights and liabilities of the Welsh Assembly Government. These may belong to the Welsh Ministers, the First Minister or to the Counsel General by those names and in each case this has the effect that they belong to the Welsh Ministers, First Minister or Counsel General for the time being. References in registers or other documents to property belonging to “the Welsh Ministers” etc. are to be read accordingly.

#### **Section 88: Transfer of Ministerial property rights and liabilities**

309. This section introduces Schedule 4, which deals with transfers of property rights and liabilities of Ministers of the Crown to the Welsh Ministers.

### ***Supplementary***

#### **Section 89: Rights and liabilities of the Crown in different capacities**

310. The Crown was originally regarded as indivisible. The effect of devolution to Wales, Scotland and Northern Ireland is however that the devolved administrations are, within the scopes of their respective powers, autonomous even though they exercise their functions on

behalf of the Crown. In practice, therefore, each, together with the United Kingdom government, is a distinct entity and this section makes it clear that as far as legal rights and liabilities are concerned, each (“the Crown in right of Her Majesty’s Government in the United Kingdom”, “the Crown in right of the Welsh Assembly Government” and so on) is to be treated as having separate legal personality. Property may be transferred between them, contracts between them may be entered into and they may be separate parties to legal proceedings.

### **Section 90: Documents**

311. This section makes provision in relation to the execution and authentication of legal documents by or on behalf of the First Minister, the Welsh Ministers or the Counsel General.

### **Section 91: Validity of acts**

312. This section ensures that the validity of the acts of a person as First Minister are not affected by any defect in that person’s nomination by the Assembly and that, similarly, the validity of any act of a person as Counsel General is not affected by any defect in the Assembly’s agreement to that person’s appointment to that office. Similar protection is given in relation to the Presiding Officer and Deputy Presiding Officer (section 25(14), members of the Assembly Commission (Schedule 2 paragraph 10(b)), and the Auditor General for Wales (Schedule 8 paragraph 1(4)).

### **Section 92: Official secrets**

313. This section provides that the First Minister (and any person designated to exercise the functions of the First Minister), the Welsh Ministers, the Counsel General (and any person designated to exercise the functions of the Counsel General) and Deputy Welsh Ministers are Crown servants for the purposes of the Official Secrets Act 1989.

## **PART 3: ASSEMBLY MEASURES**

### ***Overview of Part 3***

314. Part 3 of and Schedule 5 to the Act introduce the new mechanism for enhancing the Assembly’s legislative powers which was proposed in paragraphs 3.14 to 3.21 of “Better Governance for Wales”. It should be noted that, with minor exceptions mentioned below, the Act does not itself confer additional legislative powers on the Assembly; rather, it provides a mechanism whereby such powers can be conferred on a case by case basis as appropriate, with Parliamentary consent.

315. The White Paper envisaged that enhanced legislative competence would be conferred on the Assembly by way of Orders in Council. Section 95 makes provision for such Orders in Council. Such an Order in Council confers competence by modifying Schedule 5. Within that competence as it appears from time to time in that Schedule, the Assembly can pass laws known as Assembly Measures in relation to “matters” set out in that Schedule (as amended by such Orders in Council). Such “matters” must relate to one or more of the fields which are also set out in Part 1 of Schedule 5 to the Act. The Order in Council<sup>13</sup> will be able to amend the list of fields in relation to which “matters” can be specified, but it will not be possible for these Orders in Council to add a field, and so potentially give the Assembly legislative

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<sup>13</sup> An Order in Council, of whatever nature, under Part 3 of the Act can only be made if a draft of the Order in Council has first been approved by the Assembly and both Houses of Parliament.



competence, if no function in the field is exercisable by the Welsh Ministers, the First Minister or the Counsel General.

316. The effect of an individual Order in Council will be to insert, under the relevant field heading in Part 1 of Schedule 5, a description of the “matter” in relation to which the Assembly is to be given enhanced legislative competence, together with any specific exceptions necessary accurately to define its scope. Part 2 of Schedule 5 lists restrictions which a provision in an Assembly Measure must not breach if it is to be within legislative competence. There are exceptions from those restrictions, which are set out in Part 3 of Schedule 5. In Part 1 of Schedule 5, under the heading “Field 13: the National Assembly for Wales”, several entries are listed on the face of the Act as “matters” in relation to which the Assembly may pass Measures. These are the only examples of the Act itself conferring additional legislative powers on the Assembly; and the form of the entries may be taken as a guide to the way in which further “matters” will be added to Schedule 5 by future Orders in Council conferring enhanced legislative competence.

317. The Act provides for the Assembly and both Houses of Parliament to approve draft Orders in Council before they are recommended to be made by Her Majesty in Council. In circumstances where the Welsh Assembly Government has initiated the proposal, the main procedural stages will normally include:

- a) preparation of a proposed draft Order in Council following discussion between the Welsh Assembly Government, relevant Whitehall Departments, and the Wales Office. This will focus on ensuring there is clarity about the *vires* / scope of the Order in Council and confidence that it will give the necessary legislative competence to enable the Assembly Government’s policy objective to be achieved;
- b) pre-legislative (non-statutory) scrutiny of a proposed draft Order in Council by the Assembly and Parliament. The precise nature of pre-legislative scrutiny undertaken by the National Assembly and Parliament will be a matter for those two institutions to determine. The processes are not prescribed in the Act, although, in this context, paragraph 3.21 of the White Paper “Better Governance for Wales” said “The consideration (i.e., consideration by Parliamentary Committees or perhaps a joint Committee of both Houses) could be informed by understanding the use the Assembly might propose to make of these powers in the immediate future. However, as the power would be a general and continuing one for that particular policy area, this would serve only as an example of what could be done; the issue for the Committees and for each House would be the appropriateness in general of delegating legislative authority to the Assembly on the particular policy area specified in the draft Order in Council”. This stage will enable modifications to be made to the proposed draft, if required, in the light of comments made;
- c) the formal (statutory) processes for the Assembly and both Houses of Parliament to give their approval to the final draft Order in Council, modified as appropriate following the pre-legislative scrutiny processes. At this stage the draft Order in Council will not be able to be amended as both the Assembly and Parliament will need to approve identical text.

318. When a draft Order in Council has been approved by the Assembly, the First Minister will be required, as soon as reasonably practicable, to give notice in writing of that fact to the Secretary of State, who must, by the end of 60 days (not counting days when Parliament is dissolved or prorogued or adjourned for more than four days) either have laid the draft Order

in Council before both Houses of Parliament or have given the First Minister written reasons for not being prepared to do so.

319. Once an Order in Council conferring enhanced legislative powers in relation to a “matter” has been made, the competence conferred will be of a continuing character; that is to say, although a request for such powers may have been stimulated by a particular project of reform, use by the Assembly of the competence conferred to address that project will not preclude further Assembly Measures relating to that matter, again in the future, perhaps with some different policy objective in view. The Assembly’s legislative competence under Part 3 of the Act will be the sum total of the matters listed in Part 1 of Schedule 5 read with the restrictions and exceptions to those restrictions specified in Parts 2 and 3 of that Schedule respectively.

320. Assembly legislation made under the legislative competence of the Assembly will be known as Measures of the National Assembly for Wales. Section 94 specifies the tests that proposed Assembly Measures must satisfy if they are to be within the legislative competence of the Assembly. In particular, Measures must relate to one or more of the matters specified in Part 1 of Schedule 5 and comply with the restrictions set out in Part 2 of Schedule 5. The question whether a particular provision of a Measure relates to a matter specified in Part 1 of Schedule 5 “is to be determined by reference to its purpose, having regard (among other things) to its effect in all the circumstances” (section 94(7)). Within the legislative competence conferred, an Assembly Measure may make any provision that could be made by Act of Parliament (section 94(1)).

321. Measures may only make provision in relation to Wales or in relation to functions relating to Wales (section 94(4)(b)). However, an Assembly Measure may make provision which applies in relation to England (but not beyond) for the enforcement of Assembly Measures or which it is appropriate to make for making a provision of a Measure effective (section 94(5)(a)). Incidental and consequential amendments of the law applying in relation to England, for example to ensure that the statute book reflects accurately the effect of changes to the law made by a Measure, will also be possible (section 94(5)(b)). The Secretary of State’s power of intervention under section 101 will ensure that the Assembly does not use its powers in a way which the Secretary of State has reasonable grounds to believe would have an adverse effect on operation of the law applying in England.

322. Sections 97 and 98 make provision about Assembly proceedings on proposed Measures. Subject to exceptions for special categories of Measure (see section 98(3)), standing orders must include provision for general debate and a vote on the principles of a proposed Measure; for detailed scrutiny of its provisions; and for a final endorsement of the draft (as reconsidered and amended by the Assembly, if that is the case). Once Assembly consideration of the proposed Measure is complete, the Clerk of the Assembly submits the proposed Measure to Her Majesty in Council for approval, and the Measure is enacted on receiving such approval.

323. A period of four weeks following completion of the Assembly’s deliberations on the proposed Measure must elapse before it can be submitted to Her Majesty for approval, during which time the Counsel General or the Attorney General may refer to the Supreme Court any question as to whether the proposed Measure is within the Assembly’s legislative competence ; or the Secretary of State may prevent it from being submitted to Her Majesty if the Secretary of State has reasonable grounds to believe that its provisions are incompatible with international obligations or the interests of defence or national security, would have an adverse effect on the operation of the law as it applies in England or matters which are not

specified in Part 1 of Schedule 5, or might have a serious adverse impact on water resources or water supply in England, or the quality of water in England. However, the Clerk may submit a proposed Assembly Measure for approval by Her Majesty before the end of the four weeks following its passing, provided that the Clerk has received notifications from the Attorney General and the Counsel General that they are not going to make a reference to the Supreme Court, and from the Secretary of State that the Secretary of State is not going to make an order under section 101

324. Section 98(6) requires the standing orders to provide for Assembly reconsideration of the proposed Measure provisions if the Secretary of State intervenes under section 101, or if the Supreme Court has ruled that the proposed Measure is *ultra vires* or if the proposed Measure has been the subject of a reference by the Supreme Court to the European Court of Justice which has been withdrawn as a result of a request by the Assembly to be allowed to reconsider the proposed Measure.

### **DETAILED COMMENTARY ON SECTIONS IN PART 3**

#### **Section 93: Assembly Measures**

325. This section confers on the Assembly the power to pass a type of subordinate legislation in relation to Wales called “Measures of the National Assembly for Wales” in English, or “Mesurau Cynulliad Cenedlaethol Cymru” in Welsh. They are referred to in this Act as Assembly Measures. The ultimate right of Parliament to legislate in relation to Wales, even in principle on a matter over which legislative competence has been conferred on the Assembly, is preserved.

326. Assembly Measures will, subject to the limitations set out in this section and in Schedule 5 as to what provisions they may contain, have the same effect as an Act of Parliament. In other words they may modify the effect of legislation made or enacted before or after this Act is enacted, or make entirely new provision.

327. An Assembly Measure will be enacted (i.e., will become law) when:

- (a) it has been passed by the Assembly, or
- (b) alternatively, when it has been “approved” by the Assembly, in the case of a Measure which has been reconsidered in accordance with provision made under section 98(6),

and it has been approved by Her Majesty in Council (i.e. Her Majesty attending a meeting of the Privy Council).

328. If an Assembly Measure is enacted, but it then appears that there was some invalidity or procedural irregularity in the Assembly proceedings which led up to its enactment (for example, a rule in the Assembly’s standing orders was not complied with), the effect of section 93(3) is that the invalidity or irregularity will not render the Measure invalid and it will still be law. However, this subsection will not save a purported Assembly Measure which has not been passed at all by the Assembly because, in those circumstances, section 93(2) would not have been complied with.

329. Assembly Measures are to be judicially noticed. This means that, if an Assembly Measure is relevant in any Court proceedings, the court will apply its provisions without them having to be proved in court by evidence.

## **Section 94: Legislative competence**

330. The purpose of this section and Schedule 5 is to set out the extent of the Assembly's power to pass Measures (the Assembly's "legislative competence"). Its legislative competence may be altered by Order in Council under section 95, amending Schedule 5.

331. Provided it complies with the limits set by this section and by Schedule 5, an Assembly Measure can have the same effect as an Act of the UK Parliament. In other words it can, for example, modify existing Acts of Parliament or other enactments and it can make new provision not covered by existing statutes.

332. Subsection (2) makes it clear that if an Assembly Measure contains a provision which is outside the Assembly's legislative competence (that is, it goes beyond the limits set by this section and by Schedule 5, as amended from time to time), that provision has no legal effect. However, the whole Measure is not rendered invalid, provided that the provision which is outside legislative competence can be severed from the Measure.

333. Subsections (3) to (6) set out the rules with which a provision in a Measure must comply in order to be within the Assembly's legislative competence. It will only be within competence if it satisfies the criteria in *either* 94(4) *or* 94(5), *and* it also complies with 94(6).

334. In order to satisfy the criteria in section 94(4):

- a) the provision in question must relate to one of the "matters" specified in Part 1 of Schedule 5; and
- b) the provision in question must apply only in relation to Wales, and it must not confer, impose, change or remove (or give anyone else the power to confer, impose, change or remove) functions exercisable other than in relation to Wales.

335. Part 1 of Schedule 5 contains a list of fields, but only one of them ("National Assembly for Wales") has any matters specified in relation to it, and those relate to the internal arrangements of the Assembly. Orders in Council under section 95 will have the effect of adding matters under different field headings, thereby enabling the criteria referred to in (a) above to be satisfied over wider policy areas.

336. In order to satisfy the criteria in section 94(5):

- a) the provision in question must be one which enables a provision of an Assembly Measure (i.e. one which itself satisfies the criteria in subsection (4)) to be enforced or which is otherwise appropriate for making such a provision effective; or
- b) the provision in question must be one which is incidental to or consequential on such a provision.

337. So if a provision satisfies the criteria in subsection (5) it is not subject to the limitation in subsection (4) that a provision in a Measure may only relate to Wales. This, for example, will enable the Assembly to include in Measures necessary consequential amendments to Acts of Parliament to make it clear where they no longer apply in relation to Wales or to include provisions enabling the courts of England and Wales to enforce Assembly Measures effectively.

338. In order to comply with section 94(6):

- a) the provision in question must comply with restrictions on the Assembly's legislative competence which are set out in Part 2 of Schedule 5 to the Act. There are exceptions from these restrictions, which are set out in Part 3 of Schedule 5; and

- b) the provision in question may not “extend” to any jurisdiction other than England and Wales. (England and Wales is a single legal jurisdiction and Assembly Measures will form part of the law of that jurisdiction. Although they will only, with limited exceptions, apply to Wales, they will be able to be enforced by the courts of England and Wales generally. They will not, however, be able to make provision forming part of the law of other legal jurisdictions such as Scotland); and
- c) the provision in question must not be incompatible with the European Convention on Human Rights or European Community law.

339. Subsection (7) lays down the test to be used to decide whether a particular provision in an Assembly Measure relates to a matter or matters listed in Part 1 of Schedule 5, and therefore whether it meets the criteria in 94(4)(a). The correct approach will be to consider the purpose of the provision having regard to its effect in all the circumstances.

### **Section 95: Legislative Competence : supplementary**

340. This section provides a mechanism by which amendments may be made to Schedule 5 to the Act , so as to enhance, restrict or otherwise change the Assembly’s legislative competence to pass Assembly Measures. Amendments are made by Order in Council, which can:

- a) add to, remove or change the fields set out in Part 1 of Schedule 5;
- b) list a matter or a further matter under a field, or remove or change a matter already listed;
- c) amend Parts 2 or 3 of Schedule 5, which set out general restrictions on the passing of Assembly Measures, and exceptions to those restrictions respectively.

341. A field cannot be added to Schedule 5 if it is one in which no functions are exercisable by the Welsh Ministers, the First Minister or the Counsel General.

342. An Order in Council amending Schedule 5 can also make changes to any enactment, including Acts of the Scottish Parliament and instruments made under those Acts, prerogative instruments, and other instruments or documents, where those changes are appropriate in connection with the amendment to Schedule 5.

343. Orders in Council under this section can make provisions which apply retrospectively (i.e., to things which have already been done). So, for example, this power could be used to clarify the extent of a matter in Part 1 of Schedule 5, where there has been a legal challenge to the validity of an Assembly Measure made in relation to that matter, and there is a need for legal certainty about the extent of the matter.

344. An Order in Council under this section may only be made if the draft of it has been approved by the Assembly, the House of Commons and the House of Lords. Thus Parliament retains control over the fields and matters in relation to which the Assembly has power to pass Measures.

345. Once a draft Order in Council has been approved by the Assembly, the First Minister must, as soon as reasonably practicable, send the Secretary of State written notice of that fact and a copy of the draft approved by the Assembly. The Secretary of State must then decide whether to lay the draft Order in Council before Parliament with a view to obtaining approval of the two Houses. The Secretary of State is not obliged to lay the draft before Parliament but if the Secretary of State does not do so before the end of 60 days (not counting days when Parliament is dissolved or prorogued or adjourned for more than four days) written notice of

the reasons for refusing to do so must be given to the First Minister, who must then lay it before the Assembly. The Assembly must publish it.

346. Under subsection (10), if a change is made to Schedule 5, and thus to the Assembly's legislative competence to pass Measures, the change is to have no effect upon Assembly Measures which have already been passed (or approved, in the case of Measures which have been reconsidered and amended) by the Assembly. So even if the powers of the Assembly were narrowed so as to remove the power to pass a particular Measure it would remain law. This is subject to the power to make retrospective provision in the Order in Council.

### **Section 96: Scrutiny of proposed Orders in Council**

347. Under this section the Counsel General or the Attorney General may refer a proposed Order in Council to the Supreme Court for a decision as to whether the matter which it proposes to add to Part 1 of Schedule 5 relates to a field listed in that Part.

#### ***Procedure***

### **Section 97: Introduction of proposed Assembly Measures**

348. This section imposes certain requirements in relation to the introduction into the Assembly of proposed Assembly Measures.

349. A proposed Assembly Measure may, subject to provisions of standing orders, be introduced by the First Minister, any of the Welsh Ministers, any Deputy Welsh Minister, the Counsel General or any Assembly Member. Standing orders might restrict the ability of some of these persons to introduce a proposed Measure.

350. The person in charge of a proposed Assembly Measure must, on or before the proposed Measure's introduction, make a statement expressing their view that the provisions in the proposed Measure are within the Assembly's legislative competence.

351. The Presiding Officer of the Assembly must on or before introduction of a proposed Measure, decide whether or not it is within the Assembly's legislative competence and state that decision.

### **Section 98: Proceedings on proposed Assembly Measures**

352. This section requires the Assembly's standing orders to contain certain provisions in relation to the consideration and passing (or approval, in the case of Measures which are reconsidered and amended) of proposed Measures by the Assembly.

353. Standing orders must ensure that, generally, Measures must pass through three stages.

354. There must firstly be an opportunity for a general debate about the proposed Measure by the Assembly, and for Assembly Members to vote on its general principles. This stage mirrors the Second Reading stage of Bills in the UK Parliament.

355. There must then be a stage involving consideration of, and an opportunity for Assembly members to vote on, the details of the proposed Measure, corresponding to the committee stage of a Bill at Westminster.

356. Finally there must be a stage at which members can vote on whether to pass the proposed Measure in its final form. This is equivalent to the Third Reading of a Parliamentary Bill.

357. Standing orders may allow a different procedure in the case of proposed Measures which fall within certain categories, namely those which restate the law, those which repeal or revoke spent enactments and "private" proposed Assembly Measures. In the case of the

first two, standing orders may permit a streamlined procedure whilst in the case of “private” proposed Measures procedures they are likely to include an opportunity for individuals affected to make representations to the Assembly, as in the case of private Parliamentary Bills.

358. Standing orders must include provision for securing that, except in specified circumstances (which are left to standing orders to define) a proposed Assembly Measure can only be passed if the text of the proposed Measure is in both English and Welsh.

359. Standing orders must provide for a proposed Measure which has been passed by the Assembly to be reconsidered in certain circumstances. These are:

- a) where the Supreme Court has decided that the proposed Measure is outside the Assembly’s legislative competence, following the Counsel General or the Attorney General referring that issue to the Supreme Court under section 99;
- b) where the Counsel General or the Attorney General has referred the issue of whether the proposed Measure is within the Assembly’s legislative competence to the Supreme Court under section 99, the Supreme Court has then referred an issue arising out of it to the European Court of Justice for a preliminary ruling, but the reference to the Supreme Court has been withdrawn following a decision by the Assembly that it wishes to reconsider the proposed Measure; or
- c) where the Secretary of State has made an Order under section 101 prohibiting the Clerk of the Assembly from submitting a proposed Measure for approval by Her Majesty.

360. If a proposed Assembly Measure is, upon reconsideration, amended by the Assembly, then there must be a further final stage at which the amended proposed Assembly Measure can be approved or rejected by the Assembly.

### **Section 99: Scrutiny of Proposed Assembly Measures by Supreme Court**

361. This section provides a mechanism through which either the Counsel General or the Attorney-General can obtain a decision by the Supreme Court as to whether proposed Assembly Measures or particular provisions of proposed Assembly Measures are within the Assembly’s legislative competence. This may only be done within the four week period starting with the date the Measure was passed by the Assembly or, in the case of a Measure which has been reconsidered and approved by the Assembly, starting with the date the Measure was approved by the Assembly.

362. If the Counsel General or the Attorney General formally notifies the Clerk that he or she is not going to make such a reference then he or she is afterwards barred from doing so (unless the proposed Measure has subsequently been reconsidered and approved).

### **Section 100: ECJ references**

363. Where the Counsel General or the Attorney General has referred a proposed Assembly Measure to the Supreme Court, and the Supreme Court has referred a question in connection with the matter to the European Court of Justice for a preliminary ruling then, provided neither of these references has been decided or otherwise disposed of, the Assembly may opt to reconsider the proposed Measure under provision made under section 98(6). If it does so the person who referred the proposed Measure to the Supreme Court (i.e. Counsel General or the Attorney General, as the case may be), must request the withdrawal of the reference. If, following reconsideration, the proposed Measure were to be approved, in an amended form, and the Counsel General or Attorney General are not satisfied that the

amendment has removed the cause for referring the proposed Measure to the Supreme Court, a fresh reference may be made, within four weeks of that approval.

### **Section 101: Power to intervene in certain cases**

364. This section enables the Secretary of State to intervene and, by order which would be subject to annulment in pursuance of a resolution of either House of Parliament, prohibit the Clerk from submitting a proposed Measure for approval by Her Majesty in Council if the Secretary of State has reasonable grounds to believe that its provisions:

- a) would have an adverse effect on matters which are not within the legislative competence of the Assembly;
- b) might have a serious adverse impact on water resources in England, water supply in England or the quality of water in England;
- c) would have an adverse effect on the operation of the law as it applies in England; or
- d) would be incompatible with any international obligation or the interests of defence or national security.

365. The first ground set out above on which the Secretary of State may make an order, appears in the Act in the form “would have an adverse effect on any matter which is *not specified* in Part 1 of Schedule 5”. Matters which are not specified (i.e., as ones in respect of which the Assembly has legislative competence) include those which are excepted from a matter that is specified.

366. Such an order may be made within four weeks of the passing of the proposed Measure, or of the approval of the proposed Measure following reconsideration under provision made under section 98(6) or, if a reference to the Supreme Court has been made under section 99, within four weeks of the reference being decided or otherwise disposed of. If the Secretary of State has formally notified the Clerk that no order is going to be made in relation to the proposed Measure such an order is barred in relation to it, unless the proposed Measure is reconsidered and approved by the Assembly under provision made under section 98(6) after that notification was given.

### **Section 102: Approval of proposed Assembly Measures**

367. Once a proposed Measure has been passed (or approved upon reconsideration) by the Assembly, it is for the Clerk to submit it for approval by Her Majesty in Council

368. However, the Clerk may not do so:

- a) if the Counsel General or the Attorney General is still entitled to refer to the Supreme Court under section 99 the issue of whether a provision in the proposed Measure is within the Assembly’s legislative competence (i.e. if the four week period for doing so has not expired and they are not both barred from making a reference as a result of having notified the Clerk that they do not intend to do so);
- b) if the Counsel General or the Attorney General has made a reference to the Supreme Court under section 99 which has not yet been decided or disposed of;
- c) if the Secretary of State is still entitled to make an order under section 101 (see the notes to that section) prohibiting the Clerk from submitting the proposed Measure for approval.

369. The Clerk may not submit a proposed Measure for approval by Her Majesty in its unamended form if:



- a) the Supreme Court has ruled, on a reference under section 99, that the proposed Measure, or any provision of it, would not be within the Assembly's legislative competence; or
- b) such a reference has been withdrawn as a result of a decision by the Assembly that it wishes to reconsider the proposed Measure.

370. Once Her Majesty in Council has approved a proposed Measure the Clerk must write the date of that approval on the text of the Measure, must publish the instrument by which Her Majesty approved the Measure and must, in accordance with standing orders, notify the Assembly of the date of that approval.

## **PART 4: ACTS OF THE ASSEMBLY**

### ***Overview of Part 4***

371. Following paragraphs 3.22 - 3.29 of "Better Governance for Wales", this Part of the Act makes provision for the Assembly to have primary legislative powers across the broad range of the subjects in Part 1 of Schedule 7 without the need for further recourse to Parliament. As the White Paper made clear, such powers will only be conferred on the Assembly following approval for this in a referendum, and this Part of the Act also makes provision for holding one.

372. Section 103 of the Act provides for a referendum to be authorised by Order in Council (and Schedule 6 makes more detailed provision in relation to its organisation), but an Order in Council may not be submitted to Her Majesty in Council for approval unless a draft has been approved by both Houses of Parliament and the Assembly; and in the case of the Assembly, such approval must be demonstrated by Assembly Members representing not less than two-thirds (i.e. 40) of the Assembly seats voting in support of the motion. If a referendum is held and there is majority support for conferring these powers on the Assembly, the effect of section 105 is that the Welsh Ministers would be able to make a commencement order to bring the relevant "primary power" provisions into force. Once that is done, the Order in Council/Measure provisions of Part 3 of the Act will cease to have effect, and the Assembly would in future be able to pass legislation, to be known as Acts, in relation to one or more of the "subjects" set out in Schedule 7.

373. The White Paper stated that conferring primary legislative powers on the Assembly would mean that "it would be able to make law on all subjects within its devolved fields". That is, the Assembly's primary legislative powers would extend to those subjects where the Assembly constituted by the Government of Wales Act 1998 already has executive competence, and would preserve restrictions in particular areas where they exist now. The Act sets out those subjects, and some restrictions, in Schedule 7. Section 109 provides Order in Council powers for this Schedule to be updated to take account of any Measure making powers granted or transfers of functions agreed by Parliament between enactment and the time when any referendum might be in prospect; in other words, any referendum would proceed on the basis of an up to date statement of the scope of the powers to be conferred if the electorate approved of the Assembly gaining these powers.

374. Unlike the Scotland Act 1998, the Act defines the scope of the Assembly's "primary" legislative powers (after a referendum) by listing the subjects in relation to which the Assembly would be able to make law, rather than only listing those areas outside its legislative competence. The reasons for this were set out in a joint Memorandum from the

Secretary of State for Wales and the First Minister for Wales to the Welsh Affairs Committee<sup>14</sup>:

*“Under the approach of the Scotland Act 1998 changes to the law which are made by the Scottish Parliament are not limited to specific subjects. They can include changes to basic principles of law. For example, the Scottish Parliament has made changes in land law in Scotland, beginning with the Abolition of Feudal Tenure etc. (Scotland) Act 2000).*

*Scotland has its own distinct legal jurisdiction, with its own system of courts, judges, legal profession and provision for legal education. An ability on the part of its legislature to change basic principles of law and specific rules relating to subjects such as land law which have a general impact across almost all day-to-day activities is consistent with this situation.*

*Wales is different. It forms part of a single unified England and Wales jurisdiction with a common courts system, judges who can act throughout the two countries and lawyers who are educated and who practice in a way which does not distinguish between England and Wales. There is no intention to change this. The Assembly is to be able to make laws which apply in relation to activities in Wales but these will be part of the general law of the jurisdiction of England and Wales.*

*Lawyers who practice in Wales and judges who normally sit in Wales would inevitably be more familiar with laws which applied only to Wales than their colleagues in England but they would still be working within a single unified jurisdiction and if, in the course of a case being heard in England, it were relevant to consider something done in Wales to which an Assembly Act applied then the court would apply that Act in exactly the same way as it would apply an Act of Parliament.*

*If the Assembly had the same general power to legislate as the Scottish Parliament then the consequences for the unity of the England and Wales legal jurisdiction would be considerable. The courts would, as time went by, be increasingly called upon to apply fundamentally different basic principles of law and rules of law of general application which were different in Wales from those which applied in England. The practical consequence would be the need for different systems of legal education,*

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<sup>14</sup> Evidence to the Committee, 10 November 2005.

*different sets of judges and lawyers and different courts. England and Wales would become separate legal jurisdictions.*

*In order to avoid this result the simplest solution is to follow the Scotland Act 1978 model, limiting the legislative competence of the Assembly to specified subjects.*

*The other approach having, in principle, the same effect would be to transfer general law-making powers to the Assembly but then to reserve fundamental legal principles and basic legal rules to the UK Parliament. The view of Parliamentary Counsel is that such a reservation would be so complex and its effect so uncertain that the alternative of limiting devolved legislative competence to specific subjects would be by far the better approach.*

*There are further, subsidiary, reasons for adopting the Scotland Act 1978 approach in relation to Wales. Firstly, the list of reserved subjects which would apply in relation to Wales would be substantially longer and more complex than that in the Scotland Act 1998, in that it would need to include subjects such as criminal justice and the courts which are generally devolved in relation to Scotland but not in relation to Wales. Secondly, the task of formulating a list of devolved subjects in relation to Wales, which builds on the executive functions already devolved to the Assembly, is one which can develop out of the existing pattern of Welsh devolution and is therefore much easier to accomplish accurately and effectively than would be that of compiling an exhaustive list of subjects in relation to which the Assembly does not exercise executive functions”*

375. Assembly legislation made in exercise of “primary” legislative powers will be known as Acts. Section 108 specifies the tests that provisions of Acts must satisfy if they are to be within its legislative competence. In particular, they must relate to one or more of the subjects in Part 1 of Schedule 7, and not fall within any of the exceptions in that Part. Restrictions on the use of the Assembly’s powers, within the scope of its general area of legislative competence, are set out in Part 2 of Schedule 7. The question whether a particular provision of an Act relates to a subject is to be determined by reference to its purpose, having regard (among other things) to its effect in all the circumstances” (section 108(7)). Subject to these and other tests being satisfied, an Assembly Act may make any provision that could be made by Act of Parliament.

376. Sections 110 and 111 make provision about Assembly proceedings on draft Acts, which are referred to as Bills. Subject to exceptions for special categories of Bill (see section 111(3)), standing orders must include provision for general debate and a vote on the principles of a Bill; for detailed scrutiny of its provisions; and for a final endorsement of the Bill (including a final endorsement of a Bill which has been reconsidered and amended by the Assembly). Once Assembly consideration of the Bill is complete, the Clerk submits it to Her

Majesty for Royal Assent, and the Bill becomes law on receiving this. But a period of four weeks following completion of the Assembly's deliberations on the Bill must elapse before it can be submitted, during which time the Counsel General or the Attorney General may refer to the Supreme Court any question as to the vires of the Bill; or the Secretary of State may prevent it from being submitted for Royal Assent if the Secretary of State has reasonable grounds to believe that its provisions are incompatible with international obligations or the interests of defence or national security, or might have a serious adverse effect on water resources, water supply or water quality in England, or would have an adverse effect on the operation of the law as it applies to England, or on non-devolved matters. Section 111(6) requires the standing orders to provide for Assembly reconsideration of the Bill's provisions in such circumstances. The Bill may be submitted for Royal Assent before the end of the four weeks following its passing by the Assembly, if the Attorney General and the Counsel General have notified the Clerk that they are not going to make a reference to the Supreme Court, and the Secretary of State has notified the Clerk that no order is going to be made under section 114.

#### **DETAILED COMMENTARY ON SECTIONS IN PART 4**

##### ***Referendum***

##### **Section 103: Referendum about commencement of Assembly Act provisions**

377. This section allows a referendum to be held in Wales on whether those sections in the Act which give the Assembly power to pass Acts ("the Assembly Act provisions"), should come into force.

378. If the majority of voters in a referendum vote for the Assembly Act provisions to come into force, they are to be brought into force by commencement order made by the Welsh Ministers.

379. There is no power to bring the sections into force without the prior approval of the majority of voters in a referendum.

380. The section deals with the mechanism for calling a referendum.

381. Subsection (3) makes it clear that, if the majority of voters vote against the Assembly Act provisions being brought into force, this will not bar the holding of a later referendum on the same issue.

382. Subsection (4) provides that a recommendation to Her Majesty to make an Order initiating a referendum may only be made if the draft Order has been approved by the House of Commons, the House of Lords and the Assembly.

383. Subsection (5) provides that any Assembly resolution to approve a draft Order in Council will only be effective if the number of Assembly Members voting for it represent two-thirds or more of the total Assembly seats (as opposed to the total number of Assembly Members voting).

##### **Section 104: Proposal for referendum by Assembly**

384. This section provides the mechanism under which the First Minister or a Welsh Minister can initiate a proposal that a referendum be held on bringing the Assembly Act provisions into force.

385. If a sufficient number of Assembly Members approve the proposal, the Secretary of State is required, within 120 days, to either lay before Parliament a draft Order in Council

which will initiate a referendum, or give formal notice refusing to do so which sets out the reasons for that refusal.

### **Section 105: Commencement of Assembly Act provisions**

386. The purpose of this section is to give the Welsh Ministers the power, by order, to bring into force the Assembly Act provisions following endorsement in a referendum.

387. Subsection (3) allows a commencement order made by the Welsh Ministers to include provisions modifying other legislation, prerogative instruments, other instruments and documents, where the Welsh Ministers consider such amendments are appropriate in connection with the coming into force of the Assembly Act provisions.

388. Subsection (4) provides that an order made by the Welsh Ministers bringing the Assembly Act provisions into force on a date specified in the order, must be approved by the Assembly.

### **Section 106: Effect on Measures of commencement of Assembly Act provisions**

389. This section provides that, as soon as the Assembly Act provisions have come into force (i.e. under an order made by the Welsh Ministers under section 105), Part 3 of the Act ceases to have effect.

390. This means that the Assembly will no longer have the power to pass Assembly Measures. The vehicle for laws that might formerly have been made by Assembly Measure will, from then on, be Acts of the Assembly.

391. However, Assembly Measures which have already been enacted (i.e. passed or approved by the Assembly, and approved by Her Majesty in Council) will continue to be law.

### **Section 107: Acts of the Assembly**

392. This section confers on the Assembly the power to pass legislation in relation to Wales called “Acts of the National Assembly for Wales”, or “Deddfau Cynulliad Cenedlaethol Cymru”. They are referred to in the Act as Acts of the Assembly.

393. It also confirms that the power of the UK Parliament to legislate in relation to Wales, if it chooses to do so, is not affected.

394. Subsection (1) provides that the National Assembly for Wales may enact Acts of the Assembly.

395. Subsection (2) provides that a proposed Act of the Assembly (to be known as a Bill) will become law when:

- a) it has been passed by the Assembly (or “approved” by the Assembly, in the case of a Bill which has been reconsidered), and
- b) it has received Royal Assent.

396. Subsection (3) provides that if, after an Act is enacted, it becomes apparent that there was some invalidity or procedural irregularity in the Assembly proceedings which led up to its enactment (for example, a rule in the Assembly’s standing orders was not complied with), the invalidity or irregularity will not render the Act invalid and it will still be law. However, it is thought that this subsection will not save a purported Act which had not been passed by the Assembly at all because, in those circumstances, section 107 (2) would not have been complied with.

397. Subsection (4) means that, if a particular Act of the Assembly is relevant in any Court proceedings, its existence and validity need not be proved to the Court in the same way that other types of evidence have to be proved to the Court before the Court will take it into account.

398. Subsection (5) makes it clear that the UK Parliament is sovereign and retains the power to make laws in relation to Wales. This is the case even in relation to matters where the power to pass an Act has been given to the Assembly.

### **Section 108: Legislative competence**

399. The purpose of this section and Schedule 7 is to set out the extent of the Assembly's power to pass Acts. The section calls this the Assembly's "legislative competence". Its legislative competence may be altered by Her Majesty making an Order in Council under section 109.

400. Subsection (1) makes it clear that within the limitations imposed by the Act an Act of the Assembly can have the same effect as an Act of the UK Parliament.

401. The Assembly's power to pass Acts will be limited to the legislative competence given to it by this Act, which may be modified by Order in Council.

402. Subsection (2) means that if an Act contains a provision which is outside the Assembly's legislative competence, that provision has no legal effect.

403. Subsections (3) to (6) identify when a provision of an Act will be within the Assembly's legislative competence.

404. It will only be within competence if it satisfies the criteria in *either* section 108(4) *or* 108(5), *and* it complies with section 108(6).

405. In order to satisfy the criteria in section 108(4):

- a) the provision in question must relate to one or more of the subjects listed under any of the headings in Part 1 of Schedule 7. (Section 109 allows Her Majesty to make Orders in Council listing further headings and subjects in Part 1 of Schedule 7, or changing or removing those which are already there); and
- b) the provision in question must not fall within any of the exceptions listed in Part 1 of Schedule 7. For example, a provision in an Act which related to the subject of the Welsh Language (heading 20 in Part 1 of Schedule 7), but which sought to legislate on broadcasting would not meet the criteria in section 108(4)(a), because it would fall within the exception of "broadcasting" under heading 3 in Part 1 of Schedule 7; and
- c) the provision in question must apply only in relation to Wales, and it must not confer, impose, change or remove (or give anyone else the power to confer, impose, change or remove) functions to be carried out in relation to countries other than Wales (e.g. England).

406. In order to satisfy the criteria in section 108(5):

- a) the provision in question must be one which allows a provision contained in any Act of the Assembly (i.e. one which did meet the criteria in section 108(4)) or in an Assembly Measure, to be enforced, or be one which is otherwise appropriate for making such a provision effective; or

- b) the provision in question must be one which is incidental to or consequential on a provision contained in any Act of the Assembly or Assembly Measure which *does* meet the criteria in section 108(4).

407. In order to comply with section 108(6):

- a) the provision in question must comply with restrictions on the Assembly's legislative competence which are set out in Part 2 of Schedule 7 to the Act. There are exceptions from these restrictions, which are set out in Part 3 of Schedule 7; and
- b) the provision in question must form part of the law of England and Wales only (for example, the provision cannot form part of the law of Scotland); and
- c) the provision in question must not be incompatible with the European Convention on Human Rights or European Community law.

408. Subsection (7) lays down the test to be used to decide whether a particular provision in an Act of the Assembly relates to a subject listed under any of the headings in Part 1 of Schedule 7, and does not fall within any of the exceptions.

409. The correct approach will be to consider the purpose of the provision having regard to its effect in all the circumstances.

### **Section 109: Legislative competence: supplementary**

410. The purpose of this section is to allow amendments to be made to Schedule 7 to the Act, so as to enhance, restrict or change the Assembly's legislative competence to pass Acts.

411. Subsection (1) provides that Her Majesty may, by making an Order in Council, add further subjects and headings to Part 1 of Schedule 7. The Order in Council may also remove or change subjects or headings already listed.

412. Her Majesty may also amend Parts 2 and 3 of Schedule 7, which set out general restrictions on the passing of Bills, and exceptions to those restrictions respectively.

413. Subsection (2) provides that Orders in Council made by Her Majesty amending Schedule 7 can also make changes to enactments, including Acts of the Scottish Parliament and instruments made under those Acts, prerogative instruments, and other instruments or documents, where those changes are appropriate in connection with the amendment to Schedule 7.

414. Subsection (3) provides that Orders in Council under this section can make provisions which apply retrospectively.

415. For example, this power could be used to clarify the extent of a subject in Part 1 of Schedule 7, where there has been a legal challenge to the validity of an Act of the Assembly made in relation to that subject, and there is a need for legal certainty about the extent of the subject.

416. Subsection (4) provides that, except in relation to the first Order in Council amending Schedule 7 a recommendation to Her Majesty to make such an Order must only be made if the draft Order in Council has been approved by the House of Commons, the House of Lords and the Assembly.

417. Subsection (5) makes it clear that if a change is made to Schedule 7, and thus to the Assembly's power to pass Acts, the change is to have no effect upon Acts already passed (or approved, in the case of Acts which have been reconsidered and amended) by the Assembly.

They will remain law. This is subject to any retrospective provision that may be made in the Order in Council.

### ***Procedure***

#### **Section 110: Introduction of Assembly Bills**

418. This section imposes certain requirements in relation to the introduction into the Assembly of Assembly Bills.

419. A Bill may, subject to provisions of standing orders, be introduced by the First Minister, any of the Welsh Ministers, any Deputy Welsh Minister, the Counsel General or any Assembly Member. Standing orders might restrict the ability of some of these persons to introduce a Bill, for example by requiring Bills giving rise to public expenditure to be introduced by Ministers.

420. The person in charge of a Bill must, on or before the Bill's introduction, make a statement expressing their view that the provisions in the Bill are within the Assembly's legislative competence.

421. The Presiding Officer of the Assembly must on or before introduction of a Bill, decide whether or not it is within the Assembly's legislative competence and state that decision.

#### **Section 111: Proceedings on Bills**

422. This section requires the Assembly's standing orders to contain certain provisions in relation to the consideration and passing (or approval, in the case of Bills which are reconsidered and amended) of Assembly Bills.

423. Standing orders must ensure that, generally, Bills must pass through three stages.

424. There must firstly be an opportunity for a general debate about the Bill by the Assembly, and for Assembly Members to vote on its general principles. This stage mirrors the Second Reading stage of Bills in the UK Parliament.

425. There must then be a stage involving consideration of, and an opportunity for Assembly members to vote on, the details of the Bill, corresponding to the committee stage of a Bill at Westminster.

426. Finally there must be a stage at which members can vote on whether to pass the Bill in its final form. This is equivalent to the Third Reading of a Parliamentary Bill.

427. Standing orders may allow a different procedure in the case of Bills which fall within certain categories, namely those which restate the law, those which repeal or revoke spent enactments and "private" Bills, that is ones which change the law only on a very localised basis. In the case of the first two, standing orders may well permit a streamlined procedure whilst in the case of "private" Bills they are likely to include an opportunity for individuals affected to make representations to the Assembly, as in the case of private Parliamentary Bills.

428. Standing orders must include provision for securing that, except in specified circumstances (which are left to standing orders to define) a Bill can only be passed if the text of the Bill is in both English and Welsh.

429. Standing orders must provide for a Bill which has been passed by the Assembly to be reconsidered in certain circumstances. These are:



- a) where the Supreme Court has decided that the Bill is outside the Assembly's legislative competence, following the Counsel General or the Attorney General referring that issue to the Supreme Court under section 112;
- b) where the Counsel General or the Attorney General has referred the issue of whether the Bill is within the Assembly's legislative competence to the Supreme Court under section 113, the Supreme Court has then referred an issue arising out of it to the European Court of Justice for a preliminary ruling, but the reference to the Supreme Court has been withdrawn following a decision by the Assembly that it wishes to reconsider the Bill;
- c) where the Secretary of State has made an Order under section 114 prohibiting the Clerk of the Assembly from submitting a proposed Bill for approval by Her Majesty.

430. If a proposed Assembly Bill is, upon reconsideration, amended by the Assembly, then there must be a further final stage at which the amended Bill can be approved or rejected by the Assembly.

### **Section 112: Scrutiny of Bills by Supreme Court**

431. This section provides a mechanism through which either the Counsel General or the Attorney General can obtain a decision by the Supreme Court as to whether a Bill or particular provisions of a Bill are within the Assembly's legislative competence. This may only be done within the four week period starting with the date the Bill was passed by the Assembly or, in the case of a Bill which has been reconsidered and approved by the Assembly, starting with the date the Bill was approved by the Assembly.

432. If the Counsel General or the Attorney General formally notifies the Clerk that he or she is not going to make such a reference then he or she is afterwards barred from doing so (unless the Bill has subsequently been reconsidered and approved).

### **Section 113: ECJ references**

433. Where the Counsel General or the Attorney General has referred a Bill to the Supreme Court, and the Supreme Court has referred a question in connection with the matter to the European Court of Justice for a preliminary ruling then, provided neither of these references has been decided or otherwise disposed of, the Assembly may opt to reconsider the Bill under provision made under section 111(6). If it does so the person who referred the Bill to the Supreme Court (i.e. Counsel General or the Attorney General, as the case may be), must request the withdrawal of the reference. If, following reconsideration, the Bill were to be approved, in an amended form, and the Counsel General or Attorney General are not satisfied that the amendment has removed the cause for referring the Bill to the Supreme Court, a fresh reference may be made, within four weeks of that approval.

### **Section 114: Power to intervene in certain cases**

434. This section gives the Secretary of State a power to prevent, in certain circumstances, a Bill being submitted for Royal Assent.

435. Subsection (1) sets out the circumstances in which the Secretary of State may make an order namely, where the Secretary of State has reasonable grounds to believe that the Bill contains provisions which :

- a) would have an adverse effect upon any matter which is *not* listed in Part 1 of Schedule 7 to this Act, or which falls within any of the exceptions listed in that Part of the Schedule; or

- b) might have a serious adverse impact on water resources in England, water supply in England or the quality of water in England; or
- c) would have an adverse effect on the operation of the law as it applies in England; or
- d) would be incompatible with any international obligations, or the interests of defence or national security.

436. Such an order may be made within four weeks of the passing of the Bill, or of the approval of the Bill following reconsideration under section 111(6) or, if a reference to the Supreme Court has been made under section 112, within four weeks of the reference being decided or otherwise disposed of. If the Secretary of State has formally notified the Clerk that no order is going to be made in relation to the Bill such an order is barred in relation to it (unless the Bill is reconsidered and approved by the Assembly under section 111(6) after that notification was given).

#### **Section 114: Royal Assent**

437. Once a Bill has been passed (or approved upon reconsideration) by the Assembly, it is for the Clerk to submitting it for Royal Assent. The Clerk may not however do so:

- a) if the Counsel General or the Attorney General is still entitled to refer to the Supreme Court under section 112 the issue of whether a provision in the Bill is within the Assembly's legislative competence (i.e. if the four week period for doing so has not expired and they are not both barred from making a reference as a result of having notified the Clerk that they do not intend to do so);
- b) if the Counsel General or the Attorney General has made a reference to the Supreme Court under section 112 which has not yet been decided or disposed of;
- c) if the Secretary of State is still entitled to make an order under section 114 (see the notes to that section) prohibiting the Clerk from submitting the Bill for Royal Assent.

438. The Clerk may not submit a Bill for Royal Assent in its unamended form if:

- a) the Supreme Court has ruled, on a reference under section 112, that the Bill, or any provision of it, would not be within the Assembly's legislative competence; or
- b) such a reference has been withdrawn as a result of a decision by the Assembly that it wishes to reconsider the proposed Bill.

439. Once Royal Assent has been given the Clerk must write the date of that approval on the text of the Bill and must, in accordance with standing orders, notify the Assembly of the date of Royal Assent.

#### **Section 116: Welsh Seal and Letters Patent**

440. This section establishes a Welsh Seal and designates the First Minister as its keeper. The section also allows provision to be made by an Order in Council about the preparation and publication of the Letters Patent that signify that Royal Assent has been given to an Act of the Assembly.

### **PART 5: FINANCE**

#### ***Overview of Part 5***

441. Part 5 puts in place new provisions, dealing with the administration of the finances of the Assembly and the Welsh Ministers. These draw on the relevant sections of the Scotland

Act 1998. But the provisions concerning the manner in which the Assembly will decide on the spending plans of Welsh Ministers (and others) represent a new model.

### ***The Welsh Consolidated Fund***

442. Section 117 establishes a Welsh Consolidated Fund (WCF). The Fund will receive payments from the Secretary of State out of moneys voted by Parliament (section 118). The moneys voted by Parliament to the Secretary of State will be calculated having regard to the “Barnett Formula”, to determine what is known as the “Welsh Block Grant”. The Secretary of State will deduct the administrative expenses of the Wales Office from this, and pay the remainder into the WCF. The Secretary of State will be required, at least four months before the beginning of each financial year, to prepare and lay before the Assembly a written statement with an estimate of payments to be made into the Fund, and to the Welsh Ministers, First Minister and Counsel General, in that financial year (section 119). Under section 120, provision can be made so that certain categories of receipts are to be dealt with other than by payment into the WCF, and section 130 makes provision for receipts paid into the WCF by mistake which need to be recovered.

443. Sections 121 -123 make provision for the Welsh Ministers to borrow from the Secretary of State either to cover any short-term deficit in the Fund or to provide a working balance. The total of such borrowing may not exceed £500m at any given time. The Secretary of State will be required to prepare accounts in respect of loans issued under these powers.

444. Sections 124-129 are the provisions specifying the processes which must be complied with for expenditure out of the Fund to be regular. The norm is that sums may only be paid out of the WCF on the authority of a Budget resolution passed by the Assembly. There will be a small number of instances in which a sum may be paid out of the WCF without the need for a reference to it in a Budget motion, because the sum has been “charged on” the Fund by an enactment (for an example in this Act, see section 20(5)). As stated above, there is also special provision, in section 130, for monies that were paid into the WCF by mistake to be paid out of it without the authority of a Budget resolution. The only other exceptions to the principle that a Budget resolution of the Assembly is required before sums can be spent from the WCF are described in sections 127 and 128 (see below).

445. Section 125 sets out the requirement for an annual Budget motion (which may be moved only by the First Minister or another Welsh Minister) seeking authorisation for:

- a) the amounts of resources that can be used on the “services and purposes” specified in the motion,
- b) the amounts of accruing resources which may be retained (rather than being paid into the Welsh Consolidated Fund), and
- c) the amounts of cash that may be issued from the Fund.

446. Section 126 permits one or more Supplementary Budget motions to be moved to vary the amount of resources that can be used for specified services and purposes in a particular financial year, or to add new services and purposes and allocate resources to them. A Supplementary Budget motion may also vary the amounts of resources that can be retained instead of being paid into the WCF, or authorise new retentions. Once a Budget motion has been approved by the Assembly and becomes a Budget resolution, sums may be paid out of the WCF in support of the services and purposes referred to in the resolution; it will be for the Auditor General for Wales, under section 129, to give approvals for sums to be paid out, if satisfied that the payment out will be in accordance with the relevant Budget resolutions.

447. As mentioned above, sections 127 and 128 provide exceptions to the general principle of no payments out of the Fund without a Budget resolution (or a provision charging the payment in question on the WCF). Section 127 deals with the situation where no Budget resolution has been adopted by the Assembly by the beginning of the relevant financial year. In the absence of such a resolution, resources for services and purposes may be used up to a specified level, determined as a fixed percentage of the preceding financial year's provision for that service or purpose; in this way, a failure by the Assembly to pass a Budget resolution by the beginning of the financial year will not automatically lead to the public services funded by the Welsh Ministers exhausting their resources within a few days of the beginning of the financial year. Section 128 allows for resources to be used, up to a specified level, in emergency situations where Welsh Ministers consider the expenditure to be in the public interest and it is not reasonably practicable, for reasons of urgency, for a Budget motion to be put down to authorise the expenditure. In such a situation, the Welsh Ministers are required as soon as possible to lay a report before the Assembly explaining why they considered the action they took to be necessary.

#### ***Accounts and Audit – Sections 131 – 145***

448. Provision is made in the Act for the preparation of accounts in respect of the use of resources by the Welsh Ministers and Counsel General; payments into and out of the WCF; the use of resources by the Assembly Commission; and for the preparation by the Welsh Ministers of “Whole of Government of Wales accounts”, a concept deriving from the Government Resources and Accounts Act 2000. The Act defines who are to be the Accounting Officers for the Welsh Ministers and the Assembly Commission. The Auditor General for Wales (AGW) has responsibility for examining and certifying these accounts, and for carrying out examinations into the economy, efficiency and effectiveness with which the Welsh Ministers and the Assembly Commission have used their respective resources in discharging their functions. The AGW can lay before the Assembly any report made by the AGW in the exercise of these responsibilities, and must do so in the case of reports on accounts, or where the AGW considers it is in the public interest to do so (Schedule 8, paragraph 19). The Audit Committee can give views on what examinations the AGW should carry out and can also under section 143 consider and report itself on the reports and accounts laid before the Assembly by the AGW. The Comptroller and Auditor General may carry out examinations into the payments into and out of the WCF, and report the results of such examinations to the House of Commons and the Assembly.

449. Section 145 and Schedule 8 to the Act make revised provision for the office of AGW. In particular, it is for Her Majesty to make appointments to the office of AGW, on the nomination of the Assembly; but the AGW is not in the exercise of any functions to be subject to the direction or control of either the Assembly or the Welsh Assembly Government. The AGW obtains funding by submitting an estimate of the expenses of carrying out the functions of that office to the Audit Committee. This is then laid before the Assembly, with any modifications the Committee considers appropriate; but if modifications are to be proposed, that may only be done following consultation with the AGW. The Assembly will vote on the resources to be allocated to the AGW as part of the Budget resolution process, referred to above.

## **DETAILED COMMENTARY ON SECTIONS IN PART 5**

### ***Welsh Consolidated Fund***

#### **Section 117: Welsh Consolidated Fund**

450. This section establishes the Welsh Consolidated Fund (WCF), and stipulates that it is to be held with the Paymaster General. The norm is that sums may only be paid out of the WCF on the authority of a Budget resolution passed by the Assembly. Thus, the creation of the WCF provides the mechanism whereby the Assembly will control the use of resources by the Welsh Ministers and other bodies and offices funded directly from the WCF.

### ***Payments into Welsh Consolidated Fund***

#### **Section 118: Grants**

451. Subsection (1) provides that payments from the Secretary of State, deriving from the moneys voted to him or her by Parliament, must be paid into the WCF.

452. Subsection (2) empowers any Minister of the Crown, and any government department, to make payments to the Welsh Ministers, the First Minister or the Counsel General. This may happen where, for example, the Welsh Ministers agree to carry out, in Wales, a function of a UK Minister of the Crown. By virtue of section 120(1), such sums will normally fall to be paid into the WCF. However, this requirement may be overridden by the Assembly passing a resolution under section 120(2).

#### **Section 119: Statement of Estimated Payments**

453. In order to assist the Welsh Ministers in formulating a Budget motion under section 125 and to assist the Assembly in scrutinising that Budget motion, section 119 requires the Secretary of State to lay a written statement before the Assembly at least four months before the beginning of each financial year. The statement must contain an estimate of the total payments that the Secretary of State will pay into the WCF in that financial year. It must also contain an estimate of how much will be paid to the Welsh Ministers, the First Minister or the Counsel General in that financial year (whether by Ministers of the Crown, government departments or other persons), together with any other information that the Secretary of State considers appropriate (see subsections (1), (2), (4) and (5)).

454. Under subsection (3), the statement must also show how much of the Welsh Block Grant, voted to the Secretary of State for Wales by Parliament, the Secretary of State proposes to deduct (in particular, to meet the expenses of the Secretary of State's own department, the Wales Office), before paying the remainder into the WCF.

#### **Section 120: Destination of Receipts**

455. This section deals with which sums need to be paid into the WCF, and which do not. The normal position is that sums received by the Welsh Ministers, the First Minister, the Counsel General, the Assembly Commission, the AGW or the Public Services Ombudsman for Wales are to be paid into the WCF (because all those bodies and office-holders are funded out of that Fund - see subsection (1)).

456. However, there are a number of exceptions to this, namely:

- a) where legislation (including this Act) expressly disappplies the general requirement for receipts to be paid into the WCF (see, for an example in this Act , Schedule 8, paragraph 9(3));

- b) where the Assembly has resolved that receipts in the relevant category are, in principle, eligible for retention (as opposed to having to be paid into the WCF) by the Welsh Ministers, the First Minister, the Counsel General, the Assembly Commission, the AGW or the Public Services Ombudsman for Wales; a Budget resolution of the Assembly (for which see section 125) must also have authorised the maximum amount, up to which the person in question can retain the resources for the relevant financial year (subsection (2)).

457. In addition, HM Treasury can effectively override a requirement that sums be paid into the WCF. The Treasury can make an Order under subsection (3) designating certain categories of receipt. The consequence of this is that the Welsh Ministers have to pay an amount equivalent to those receipts into the UK Consolidated Fund, via the Secretary of State for Wales. This power of HM Treasury is outside the Assembly Budget process (for which see below), because the sums involved are charged on the WCF by virtue of subsection (6). This means that they are paid automatically out of the WCF, without the need for Assembly approval in a Budget resolution. Subsection (7) provides that these Treasury Orders are to be made by negative resolution procedure in the House of Commons (in accordance with the convention that the Commons alone controls matters relating to the supply of finance to the executive).

### ***Borrowing***

#### **Sections 121-123**

458. Sections 121-123 make provision for the Welsh Ministers to borrow from the Secretary of State, either to cover a short term deficit in the WCF, or to provide a working balance within that Fund (section 121(1)). The total assets borrowed may not exceed £500 million at any given time (section 122(2)). This overall limit includes loans made by the Secretary of State to the National Assembly for Wales as constituted by the Government of Wales Act 1998, and any other loans issued out of the National Loans Fund which the Assembly is liable to repay, to the extent that these are still outstanding when the Welsh Ministers come into existence (Schedule 11, paragraph 57). The £500 million ceiling can be increased by the Secretary of State by order, provided that HM Treasury consent (section 122(3)). Such an Order is subject to affirmative procedure in the House of Commons (section 122(4)), thus preserving the principle that that House should control the supply of money to the executive.

459. The Assembly will not be able to control, by means of its Budget process, the rate at which such loans are repaid to the Secretary of State, as HM Treasury may determine the timing and interest rate of those repayments (section 121(2)), and sums required for the repayments are “charged on” the WCF (section 121(3)) (for which see the note on section 124 below). Sums received by the Secretary of State by way of repayment will be paid into the National Loans Fund, from which they were originally provided (section 122(1) and (5)).

460. Under section 123, the Secretary of State is required to prepare, for each financial year, accounts in respect of loans issued under these provisions. These accounts are to include any outstanding loans or advances made by the Secretary of State to the Assembly as constituted by the Government of Wales Act 1998. The accounts are to be sent to the Comptroller and Auditor General for examination (section 123(2)). The Comptroller and Auditor General must lay copies of those accounts, and the Comptroller and Auditor General’s report on them, before each House of Parliament (section 123(3)).

## ***Expenditure***

### **Sections 124, 125, 126, 127, 128, 129 and 130**

461. Sections 124-130 deal with the processes which must be complied with for expenditure out of the WCF to be regular. The normal process is that sums will only be paid out of the WCF on the authority of a Budget resolution passed by the Assembly (section 124(1)(b) and section 125). There are three sets of exceptions to this norm.

462. The first is that, in a small number of cases, sums will have been “charged on” the Fund by legislation (for an example in this Act, see section 20(5)). Sums so charged are paid out of the Fund automatically, without the need to be approved in a Budget resolution (although the AGW still has to approve the issue of the sum, having been satisfied that it is indeed charged on the WCF (section 129 and the final words of section 124(1))).

463. The second set of exceptions is where the payment out is deemed to have been authorised by a Budget resolution of the Assembly, by virtue of sections 127 or 128 (for more on which, see below).

464. The third exception to the norm applies to sums which were paid into the WCF by mistake – see sections 124(5) and 130.

465. Payments out of the WCF which have been authorised (or deemed authorised) by a Budget resolution of the Assembly, still cannot be made except to meet expenditure of a “relevant person”, or expenditure payable out of the WCF by virtue of legislation (section 124(2)). A “relevant person” for these purposes is defined, in subsection (3), as any of:

- a) the Welsh Ministers, the First Minister or the Counsel General;
- b) the Assembly Commission;
- c) the AGW, or
- d) the Public Services Ombudsman for Wales

466. Sections 125 and 126 set out the process of Budget resolutions. For each financial year, the First Minister or another Welsh Minister must move a Budget motion in the Assembly (section 125(1) and (2)). Normally, the Budget resolution for each financial year will be made by the Assembly in the previous financial year (see section 127(1)). The Budget motion must seek the Assembly’s approval for:

- a) how much, in terms of resources, can be used on the services and purposes specified in the motion in the financial year to which it relates;
- b) how much, in terms of accruing resources, any of the relevant persons (for which see above) can retain (rather than paying those resources into the WCF) for use on the services and purposes specified in the motion; and
- c) how much money can be paid out of the WCF in the relevant financial year for use on those services and purposes.

467. The “use of resources”, in accepted accounting terminology, means their expenditure, consumption or reduction in value (section 125(4)). Accruing resources means income, including income from the disposal of capital assets (the latter being known as “non-operating income”).

468. There are thus two aspects to a Budget motion. First, it seeks authorisation for the maximum amount of resources which a relevant person can plan to use on services and

purposes approved in the motion. At that point, the income constituting accruing resources may not have materialised in the form of a cash receipt.

469. Secondly, the motion seeks authorisation for the maximum amount of cash that can be issued out of the WCF to be spent on the services and purposes referred to.

470. The Act provides that, as a minimum, there must be one Budget motion per year, known as the “annual Budget motion” (section 125(1)). As stated above, this will normally be moved and passed before the beginning of the financial year to which it relates (section 127(1)). Supplementary Budget motions may also be moved in relation to a financial year (section 126). These may be moved before the beginning of the financial year to which they relate, in the financial year to which they relate, or in a subsequent financial year. They may vary the amounts of resources to be made available for the services and purposes specified in the annual Budget resolution or they may specify new services and purposes, and allocate resources to those. They can also vary the amounts of resources which any of the relevant persons (see above) can retain, or authorise new retentions, rather than paying these into the WCF. And finally, as with annual Budget motions, supplementary Budget motions can seek authority for the AGW to approve the issue of additional sums of cash out of the WCF, or they can vary the amounts of cash which the Assembly has already authorised to be issued out of the WCF.

471. Like annual Budget motions, supplementary Budget motions may be moved only by the First Minister or another Welsh Minister.

472. As referred to above, two of the exceptions to the norm that a Budget resolution of the Assembly is required before sums can be paid out of the WCF are contained in sections 127 and 128. Section 127 deals with the situation where no Budget resolution has been adopted by the Assembly by the beginning of the relevant financial year. In the absence of such a resolution, section 127 provides that resources may be used on services and purposes, and money issued out of the WCF accordingly, up to a specified level. This level is determined as a fixed percentage of the preceding financial year’s provision for each such service or purpose. Likewise, any of the relevant persons (for which see above) can retain resources (rather than paying them into the WCF), up to the same percentage of the amount of resources that they were authorised to retain in the preceding financial year. The percentage in question is 75% up to the end of July in a financial year. Furthermore, if a Budget resolution for the financial year has still not been passed by the end of July, then resources can be used, amounts retained, and cash issued out of the WCF, up to a further 20% of the previous year’s authorised amounts; that is, up to 95% overall.

473. Section 128 (Contingencies) is aimed at emergency situations in which:

- a) the Welsh Ministers consider expenditure to be necessary in the public interest;
- b) that expenditure is not authorised under an existing Budget resolution; and
- c) it is not reasonably practicable, for reasons of urgency, for a Budget motion to be put down so as to authorise it.

474. In that situation, section 128 allows resources to be used and cash to be paid out of the WCF, up to a ceiling of 0.5% of the total amount authorised for use by, or 0.5% of the total amount of cash authorised to be issued to, the relevant person, or pursuant to a relevant enactment, for the financial year in question. On current figures, this ceiling would equate to approximately £50 million (in the case of the resource authorisation for the First Minister, Welsh Ministers and Counsel General). Where the Welsh Ministers use this power, they must, as soon as possible, lay a report before the Assembly, setting out the amount of



resources and cash involved, and explaining why they considered the action they took to be necessary (subsection (7)).

475. Once payments out of the WCF have been authorised (whether by Budget resolution, by legislative provision “charging” them on the WCF, or under sections 127, 128 or 130), they still cannot be made unless the AGW has granted an approval to draw (section 129). Before doing so, the AGW will need to be satisfied that the conditions laid down in section 124 or section 130 have been met (sections 129(2) and 124(5)). Once an approval to draw has been granted, the Paymaster General, who holds the WCF, must make the funds available to the person entitled to them (section 129(4)).

476. The section makes provision for daily information on payments out of the WCF to be available to the AGW and the principal accounting officer for the Welsh Ministers (subsection (5)).

477. Subsections (6) – (8) make provision concerning the principal accounting officer for the Welsh Ministers. By subsection (6), this is to be the Permanent Secretary to the Welsh Assembly Government – i.e. the most senior civil servant serving the Welsh Assembly Government (see subsection (8)). If there is a temporary vacancy in the post of Permanent Secretary, or the Permanent Secretary is incapable of acting as principal accounting officer to the Welsh Ministers – e.g. because of illness – HM Treasury can appoint a temporary replacement.

### **Section 131: Welsh Ministers’ Accounts**

478. Subsection (1) imposes an obligation on the Welsh Ministers to prepare accounts for each financial year in accordance with directions given to them by HM Treasury. By virtue of subsection (2), these accounts are to cover the financial affairs and transactions of the Counsel General. By virtue of subsection (3), the Treasury may direct the Welsh Ministers to include accounts of financial affairs and transactions of other persons.

479. The Treasury’s power to direct the form of the Welsh Minister’s accounts is based on provisions in the Government of Wales Act 1998. The Treasury does not have an equivalent power under the Scotland Act 1998, because the Scottish Parliament has primary legislative powers which it can use to dictate the form and content of the accounts of the Scottish Ministers. The power to direct the form of the Welsh Ministers’ accounts will remain vested in the Treasury unless and until the Assembly gains the legislative competence to provide otherwise.

480. The Welsh Ministers must submit their accounts to the AGW, who must report on them to the Assembly (subsections (5) and (6), which also lay down the time-scales within which these actions must be performed). In examining the accounts, the AGW must be satisfied that the Welsh Ministers’ and the Counsel General’s expenditure, recorded in the accounts, was incurred in accordance with the law and with the particular authority which governs it (for instance, in accordance with the provisions of a Budget resolution of the Assembly, in so far as it relates to the Welsh Ministers and the Counsel General). The AGW must also be satisfied that monies received by the Welsh Ministers or the Counsel General for a particular purpose or purposes have been used only on that purpose or purposes.

481. Subsection (8) enables duplication of effort to be avoided, by giving the Treasury a power, by direction, to relieve the Welsh Ministers of a statutory obligation to prepare accounts dealing with any matters which the Welsh Ministers would have to include in accounts which the Treasury have directed them to prepare under this section.

### **Section 132: Account Relating to Welsh Consolidated Fund**

482. As well as accounts of their own transactions, the Welsh Ministers must prepare an account of all receipts into and payments out of the Welsh Consolidated Fund in any financial year (subsection (1)). The account must be prepared in accordance with directions given to the Welsh Ministers by the Treasury (subsection (2)). The account must be submitted to the AGW, who must report on it to the Assembly (subsections (4) and (5), which also lay down the time-scale within which these actions must be performed). In examining the account, the AGW must be satisfied that any payments out of the Welsh Consolidated Fund, referred to in the account, complied with the conditions laid down in sections 124 or 130, and that any monies received by the Welsh Ministers were paid into the Welsh Consolidated Fund, unless they did not have to be by law (subsection (6)).

### **Section 133: Accounting Officers for Welsh Ministers**

483. This section deals with the functions of the principal accounting officer for the Welsh Ministers, as designated by section 129(6). These functions will also relate to the finances of the Counsel General.

484. Essentially, principal accounting officers are responsible for the propriety and regularity of the finances of the body in which they hold that office, and for ensuring that that body uses its resources with economy, efficiency and effectiveness.

485. The principal accounting officer may designate other members of the staff of the Welsh Assembly Government as additional accounting officers, to assist in the principal accounting officer's role.

### **Section 134: Accounts of Subsidiaries of Welsh Ministers**

486. This section ensures that the AGW, when examining any accounts of the Welsh Ministers, has a right of access to documents and information relating to the accounts of any subsidiary of the Welsh Ministers. The AGW also has the right to any assistance or explanation, which the AGW reasonably thinks is necessary in that connection, from any person holding or accountable for any such document (subsection (1)).

487. In this context, a "subsidiary of the Welsh Ministers" means (subsection (4)):

- a) a body corporate (such as a limited company) or other undertaking in relation to which, if the Welsh Ministers were an undertaking for the purposes of section 259(1) of the Companies Act 1985 (c.6), the Welsh Ministers would be a parent undertaking for the purposes of section 258 of that Act;
- b) a trust of which the Welsh Ministers are settlors; or
- c) a charitable institution of which the Welsh Ministers are founders, but which is neither a body corporate nor a trust.

488. Subsection (2) gives the Treasury a power to direct a subsidiary of the Welsh Ministers to include additional information in its accounts. Such a direction would override any prohibition on the inclusion of that information in accounts of that type (subsection (3)). There are, for instance, legislative rules, which might be relevant here, on the contents of company and charity accounts.

### **Section 135: Examinations into Welsh Ministers' Use of Resources**

489. This section gives the AGW power to carry out examinations into the economy, efficiency and effectiveness with which the Welsh Ministers and the Counsel General have used their resources in discharging their functions. These are commonly known as "value for

money”, or “VFM” examinations. In doing so, the AGW is not entitled to question the merits of the policy objectives being pursued by the Welsh Ministers or the Counsel General (subsection (2)).

490. Before carrying out any such examinations, the AGW must take into account the views of the Audit Committee of the Assembly as to what examinations the AGW should carry out under this provision (subsection (3)). The AGW may, but does not have to, lay a report of the results of any such examination before the Assembly (subsection (4)). The AGW does, however, have to do so where the AGW considers that it is in the public interest so to do (Schedule 8, paragraph 19).

### **Section 136: Examinations by Comptroller and Auditor General**

491. In addition to the AGW’s scrutiny of accounts of payments into and out of the Welsh Consolidated Fund, the Comptroller and Auditor General may carry out examinations into such payments, and report the results to the House of Commons (subsections (1) and (2)). This is because the Welsh Consolidated Fund will be largely made up of monies voted by Parliament to the Secretary of State for Wales, and, in Parliament, the House of Commons controls the supply of finance to the executive.

492. If the Comptroller and Auditor General makes a report to the House of Commons under subsection (2) it must be laid before the Assembly at the same time (subsection (3)).

493. Subsections (4) and (5) deal with the Comptroller and Auditor General’s rights of access to documents, and to assistance, information or explanations, for the purpose of carrying out examinations under this section. These rights extend, not only to the Welsh Ministers, the Counsel General and the Assembly Commission, but to the AGW and to any other person audited by the AGW, other than a Welsh NHS body within the meaning given in section 60 of the Public Audit (Wales) Act 2004 (c.23). The reason for the exclusion of these Welsh NHS bodies is because the Comptroller and Auditor General is not the statutory auditor of the equivalent bodies in England.

494. Subsection (6) seeks to avoid unnecessary duplication of effort, by providing that, before carrying out an examination under this section, the Comptroller and Auditor General must consult the AGW and take into account any relevant work done or being done by the AGW.

### **Section 137: Assembly Commission’s accounts**

495. This section obliges the Assembly Commission to prepare accounts for each financial year. As in the case of the Welsh Ministers, the accounts are to be in a form directed by HM Treasury, which can direct the Assembly Commission to include accounts of financial affairs and transactions of other persons (subsections (1) and (2)).

496. The Assembly Commission must submit the accounts to the AGW, who must report on them to the Assembly (subsections (4) and (5), which also lay down the time-scale within which these actions must be taken). In examining the accounts, the AGW must be satisfied that the Assembly Commission’s expenditure, recorded in the accounts, was incurred in accordance with the law and with the particular authority which governs it (for instance, in accordance with the provisions of a Budget resolution of the Assembly, in so far as it relates to the Assembly Commission). The AGW must also be satisfied that monies received by the Assembly Commission for a particular purpose or purposes have been used only on that purpose or purposes.

### **Section 138: Accounting officers for Assembly Commission**

497. This section designates the Clerk of the Assembly (see section 26) as the principal accounting officer for the Assembly Commission (subsection (1)). Accounting officers are essentially responsible for the propriety and regularity of the finances within their remit, and for ensuring that the body of which they are the principal accounting officer uses its resources with economy, efficiency and effectiveness.

498. If there is a temporary vacancy in the office of Clerk, or if the Clerk is incapable as acting as principal accounting officer for the Assembly Commission – e.g. because of illness – HM Treasury can appoint a temporary replacement (subsection (2)).

499. The principal accounting officer may designate other members of the staff of the Assembly as additional accounting officers, to assist in the principal accounting officer's role.

### **Section 139: Accounts of subsidiaries of Assembly Commission**

500. This section ensures that the AGW, when examining any accounts of the Assembly Commission, has a right of access to documents and information relating to the accounts of any subsidiary it may have. It also gives the AGW a right to any assistance or explanation which the AGW reasonably thinks is necessary from any person holding or accountable for such a document (subsection (1)).

501. In this context, a “subsidiary of the Assembly Commission” means (subsection (4)):

- a) a body corporate (such as a company) or other undertaking (as defined in section 259(1) of the Companies Act 1985 (c.6), in relation to which the Assembly Commission is a parent undertaking for the purpose of section 258 of that Act;
- b) a trust of which the Assembly Commission is settlor; or
- c) a charitable institution of which the Assembly Commission is founder, but which is neither a body corporate nor a trust (subsection (4)).

502. Subsection (2) gives the Treasury a power to direct a subsidiary of the Assembly Commission to include additional information in its accounts. Such a direction would override any prohibition on the inclusion, in accounts of that type, of that information (subsection (3)). Legislative rules on company or charity accounts may be relevant here.

### **Section 140: Examinations into Assembly Commission's use of resources**

503. This section gives the AGW power to carry out examinations into the economy, efficiency and effectiveness with which the Assembly Commission has used its resources in discharging its functions. These are commonly known as “value for money”, or “VFM” examinations. In doing so, the AGW is not entitled to question the merits of the policy objectives being pursued by the Assembly Commission (for example, a policy concerning recruitment or employment of staff) (subsection (2)).

504. Before carrying out any such examinations, the AGW must take into account the views of the Audit Committee of the Assembly as to what examinations the AGW should carry out under this provision (subsection (3)). The AGW may, but does not have to, lay a report of the results of any such examination before the Assembly (subsection (4)). The AGW does, however, have to do so where the AGW considers that it is in the public interest so to do (Schedule 8, paragraph 19).

## **Section 141: Whole of government accounts: Welsh Ministers, and Section 142: Functions of Auditor General**

505. Section 141 makes provision for the preparation, by the Welsh Ministers, of “Whole of Government accounts” in relation to Wales. This concept was introduced by the Government Resources & Accounts Act 2000 (c.20). It is a set of accounts for a group of bodies, each of which appears to HM Treasury to exercise functions of a public nature or to be entirely or substantially funded from public money (section 9(1), Government Resources & Accounts Act 2000). It can also include information about activities of other persons or bodies, which appear to the Treasury to be activities of a public nature (section 9(2), Government Resources & Accounts Act 2000). Such accounts can, therefore, be used to give a total picture of the financial transactions of the public sector, or a part of the public sector.

506. Under section 10(8) of the Government Resources & Accounts Act 2000, as amended by the Act, the Treasury can make arrangements with the Welsh Ministers to gather information from bodies designated by the Treasury for the purpose of preparing Whole of Government accounts in relation to Wales. Where such an arrangement exists, the Welsh Ministers must prepare a set of accounts for those bodies (subsection (2)). The accounts may include information about activities which are not activities of bodies designated by the Treasury, but which appear to the Welsh Ministers to be activities of a public nature (subsection (3)). Before designating a body, or giving any direction to it, the Treasury must consult the Welsh Ministers where it thinks appropriate. This will normally be where the body has activities relating wholly, or in significant parts, to Wales.

507. The section makes provision as to the form of the accounts (subsections (2), (4) and (6)).

508. The Welsh Ministers must send accounts under this section to the AGW by 30<sup>th</sup> November in the following financial year, or such other date as they may prescribe by Order after consulting HM Treasury and the AGW. The reason for this power to change the date is that the system of Whole of Government accounts is still relatively new and aspects of it are still being piloted by the Treasury.

509. The AGW must examine accounts sent to the AGW under section 141 with a view to being satisfied that they present a true and fair view (section 142(1)). The AGW must then report on the accounts to the Assembly (subsection (2)). This must be done within four months of the accounts being submitted to the AGW (subsection (2)). The auditors of the bodies included in the Whole of Government accounts must give the AGW such information and explanations as the AGW may reasonably require to carry out functions under section 142 (subsection (3)).

## **Section 143 : Audit Committee Reports**

510. The Audit Committee of the Assembly can consider, and report to the Assembly on, any accounts, statement of accounts or report laid before the Assembly by the AGW or the AGW’s own auditor (subsection (1)).

511. Thus, in addition to the scrutiny of accounts by the AGW, and the AGW’s power to examine and report on the value for money achieved by the Welsh Ministers or the Assembly Commission, the Audit Committee may provide a further level of scrutiny, based on the findings of the AGW. This power of the Audit Committee also extends to other reports and accounts, and reports of examinations, which the AGW will lay before the Assembly. These include examinations into the economy, efficiency and effectiveness with which a body or office specified in Schedule 17 to the Government of Wales Act 1998 has used its resources

in discharging its functions, or reports on the accounts of Welsh NHS bodies, as defined in section 60 of the Public Audit (Wales) Act 2004 (c.23).

512. In addition to these powers of the Audit Committee, the Committee can take evidence, if requested to do so, on behalf of the House of Commons Committee of Public Accounts, and report its findings to that Committee. The Committee of Public Accounts can take evidence from devolved Welsh public bodies, and would usually do so on the basis of a report from the Comptroller and Auditor General (see section 136). The persons from whom the Audit Committee can take evidence under this power are:

- a) the principal accounting officer for the Welsh Ministers;
- b) the principal accounting officer for the Assembly Commission, and
- c) any additional accounting officer designated by either of them.

#### **Section 144: Publication of Accounts and Audit Reports etc**

513. This section imposes an obligation on the Assembly to publish the documents referred to in subsection (2) as soon after they are laid before the Assembly as is reasonably practicable.

514. The documents in question are:

- a) any accounts, statement of accounts or reports laid before the Assembly by the AGW;
- b) any accounts or reports laid before the Assembly by the AGW's own auditor;
- c) any report laid before the Assembly by the Audit Committee under section 143(1), i.e. a report by the Audit Committee on any accounts, statement of accounts or report laid before the Assembly by the AGW or the AGW's own auditor; and
- d) the annual estimate prepared by the AGW of the income and expenses of the AGW's office for the following financial year, submitted to the Audit Committee under paragraph 12(1) of Schedule 8 to the Act, as amended by the Audit Committee if applicable.

#### **Section 145: Auditor General**

515. This section provides for the continuation of the office of Auditor General for Wales or Archwilydd Cyffredinol Cymru. The office was first established by section 90 of the Government of Wales Act 1998 (c.38).

516. Schedule 8 makes other provision concerning the office of AGW.

### **PART 6: MISCELLANEOUS AND SUPPLEMENTARY**

#### ***Overview of Part 6***

517. Part 6 of the Act deals with Miscellaneous and Supplementary matters; only some of these are referred to here.

518. The provisions (ss.116-118) in the 1998 Act relating to Welsh public records are carried forward into this Act, with amendments. These take account of the changes being implemented by this Act, together with other changes in public administration in Wales (so for example the records of the newly-created Welsh Centre for Health are included as Welsh public records).

519. In the same way, the existing provisions in Schedule 8 of the 1998 Act on legal proceedings on "Devolution issues" are carried forward into the new Act as Schedule 9, but

the provisions are updated to take account of the creation of the Supreme Court by the Constitutional Reform Act 2005.

520. Sections 150, 151 and 153 deal with issues potentially arising as a result of use by the Assembly of its Measure-making or Act-making powers. Section 150 (which is based on s.104 of the Scotland Act 1998) authorises the Secretary of State to make orders amending legislation or any other instrument or document consequential upon an Assembly Measure or Act or another piece of subordinate legislation relating to Wales. The purpose of this is to enable the Secretary of State to ensure that the statute book for England and Wales maintains general consistency and coherence, and that questions as to the meaning of legislation (other than that made by the Assembly) are not inadvertently raised as a result of any Measure adopted by the Assembly. Section 151 is similarly a “tidying-up” power, enabling Her Majesty in Council to make orders to deal with any consequences of possible *ultra vires* action by the Assembly in exercise of its legislative functions. Section 153 carries forward, with amendments, the existing provision (s. 110) of the 1998 Act, enabling courts or tribunals, in circumstances where they have concluded that either the Assembly or the Welsh Ministers have gone beyond their legislative powers, to make orders limiting or removing the retrospective effect of any such conclusion.

521. Finally, sections 154 and 156 provide guidance to the courts on the interpretation of Assembly legislation. By section 156, and following s.122 of the 1998 Act, the English and Welsh texts of legislation are to be treated as of equal standing. Section 154 authorises a court to “read down” Assembly legislation, so far as that is possible, in order to be able to conclude that a provision in issue is *intra vires*.

## **DETAILED COMMENTARY ON SECTIONS IN PART 6**

### ***Welsh public records***

#### **Section 146: Status of Welsh public records**

522. This section carries through, with some amendments, the provision made by section 116 of the Government of Wales Act 1998. The effect of the section is that Welsh public records, as defined by section 148, are governed by the Public Records Act 1958 until such time as the Lord Chancellor makes an order under section 147 imposing or conferring functions in respect of them (for example, a duty to preserve them) on either the Welsh Ministers, or a member of staff of the Welsh Assembly Government. The Public Records Act 1958 provides for the preservation and safe-keeping of public records. Rights of access to such records are now governed by the Freedom of Information Act 2000.

523. However, under the definition in section 148, the records of the Assembly and the Assembly Commission are not Welsh public records. Therefore, the Lord Chancellor cannot make an order under section 147 imposing a duty on the Welsh Ministers or a member of staff of the Welsh Assembly Government to preserve those records. Furthermore, those records are not public records for the purposes of the Public Records Act 1958. Accordingly, in analogy with the position in respect of the records of the UK Parliament and the Scottish Parliament, the Assembly and the Assembly Commission will be responsible for their own records, and are not subject to a statutory regime in relation to the records’ maintenance. However, under this Act, the Assembly and the Assembly Commission will both be subject to the access to information regime in the Freedom of Information Act 2000.

524. Records which are records of the Assembly constituted under the Government of Wales Act 1998, but which are to transfer to the Welsh Ministers, the First Minister or the Counsel General by virtue of paragraphs 38 and 39 of Schedule 11 of this Act (unless an

Order in Council makes alternative provision, records connected with a function which is transferred under this Act to the Welsh Ministers, the First Minister or the Counsel General will transfer to the same transferee), are Welsh public records by virtue of section 148(1)(a). Accordingly, by virtue of section 146 they will be subject to the provisions of the Public Records Act 1958 until such time as the Lord Chancellor makes an order under section 147. Records of the Assembly constituted under GoWA which have not transferred to the Welsh Ministers will be the responsibility of the Assembly/Assembly Commission.

#### **Section 147: Transfer of responsibility**

525. This section replicates the Lord Chancellor's order-making power under section 117 of the Government of Wales Act 1998 except in so far as post-separation the duty to preserve Welsh public records can only be imposed on the Welsh Assembly Government rather than on the Assembly.

526. It allows the Lord Chancellor (who is otherwise responsible for Welsh public records by virtue of section 146 and the Public Records Act 1958) to confer or impose functions, including responsibility for the preservation and safe-keeping of such records on the Welsh Ministers, or on a member of staff of the Welsh Assembly Government.

527. The Lord Chancellor must consult the Welsh Ministers before making an order under this section.

#### **Section 148: Meaning of "Welsh public records"**

528. This section defines "Welsh public records". The Lord Chancellor can make an order under this section designating other records as "Welsh public records", but cannot do so in respect of certain records, including those of the Assembly or the Assembly Commission.

#### *Miscellaneous*

#### **Section 149: Resolution of devolution issue**

529. This section gives effect to Schedule 9, which makes detailed provision about the resolution of devolution issues.

#### **Section 150: Power to make consequential provision**

530. This section enables the UK Government to make subordinate legislation to deal with the consequences of provision made by or under 'Welsh legislation'.

531. The section enables the Secretary of State by order, to make provision which he considers appropriate in consequence of any provision made by or under an Assembly Measure or Act, or any provision of subordinate legislation made, confirmed or approved (or purporting to be made, confirmed or approved) by the Welsh Ministers, the First Minister or the Counsel General, or any provision of subordinate legislation made, confirmed or approved (or purporting to be made, confirmed or approved) by a person other than a Minister of the Crown under an Act of Parliament where the statutory instrument is required to be laid before the Assembly.

532. An order under this section can make provision having retrospective effect and may modify any enactment, prerogative instrument or other instrument or document as is considered appropriate by the Secretary of State. Orders under this section are subject to negative procedure in Parliament (i.e. they can be annulled after being made by a resolution of either House of Parliament) unless they modify an Act, in which case they are subject to affirmative procedure (i.e. they cannot be made unless they have first been laid before and approved in draft by a resolution of both Houses of Parliament).



### **Section 151: Power to remedy ultra vires acts**

533. This section enables Her Majesty by Order in Council to make provision in consequence of an Assembly Measure or Act or an exercise by any person of a function imposed or conferred by Assembly Measure or Act which is, or is suspected to be, outside the competence of the Assembly or person. Such provision could be given retrospective effect to enable third parties to be put in the position they thought they were in before a defect was discovered.

534. An Order in Council under this section can make any modifications as Her Majesty considers appropriate to remedy any enactment (including an Act of the Scottish Parliament or an instrument made under such an Act), prerogative instrument or other instrument or document. However, where the proposed modifications are amendments to or repeals of Acts, a draft statutory instrument has to be approved by a resolution of both Houses of Parliament before a recommendation can be made to Her Majesty to make the Order in Council.

535. In circumstances where the Secretary of State has used his power in section 150 to make modifications of enactments, instruments or documents (see the note to that section), in consequence of an Assembly Measure, an Act of the Assembly or subordinate legislation made under such Measure or Act, but it is subsequently considered that the Measure or Act in question (including the Act or Measure under which the subordinate legislation was made) was outside the Assembly's legislative competence, the power in section 151 may be used by Her Majesty to reverse or modify any consequential modifications made in exercise of the power under section 150. Such reversal or modification of the modifications may be considered appropriate in consequence of the Measure or Act which is considered to be beyond competence.

### **Section 152: Intervention in case of functions relating to water etc.**

536. This section allows the Secretary of State to intervene where the exercise of (or failure to exercise) devolved functions by the First Minister, the Welsh Ministers or the Counsel General, or by anyone else upon whom such functions have been conferred by an Assembly Measure or Act, might have a serious adverse impact on water resources, supply or quality in England. The intervention is to take the form of a notice to the person(s) on whom such functions are conferred. The Environment Agency and any water or sewerage undertaker concerned in the case must also be notified that the Secretary of State is intervening. The effect of the notice is to allow that the Secretary of State to exercise the relevant function instead of the person(s) on whom it is conferred. The notice must explain why the Secretary of State is intervening. It can also make provision about the effect of actions previously taken by the person(s) on whom the function is conferred, and extend the time for the taking of steps in relation to that function by the Secretary of State, or any other person.

### **Section 153: Power to vary retrospective decisions**

537. This section provides for a court or tribunal to remove, or limit any retrospective effect, or suspend any such effect, of a decision by it that an Assembly Measure or Act or a provision of it is outside the Assembly's competence, or that a provision of subordinate legislation made (or purported to be made) under an Assembly Measure or Act of the Assembly, or by the Welsh Ministers, the First Minister or the Counsel General is outside the power to make that subordinate legislation..

538. The section also provides that one of the criteria the court or tribunal must take into account when determining whether to use this power is the extent to which third parties would otherwise be adversely affected.

539. The section also provides that if a court or tribunal is considering using this power it must in certain circumstances give notice of that fact to the Attorney General and the Counsel General in relation to proceedings in England and Wales, to the Advocate General for Scotland in relation to proceedings in Scotland and to the Advocate General for Northern Ireland in relation to proceedings in Northern Ireland. The appropriate person may then become a party to the proceedings so far as they relate to the making of the order. The section enables the court or tribunal to take into account and award the whole or part of the additional expense incurred as a result of the participation of an appropriate person to the person who incurred them.

540. Provision for court procedures applying for the purposes of this section can be made under any power to make provision for regulating procedure before any court and tribunal. Such provision would include, for example, how to determine the time within which any notice is to be given.

#### **Section 154: Interpretation of legislation**

541. This section makes provision for the interpretation of a proposed Assembly Measure, an Assembly Measure, an Act or Bill of the Assembly, and of subordinate legislation made, confirmed or approved or purporting to be made, confirmed or approved under an Assembly Measure or Act of the Assembly. The purpose of the section is to enable the courts to give effect to such legislation, wherever possible, rather than to invalidate it merely because it could be read in such a way as to be outside the competence or powers under which it was made.

542. It provides that, in such case, the legislation is to be read as narrowly as is required for it to be considered to be within competence or powers (if such a reading is possible) and is to have effect according to that narrow reading.

#### **Section 155: Functions exercisable in relation to Wales**

543. This section allows Her Majesty to make Orders in Council specifying functions which are, or are not, for such purposes as the Order may specify:

- a) exercisable by the First Minister, the Welsh Ministers or the Counsel General; or
- b) exercisable in relation to Wales.

544. Orders under this section are subject to negative procedure in Parliament, (i.e. they can be annulled after being made by a resolution of either House of Parliament).

#### **Section 156: English and Welsh texts of legislation**

545. This section confers equal validity on the English and Welsh texts of legislation (including Assembly Acts and Measures, and subordinate legislation) made bilingually.

546. It also contains a provision allowing the Welsh Ministers to provide by order (subject to the prior approval of the Assembly by formal resolution) that particular Welsh words and phrases in Assembly Measures or Acts, or in subordinate legislation made under them or by the Welsh Ministers, are to have the same meaning as the English words and phrases specified in relation to them in the order. The purpose of this provision is to ensure that the legislation has the same effect in both languages.

#### **Section 157: Orders and directions**

547. This section contains provision applicable to any power in the Act to make orders. It provides that the Welsh Ministers' and a Minister of the Crown's powers under the Act to

make orders are to be exercisable by statutory instrument. It also provides that any power under the Act to give a direction includes a power to vary or revoke the direction.

**Section 158: Interpretation**

548. This section defines terms used in the Act.

**Section 159: Index of defined expressions**

549. This section contains a list of expressions which are defined or explained in the Act and notes the provisions where such definitions or explanations are to be found.

**Section 160: Minor and consequential amendments**

550. This section introduces Schedule 10 which contains minor and consequential amendments to other legislation that follow from the provisions of this Act. It enables the Secretary of State by order to make further amendments, in consequence of this Act, to legislation which was made before, or was made in the same Parliamentary session as, this Act.

551. The section also provides for a mechanism that ensures that the Secretary of State cannot make an order making consequential amendments to another Act, unless the order has been approved by both Houses of Parliament. The mechanism is that the Secretary of State must lay a draft of the order before both Houses of Parliament, and cannot make the order until both Houses have made a resolution approving the draft order. If the order does not contain amendments to Acts, a resolution of either House of Parliament can annul that order after it has been made.

**Section 161: Commencement**

552. This section provides that, subject to the following exceptions, the provisions of this Act come into force immediately after the Assembly ordinary election in 2007. The exceptions are as follows.

553. Provisions which come into force on the date of Royal Assent:

Section	Effect
Schedule 2, paras 5, 6 and 12	<p>Para 5 allows the Assembly Commission to promote awareness of the Assembly election system, and of the current or any pending system of devolved government in Wales.</p> <p>Para 6 allows the Assembly Commission to provide financial assistance to the Electoral Commission to promote awareness of the Assembly election system and the system of devolved government in Wales.</p> <p>Para 12 allows Her Majesty to make an Order in Council providing for the Assembly Commission to be treated to any extent as a Crown body for the purposes of any enactment.</p>
Sections 95 and	Section 95 allows Her Majesty to amend Schedule 5 by Order in

<p>96, and Schedule 5</p>	<p>Council. Schedule 5 contains the matters in relation to which the Assembly may pass Assembly Measures, together with general restrictions on such legislative competence and exceptions from those restrictions.</p> <p>Section 96 permits the Counsel General or the Attorney General to refer a proposed Order under section 95 to the Supreme Court to decide whether any matter that the proposed Order would add to Part 1 of Schedule 5 relates to a field listed in that Part.</p>
<p>Section 109 and Schedule 7</p>	<p>Section 109 allows Her Majesty to amend Schedule 7 by Order in Council. Schedule 7 contains the subjects (including exceptions from those subjects) in relation to which the Assembly would be able to pass Acts of the Assembly if the majority of voters in a referendum voted for the Assembly to have such powers. The Schedule also contains general restrictions on such legislative competence and exceptions from those restrictions.</p>
<p>Section 119, and repeal by Schedule 12 of section 81 of GoWA</p>	<p>Requirement for the Secretary of State to make a written estimate to the Assembly of payments to be made into the Welsh Consolidated Fund, and to the Welsh Ministers, First Minister and Counsel General, at least four months before the beginning of the financial year.</p> <p>The purpose of commencing this provision on the date of Royal Assent is to allow the Secretary of State to produce written estimates of payments in sufficient time to enable the “old” Assembly established under GoWA to set the budget for financial year 2007-08.</p> <p>Repeal of antecedent provision under s.81 GoWA.</p>
<p>Section 120 (3) and (7)</p>	<p>Provision allowing the Treasury to designate by order that, in respect of certain sums received by or on behalf of the Welsh Ministers and others (e.g. the Auditor General) the Welsh Ministers are required to pay an equivalent sum into the UK Consolidated Fund, via the Secretary of State.</p>
<p>Section 125 and repeal by Schedule 12 of section 86 of GoWA</p>	<p>Requirement for an annual Budget motion, and repeal of provision requiring Assembly constituted under GoWA to make an annual statement of proposed expenditure.</p> <p>The provisions in Section 125 are commenced from Royal Assent to enable the “old” Assembly constituted under GoWA to set an</p>

*These Notes refer to the Government of Wales Act 2006 (c. 32)  
which received Royal Assent on 25 July 2006*

	annual Budget for financial year 2007-'08.
Sections 157 to 159	General provisions about orders and directions; interpretation; and index of defined expressions.
Section 160 (2) to (4)	Power for the Secretary of State to make consequential amendments to other enactments.
The amendment made to section 13 of the Political Parties, Elections and Referendums Act 2000 (PPERA), by paragraph 61 of Schedule 10	Provision in relation to financial assistance which may be provided by the Assembly Commission to the Electoral Commission under paragraph 6 of Schedule 2 to this Act.
This section	Provides for when the provisions of this Act come into force.
Section 162 and Schedule 11	Transitional provisions, transitory provisions and savings, together with power for the Secretary of State to make other such provisions.
Repeal by Schedule 12 of s.12(1)(d) GoWA	Repeal of provision disqualifying from Assembly membership anyone who has been disqualified from being a local authority member under ss. 17(2)(b) or 18(7) of the Audit Commission Act 1998. Those sections are now spent.
Sections 164 to 166	Extent, Financial Provision and short title.

554. Provisions which come into force on 1<sup>st</sup> April 2007:

Sections 117 and 118, and repeal by Schedule 12 of s.80 GoWA	Establishing the Welsh Consolidated Fund, and requiring the Secretary of State to make payments into it from time to time.  Repeal of antecedent provision under s.80 GoWA.
Section 120(1) and (2), (4) to (6) and (8) and the repeal by Schedule 12 of	Provisions relating to payments into, and payments chargeable on, the Welsh Consolidated Fund.

section 84 of GoWA	
Sections 121 and 122, and repeal by Schedule 12 of s.82 GoWA	Provisions allowing the Welsh Ministers to borrow money from the Secretary of State.  Repeal of antecedent provision under s.82 GoWA.
Section 124, and repeal by Schedule 12 of ss. 85(1) and 89 GoWA	Provisions specifying when payments can be made out of the Welsh Consolidated Fund.  Repeal of antecedent provision under s.85(1) and 89 GoWA.
Section 126 Sections 128 and 129  Schedule 10	Section 126 allows one or more supplementary Budget motions to be moved in any financial year.  Section 128 permits payments to be made out of the Welsh Consolidated Fund without a budget resolution in an emergency situation. Section 129 requires approval to draw from the Auditor General for Wales before any payment can be made out of the Welsh Consolidated Fund.  The amendments made to the Local Government, Planning and Land Act 1980, the Local Government Finance Act 1988 and the Housing Act 1988, consequential upon the creation of the Welsh Consolidated Fund.

555. Provisions which come into force immediately after the day on which the first First Minister is appointed under section 46, unless they were brought into force on Royal Assent or on 1<sup>st</sup> April 2007 as set out above, and subject to section 161 (6), which makes provision as to when certain repeals of GoWA will come into force

- a) Any provision so far as it relates to functions of the First Minister, the Welsh Ministers, the Counsel General or the Assembly Commission,
- b) Any provision so far as it relates to the Auditor General or the Comptroller and Auditor General,
- c) Any other provision which is an amendment to GoWA 1998 made by Schedule 10 to this Act,
- d) Repeals by Schedule 12 of provisions which fall to be repealed as a consequence of provisions which fall within sections 161 (4) (a), (b) or (c).

556. The repeal by Schedule 12 of sections 83, 88, 93(8), 97 and 101A of GoWA, and of other provisions of that Act so far as they relate to those sections, is dealt with by section 161 (6).

557. The repeals come into force when those sections (which make various provisions in relation to the preparation of accounts by the Assembly and by the Secretary of State) have been complied with for the financial year ending 31<sup>st</sup> March 2007 (and for earlier financial years), and sections 123, 131, 132 and 141 do not apply for that financial year.

558. The Assembly Act provisions and provisions relating to the holding of a referendum on those provisions, come into force as follows:

- a) The “Assembly Act provisions” are defined by section 103(8) as sections 107 and 108, and sections 110 to 115.
- b) Sections 107 and 108 give the Assembly primary legislative powers, its legislative competence being set out in section 108 and Schedule 7. These powers are exercisable by the passing of Acts of the Assembly. Sections 110 to 115 set out related procedural provisions.
- c) Sections 103 and 105 come into force immediately after the Welsh ordinary election in 2007. Section 103 provides for the holding of a referendum on whether the Assembly Act provisions should be brought into force. Section 105 provides that if the majority of voters in such a referendum vote in favour of bringing the Assembly Act provisions into force, then the Welsh Ministers can bring them into force on such date as they may specify by making a commencement order. Section 104, which deals with proposals by the Assembly that a referendum should be held, comes into force on the first appointment of a First Minister under the Act .

### **Section 162: Transitional etc. provision**

559. This section gives effect to Schedule 11, which contains transitional and transitory provisions and savings. It also confers a general power on the Secretary of State to make, by order, any other transitional, transitory or saving provision which appears appropriate, including savings from the effect of amendments, repeals or revocations of legislation made by this Act. This power is not limited by Schedule 11, and orders made under this section can modify that Schedule.

560. The provisions made in Schedule 11 and in any order under this section are subject to sections 16 and 17 of the Interpretation Act 1978 . Section 16 of that Act makes general provisions about the effect of repeals, e.g. saving the validity of anything done or any right incurred under a previous enactment prior to its repeal. Section 17 provides that where an Act repeals and re-enacts a previous enactment, unless the contrary intention appears, any reference in any other enactment to the repealed enactment shall be construed as one to the re-enacted provision. It also provides that subordinate legislation, or other things done under the repealed enactment, are to have effect as if made or done under the re-enacted provision.

561. Orders under this section are subject to negative parliamentary procedure, unless they amend or repeal any of paragraphs 30 to 35, 50 and 51 of Schedule 11 to this Act, in which case they are subject to affirmative parliamentary procedure.

### **Section 163: Repeals and revocations**

562. This section introduces Schedule 12.

### **Section 165: Extent**

563. The Act's substantive provisions extend (with limited exceptions) to the whole of the United Kingdom although its practical application will be confined almost entirely to Wales. The provisions which do not extend to the whole of the United Kingdom are section 36(7) to (9), section 39 and section 40(2) and (3). These provisions create criminal offences and extend only to England and Wales. Where the Act makes consequential amendments, these have the same extent as that of the statutes amended.

### **Section 166: Short title**

564. This section provides the title by which reference may be made to this Act in other legislation.

## **SCHEDULE 1: ALTERATION OF ASSEMBLY ELECTORAL REGIONS**

565. Section 2 of the Act says, among other things, how the Assembly electoral regions are delineated and how many seats will be allocated to each.

566. Alterations may need to be made to those regions, and to the numbers of seats allocated to those regions, as a consequence of changes to parliamentary constituencies.

567. This Schedule deals with making alterations in such circumstances. However, until such time as the functions of the Boundary Commission for Wales are transferred to the Electoral Commission, and functions are conferred on the Boundary Committee for Wales, by the coming into force of section 16 (1) of the Political Parties, Elections and Referendums Act 2000 for those purposes, the Schedule is to have effect with the modifications set out in paragraph 1 of Schedule 11.

### **Paragraph 1 – Introduction**

#### **Paragraph 1(2)**

568. Sub-sections 3(1) and 3(2) of the Parliamentary Constituencies Act 1986 require the Electoral Commission to keep under review the representation of England, Scotland, Wales and Northern Ireland in the House of Commons, and to make regular reports to the Secretary of State about the representation of the *whole* of each of those parts of the United Kingdom (for example, the whole of Wales).

569. Sub-section 3 (3) of the Parliamentary Constituencies Act 1986 also gives the Electoral Commission the power to report to the Secretary of State on a particular area (for example, a specific area of Wales), showing the constituencies into which it thinks the area should be divided, in order to ensure compliance with rules which are set out in Schedule 2 to the Parliamentary Constituencies Act 1986.

570. The effect of sub-section 3A (1) of the Parliamentary Constituencies Act 1986 is that where the Electoral Commission intends to consider making a report under sub-section 3(1) or sub-section 3(2) of that Act, the Boundary Committee for Wales must carry out a review.

571. The purpose of the review by the Boundary Committee for Wales is to enable it to make recommendations to the Electoral Commission about what it should put in its report to the Secretary of State.

572. Under sub-section 3A(2) of the Parliamentary Constituencies Act 1986, the Boundary Committee for Wales must put its recommendations in a report to the Electoral Commission.



573. Paragraph 1(2) of Schedule 1 to this Act says that Schedule 1 will apply where the Electoral Commission intends to consider making a report in respect of the whole of Wales, or a part of Wales under section 3 of the Parliamentary Constituencies Act 1986 and, therefore, the Boundary Committee for Wales is under a duty to make recommendations to the Electoral Commission about what the report should say.

## **Paragraph 2 - Assembly electoral region issue**

### **Paragraphs 2(1) and 2(2)**

574. Paragraph 9 of this Schedule sets out rules which must be followed in relation to the delineation of Assembly electoral regions, and the allocation of regional seats to those regions.

575. If the Boundary Committee for Wales has provisionally decided upon some recommendations which it is minded to put in a report to the Electoral Commission, and which would involve altering any parliamentary constituency in Wales, it must *also* consider whether there needs to be any alteration to the Assembly electoral regions, or to the allocation of seats to those regions, in order to ensure that the rules in paragraph 9 of this Schedule would still be complied with, following those alterations to parliamentary constituencies (“the Assembly electoral region issue”).

### **Paragraph 3 - Notice of Committee’s proposed recommendations**

576. This paragraph requires the Boundary Committee to publish notice of its recommendations in each electoral region affected.

#### **Paragraph 3(1)**

577. For the purposes of this paragraph, a recommendation which “affects” an Assembly electoral region need not be a recommendation that the region should be altered. A recommendation that a region should *not* be altered also counts as a recommendation that affects a region.

#### **Paragraph 3(2)**

578. This says what must be in the notice. The notice must:

- a) say what the effect of the Boundary Committee for Wales’ proposed recommendations will be;
- b) if the Boundary Committee *is* recommending a *change* to an electoral region, say where the public can inspect a copy of the recommendations. There must be at least one place of inspection in each constituency which falls within the electoral region;
- c) explain that if anyone wishes to express a view about the recommendations they may do so by writing to the Boundary Committee. Their letter must be received by the Committee within one month of the date of publication of the notice.

#### **Paragraph 3(3)**

579. The Boundary Committee for Wales must take into account any views which are received by it within the one month time limit.

#### **Paragraph 3(4)**

580. This says what must happen if, after the newspaper notice has been published, the Committee changes any of its recommendations in respect of an electoral region (including

where it has made the change after taking into account views expressed to it following publication of the newspaper notice).

581. The Committee must publish another notice in a newspaper which is readily available in the electoral region to which the changed recommendations relate. The notice must:

- a) say what the effect of the changed recommendations would be;
- b) if a changed recommendation would have the effect of altering an Assembly electoral region, say where the public can inspect a copy of the recommendation. There must be at least one place of inspection in each constituency which falls within the electoral region;
- c) explain that if anyone wishes to express a view about the changed recommendations they may do so by writing to the Boundary Committee. Their letter must be received by the Committee within one month of the date of publication of the notice.

### **Paragraph 3(5)**

582. However, where the effect of the Boundary Committee's recommendation (original or revised) is only to alter the number of regional seats for a region, and the resulting number of regional seats for all the regions would be exactly divisible by 5, the Committee does not have to publish a newspaper notice.

### **Paragraph 3(6)**

583. However, if the Boundary Committee's proposed recommendations (original or revised) would result in the *total* number of seats for *all* the Assembly electoral regions not being exactly divisible by 5, then the recommendation will necessarily affect all the electoral regions.

584. Therefore, the Boundary Committee must publish newspaper notices which comply with paragraph 3(2) of this Schedule in all the electoral regions. The effect on each region must be stated in the notice. The Boundary Committee is under a duty to take into account any views expressed following publication of the notice.

### **Paragraph 4 - Local inquiries**

585. This paragraph enables the Boundary Committee to hold a local inquiry in respect of the Assembly electoral region or regions.

### **Paragraph 4(6)**

586. The person appointed to hold the local inquiry has the powers to summon witnesses that are set out in sub-section 250(2) of the Local Government Act 1972.

587. The person holding the inquiry may issue a summons requiring someone to attend the inquiry at a particular time and place, and to give evidence or produce documents of a specified nature. The documents must be ones which are in his custody or control, and which relate to any matter which is in issue at the inquiry.

588. The person holding the inquiry can take evidence on oath, and may administer the oath.

589. Witnesses who have been summoned to attend must have their expenses paid.

590. Sub-section 250(3) of the Local Government Act 1972 also applies to inquiries held under this paragraph, and this creates offences about deliberately disobeying summonses, and deliberately altering, suppressing, concealing, or destroying evidence.

591. The offences are summary only. The maximum fine for the offences is level 3 on the standard scale, or imprisonment for up to six months, or both.

### **Paragraph 5 – Committee’s Report**

592. This paragraph requires the Committee’s report to contain the recommendations which they propose should be included in the Electoral Commission’s report under paragraph 8 of this Schedule.

### **Paragraph 6 – Consideration of the Committee’s Report by the Commission**

#### ***General***

593. Under section 3A(3) of the Parliamentary Constituencies Act 1986, when the Electoral Commission receives the recommendations of the Boundary Committee in relation to *parliamentary* constituencies, the Commission may :

- a) accept all the Committee’s recommendations and include them in its report to the Secretary of State;
- b) agree changes to the recommendations with the Committee, and then include the changed recommendations in its report; or
- c) reject the recommendations

594. If it rejects the recommendations, it must either:

- a) require the Boundary Committee to reconsider them, with a view to the Committee submitting different recommendations to the Commission; or
- b) require the Committee to carry out a fresh review of the whole or part of the area it had originally reviewed; or
- c) only in a case where the purpose of the Boundary Committee’s review was to enable the Electoral Commission to submit a report under section 3(3) of the Parliamentary Constituencies Act, take no further action.

595. A report under section 3 (3) of the Parliamentary Constituencies Act 1986 is the one which the Electoral Commission has power to submit to the Secretary of State in relation to a particular area of the United Kingdom, making recommendations about the division of that area into parliamentary constituencies, in order to ensure that rules set out in Schedule 2 to the Parliamentary Constituencies Act are complied with.

### **Paragraph 6(1)**

596. Paragraph 6(1) says that the Electoral Commission has the same powers (with any necessary modifications) in relation to recommendations by the Boundary Committee about Assembly electoral regions, as it has in relation to recommendations about parliamentary constituencies (i.e., those set out in section 3A(3) of the Parliamentary Constituencies Act 1986 and explained above).

### **Paragraphs 6(2) to (4)**

597. These paragraphs say that if the Electoral Commission is minded to use its powers in section 3A (3) (b) and (c) of the Parliamentary Constituencies Act 1986 (these are the powers of acceptance with agreed changes, or rejection), in relation to recommendations by the Boundary Committee about Assembly electoral regions, then it must have regard to any views expressed in response to the Committee's newspaper notice.

598. If the Commission is minded to use those powers in relation to only part of an electoral region, then the views to which it must have regard are those which relate to that part.

599. It must also have regard to the findings of any local inquiry which was held.

600. If the Commission is minded to use its powers in relation to only part of an electoral region, then the findings of any local inquiry to which it must have regard are those which relate to that part.

### **Paragraph 7 – Directions by Commission to the Committee**

601. This applies section 3A (4) of the Parliamentary Constituencies Act 1986 with a modification.

602. When the Boundary Committee is carrying out its duties under the Parliamentary Constituencies Act 1986, it must comply with any directions which the Electoral Commission gives to it.

603. The effect of the modification is that the Boundary Committee must only follow them if it can do so and still ensure compliance with the rules in paragraph 9 of this Schedule (i.e., the rules which must be followed in relation to the delineation of Assembly electoral regions, and the allocation of regional seats to those regions).

### **Paragraph 8 – Commission's Report**

604. This paragraph deals with what happens if the Electoral Commission submits to the Secretary of State a report under section 3(1) of the Parliamentary Constituencies Act 1986 which recommends alterations in parliamentary constituencies in Wales, or a report under section 3(3) of that Act which relates to any constituency in Wales.

#### **Paragraph 8(1)**

605. The report under section 3 (3) of the Parliamentary Constituencies Act 1986 is one which says what constituencies the Electoral Commission think an area should be divided into, in order to comply with rules that are set out in paragraphs 1 to 6 of Schedule 2 to the Parliamentary Constituencies Act 1986.

### **Paragraph 9 - Rules**

#### ***General***

606. The rules in paragraph 9 apply to the Boundary Committee's consideration of the Assembly electoral region issue and the Electoral Commission's report under section 3 of the Parliamentary Constituencies Act 1986.

**Paragraph 9(1)**

***The rules are as follows:***

607. The whole of an Assembly constituency must be contained in the same electoral region. It must not straddle two or more regions.

608. The electoral regions must contain a similar number of electors, so far as is reasonably practicable. There may be special geographical factors which mean that this is not reasonably practicable, and these can be taken into account.

609. The number of regional seats must be half the number of Assembly constituencies. For example, if there are 40 constituencies, there must be 20 regional seats.

610. However, if the number of constituencies can't be divided exactly by 2 (e.g. 39), one is added to the number of constituency seats, and then that number is divided by 2.

611. For example, if there were 39 constituencies, "1" would be added to 39, to give 40, and 40 would then be divided by 2 - so the number of regional seats would be 20.

612. The number of seats in each electoral region will be the total number of regional seats in the Assembly, divided by 5. Therefore, if the total number of regional seats is 20, the number of regional seats in Assembly electoral region "A" will be 4.

**Paragraph 9(2)**

613. However, if the total number of regional seats cannot be divided exactly by 5 (for example, 19), the next highest number which can be divided exactly by 5 is identified (for example, if the total number of regional seats was 19, that next highest number would be 15.)

614. This is then subtracted from the total number of regional seats (in the above example, 15 would be subtracted from 19, leaving 4).

**Paragraph 9(3)**

615. The result (4, in the above example) is the number of residual seats.

**Paragraph 9(4)**

616. Only one residual seat can be allocated to each electoral region.

**Paragraph 9(5)**

617. The next highest number below the total number of regional seats which can be divided exactly by 5 is then taken again. In the above example of 19 regional seats, it was 15. This is then divided by 5. In this example, the result would be 3.

618. For each electoral region, that number is then added to the number of Assembly constituencies in the region. The result is then divided into the number of electors in that region.

**Paragraph 9(6)**

619. Taking the above example again, if the number of electors in electoral region A is 130,000, and the number of constituencies in the region is 10, 130,000 is divided by 13 (10 + 3), giving a result of 10,000.

620. The results which this calculation produces for each region are then compared. The residual seats are then allocated. It is desirable that the residual seats are allocated to the

regions in respect of which this calculation produced the highest results, and this should be taken into account when the residual seats are allocated.

621. If an electoral region is not allocated a residual seat, the number of regional seats it has will just be one fifth of the next highest figure to the total number of regional seats which can be divided exactly by 5. In the example of 19 regional seats, the next highest number would be 15, which when divided by 5 gives 3 regional seats.

### **Paragraph 10 – Orders in Council giving effect to Commission reports**

#### **Paragraph 10(1)**

622. Recommendations of the Electoral Commission are put into effect by an Order in Council, made under the Parliamentary Constituencies Act 1986.

623. Where parts of the Order relate to parliamentary constituencies, and parts relate to Assembly regions, those parts can come into force on different dates.

#### **Paragraph 10(2)**

624. However, where an Order has come into force altering Assembly electoral regions, any constituency by-elections, or the filling of vacancies in regional seats will take place on the basis of the old electoral regions. Voters will only vote on the basis of the new electoral regions at the next general election.

### **Paragraph 11 – Interpretation: the regional electorate**

#### **Paragraph 11(1) to 11(3)**

625. It is necessary for the Electoral Commission and the Boundary Committee to identify the regional electorate figure for each region, when they are considering whether there needs to be any alteration to the Assembly electoral regions to ensure the rules in paragraph 9 of this Schedule are still complied with.

626. This paragraph defines what the Commission and the Committee should take as the regional electorate figure.

627. For each Assembly electoral region, it is the total number of persons who are on a register of local government electors at addresses which fall within that Assembly electoral region, on a specific date.

628. The specific date (“the enumeration date” referred to in paragraph 11 (2)) is the date on which the notice appeared in the London Gazette, saying that the Electoral Commission intends to issue a report into parliamentary constituencies under the Parliamentary Constituencies Act 1986. The Electoral Commission has a duty to publish the notice under section 5 (1) of that Act.

### **Paragraph 12: Interpretation: general**

#### **Paragraph 12**

629. When this Schedule refers to “the Assembly electoral region issue”, it means the question the Boundary Committee are obliged to consider as to whether any recommendations they are making about alterations to parliamentary constituencies require any alterations to Assembly electoral regions, or to the allocation of Assembly regional seats.

630. There is a clarification of the meaning which should be given to the phrase “recommendation” in this Schedule. It can mean both a recommendation that an alteration is

made, and a recommendation that no alteration is made, unless it is clear from the context in which it is used that it only means a recommendation that an alteration be made.

631. The effect of this clarification means that, for example, in paragraph 3 (2) (a) of this Schedule “recommendation” would include both a recommendation for a change to an Assembly electoral region, *and* a recommendation for *no* change to an electoral region.

632. In contrast, when paragraph 3 (2) (b) refers to “a copy of the recommendations” being open to inspection, it is clear from the first part of that sub-paragraph that “recommendations” is only intended to refer to those recommendations which are for a *change* to an electoral region.

## **SCHEDULE 2: ASSEMBLY COMMISSION**

633. Schedule 2 makes further detailed provision about the National Assembly for Wales Commission (“the Assembly Commission”), which is established by Section 27. This Schedule covers the membership, property, staff, powers, duties, proceedings and status of the Assembly Commission.

634. The Schedule applies the principles of sustainable development, equality of opportunity and equal treatment of the English and Welsh languages to the exercise of the Assembly Commission’s functions. It also provides a power for the Assembly Commission to promote public awareness of the current or pending system of devolved government in Wales, and the system for the election of Assembly members.

### ***Membership***

#### **Paragraph 1**

635. Paragraph 1(1) provides that unless the Presiding Officer ceases to be an Assembly member (otherwise than by reason of a dissolution of the Assembly), the Presiding Officer continues to hold office as a member of the Assembly Commission until another person is elected to the office of Presiding Officer (under section 25).

636. Paragraphs 1(2) and (3) provide that the four other members of the Assembly Commission appointed under section 27(3) remain in office, including after a dissolution, until a replacement is appointed. They would only cease to be a member of the Assembly Commission if they died, became disqualified from being an Assembly member, resigned their seat as an Assembly member or their office as a member of the Assembly Commission, or were removed from the Assembly Commission by resolution of the Assembly.

637. Thus the effect of paragraph 1 is to allow the Assembly Commission to continue to function during a dissolution.

### ***Property***

#### **Paragraph 2**

638. This provides that the Assembly Commission has the power to acquire, hold and dispose of property.

639. By virtue of paragraph 28 of Schedule 10 to the Act, which inserts section 166C and 166D into the Copyright, Designs and Patents Act 1988, the Assembly Commission is the first owner of the copyright in proposed Measures and Bills introduced into the Assembly.

## **Staff**

### **Paragraph 3**

640. Paragraph 3(1) gives the Assembly Commission the power to appoint staff.

641. Paragraph 3(2) provides that staff employed by the Assembly Commission, including the Clerk of the Assembly, are referred to in the Act as the members of the staff of the Assembly.

642. Paragraph 3(3) provides that staff of the Assembly are not Crown servants, and therefore they are not civil servants. However, paragraph 12(2)(a) (see below) allows Her Majesty by Order in Council to provide for the purposes of any enactment that Assembly Commission employees be treated as Crown servants.

643. So, for example, an Order in Council could provide for employment by the Assembly Commission to be treated as “Crown employment” for the purposes of certain provisions of the Data Protection Act 1998, as is the case in relation to employees of the Scottish Parliamentary Corporate Body.

644. Paragraph 3(4) requires the procedures for recruiting and selecting staff of the Assembly, and the terms and conditions on which they are employed (including salaries), to be broadly in line with those for civil servants serving the Welsh Assembly Government.

645. In general this will require the Assembly Commission to adopt procedures broadly corresponding to the Civil Service Recruitment Code, and the Civil Service Code made under it, so as to ensure fair and open recruitment and selection of staff on merit, and upholding the political impartiality of staff.

646. However, as is the case with civil service recruitment, there can be exceptions to these principles e.g. in appointing special advisers, in relation to recruitment of disabled persons, or in relation to certain categories of staff with Welsh language qualifications. Thus the Assembly Commission will enjoy a similar degree of flexibility to the Welsh Assembly Government in these matters.

647. Staff seconded in or out of the Assembly post-separation will retain their pre-existing employment status, i.e. civil servants working for the Welsh Assembly Government who are seconded to work at the Assembly will retain their status as civil servants.

648. Paragraph 3(5)-(8) deals with salaries, expenses and pensions etc. The Commission is to pay the salaries and expenses of the staff of the Assembly. The Assembly Commission will be able to make arrangements for the payment of pensions, gratuities or allowances to former employees (sub-paragraph (6)), and in particular can make contributions towards such payments (sub-paragraph (7)).

649. The effect of sub-paragraph (8) is that staff of the Assembly can be covered by the Principal Civil Service Pension Scheme (as can staff of the Assembly Commission’s Scottish equivalent, the Scottish Parliamentary Corporate Body). Sub-paragraph (9) require payments to the Minister for the Civil Service in respect of Assembly staff members’ participation in that scheme to be made by the Assembly Commission.

## **Powers**

### **Paragraph 4**

650. Paragraph 4(1) and (2) provide that the Assembly Commission can do anything which it considers necessary or appropriate for the purposes of, or in connection with, its functions. The Assembly Commission’s functions, as set out in Section 27(4) are the provision of



property, staff and services to the Assembly, though the Assembly can confer further functions on the Assembly Commission by Assembly Measure. In particular under sub-paragraph (2) the Assembly Commission has power to enter into contracts; to charge for goods and services; to invest money not immediately required for the discharge of its functions; and to accept gifts. Paragraph 4(3) provides that gifts to the Assembly (e.g. by visiting heads of state) vest in the Assembly Commission.

651. Paragraph 4(4) allows the Assembly Commission to sell goods or provide services to the public, or to make arrangements for doing so.

652. Paragraph 4(5) and (6) allow the Assembly Commission to borrow money (but only in sterling) in order to meet a temporary shortfall in sums available to meet its expenditure. This includes a power to enter into an overdraft arrangement. The Assembly Commission can only borrow money in accordance with special or general directions given by the Assembly under section 27(6). Thus the borrowing power is conditional upon the Assembly's prior approval.

### ***Promotion of awareness of election system and devolved government***

#### **Paragraphs 5 and 6**

653. Paragraph 5(1) gives the Assembly Commission its own specific power to promote public awareness of Assembly elections and the system of devolved government in Wales. This includes (by sub-paragraph (2)) a power to promote awareness of any newly enacted systems not yet in force. Paragraph 5(3) gives the Assembly Commission a general discretion as to how it carries out this power, but specifically permits it to carry out public education or information programmes, or to make grants facilitating the production of such programmes by other persons or bodies. The Assembly Commission can impose conditions on such grants as it thinks fit (sub-paragraph (4)).

654. Paragraph 6 allows the Assembly Commission to provide financial assistance to the Electoral Commission so as to promote public awareness of Assembly elections and the system of devolved government in Wales.

655. The powers in paragraphs 5 and 6 would permit, among other things, the promotion of public awareness about Assembly elections and devolved government in Wales through cross-border media (e.g. radio and television transmissions, "mobile" advertisements on trains etc.).

### ***Delegation***

#### **Paragraph 7**

656. Paragraph 7 allows the Assembly Commission to delegate any of its functions to the Presiding Officer or to the Clerk of the Assembly. The Presiding Officer can authorise the Deputy Presiding Officer to exercise these functions (subject to section 25(11) and paragraph 11 of this Schedule). The Clerk can authorise other Assembly staff to exercise his/her functions (section 26(4)).

### ***Principles in accordance with which functions are to be exercised***

#### **Paragraph 8**

657. Paragraph 8(1) requires the Assembly Commission to make appropriate arrangements with a view to securing that its functions are exercised with due regard to the principle of equality of opportunity for all people.

658. Paragraph 8(2) obliges the Assembly Commission to have due regard to the principle of promoting sustainable development in exercising its functions.

659. Paragraph 8(3) requires it to give effect to the principle of equal treatment of the English and Welsh languages in the exercise of its functions, so far as is appropriate and reasonably practicable.

660. These duties are subject to the Assembly's power under section 27(6) to give general and specific directions to the Assembly Commission about the exercise of its functions.

### ***Annual report***

#### **Paragraph 9**

661. Paragraph 9 provides that the Assembly Commission must, after each financial year, publish and lay before the Assembly a report on the exercise of its functions during that financial year.

662. The Assembly can flesh out the detail of this duty through Assembly directions under section 27(6). For example, it can direct what the report is to cover, and give directions so that the timetable for the report's publication and laying before the Assembly ties in with the Assembly's own audit timetable.

### ***Validity of acts***

#### **Paragraph 10**

663. Paragraph 10 preserves the validity of any act of the Assembly Commission against any vacancy among its members, any defect in their appointment or any lack of qualification for their membership. It is intended to preclude legal challenge to the Assembly Commission on these grounds.

### ***Proceedings***

#### **Paragraph 11**

664. Paragraph 11 provides that the Assembly Commission is free to set its own rules of procedure (sub-paragraph (1)), save that its meetings must be presided over by the Presiding Officer, unless that office is vacant or the Presiding Officer is unable to act, in which case the Assembly Commission can appoint another of its members to preside over the meeting (sub-paragraph (2)).

### ***Crown status***

#### **Paragraph 12**

665. The Assembly Commission is not a Crown body as it is exercising functions on behalf of the Assembly, rather than on behalf of the Welsh Assembly Government (whose Ministers exercise functions on behalf of the Crown).

666. Paragraph 12(1) provides that Her Majesty can make Orders in Council that provide for the Assembly Commission to be treated as a Crown body for the purpose of any enactment. In particular the Order in Council may (sub-paragraph (2)) provide for employment by the Assembly Commission to be treated as Crown employment; or for land held, used or managed by the Assembly Commission, or operations carried out by them, to be treated as Crown land or operations. This mirrors provision made in relation to the Parliamentary corporate bodies of the House of Commons and the House of Lords, and that made in relation to the Scottish Parliamentary Corporate Body.

667. The Scottish Parliamentary Corporate Body (Crown Status) Order 1999 (SI 1999/677) is an example of what such an Order in Council may cover. It provides for that Body to be treated as a Crown body for the purposes of various enactments relating to planning, building legislation, fire precautions, VAT and data protection.

668. Paragraph 12(3) provides that “Crown body” means a servant or agent of the Crown and includes a government department.

669. Paragraph 12(4) provides that an Order in Council which requires the Assembly Commission to be treated as a Crown body under any enactment can be annulled by a resolution of either House of Parliament, or by resolution of the Assembly.

### **SCHEDULE 3: TRANSFER ETC. OF FUNCTIONS: FURTHER PROVISIONS**

#### **Part 1: Functions transferable etc.**

670. Paragraph 1 provides that an Order in Council under section 58 may make provision about any Ministerial function, including one created after the passing of the Act. However, this does not apply to functions of the Secretary of State under the Act itself, other than the power to vary the date of an Assembly general election under section 4.

671. Paragraph 2 provides that a function of a Minister of the Crown which is exercisable in relation to the Welsh language or to any other aspect of Welsh culture is to be regarded as exercisable in relation to Wales.

672. Paragraph 3 extends the power to make provision by Order in Council under section 58 to include provision about Ministerial functions in relation to cross-border bodies (i.e. bodies exercising functions or carrying on activities in or with respect to Wales or part of Wales but also with respect to other areas) and in relation to English border areas (i.e. parts of England adjoining Wales). In the case of English border areas the power will however only be able to be exercised in relation to functions relating to certain water matters, and only if the Order in Council (or an earlier one) has made corresponding provision about that function so far as exercisable in relation to Wales or part of Wales adjoining England.

673. Paragraph 4 enables an Order in Council under section 58 to impose on Ministers of the Crown a duty to consult the Welsh Ministers before exercising certain functions in relation to that part of the sea adjacent to Wales but beyond the 12-mile limit.

#### **Part 2: Exercise of transferred functions**

674. Where a power to make subordinate legislation has been transferred to the Welsh Ministers, paragraph 5 provides that it may still be exercised by the Minister of the Crown from whom it was transferred, for the purpose of implementing, or enabling the implementation of, any European Community obligations of the United Kingdom, enabling UK rights under Community law to be exercised and for ancillary purposes.

675. An Order in Council transferring a function to the Welsh Ministers, the First Minister or the Counsel General in relation to a cross-border body or to an English border area, or providing for such a function to be exercisable concurrently by the Welsh Ministers etc and a Minister of the Crown may, under paragraph 6, provide that the function may only be exercised by the Welsh Ministers etc with the agreement of, or after consulting, a Minister of the Crown.

676. Where a function is transferred to the Welsh Ministers, First Minister or Counsel General, and the Minister of the Crown from whom it is to be transferred was required, before exercising it, to obtain the agreement of, or consult with, another Minister of the

Crown or to obtain the authorisation of Parliament, paragraph 7 provides that the requirement in question is not to apply to the Welsh Ministers etc unless the Order in Council transferring the function provides that it should. Where an Order in Council directs that a function is to be exercisable by the Welsh Ministers etc concurrently with a Minister of the Crown, and such a requirement applies to the exercise of that function by the Minister of the Crown, then paragraph 7 provides that the Order in Council may provide that it is to be exercisable by the Welsh Ministers etc free from that requirement.

677. Paragraph 8 provides that an Order in Council under section 58 making a function exercisable by the Welsh Ministers, the First Minister or the Counsel General, may make the exercise of the function subject to consultation with, or authorisation from, the Assembly or the Assembly Commission. It also confirms that an Order in Council under section 58 making a function exercisable by the Welsh Ministers, First Minister or Counsel General, can require the Welsh Ministers etc to lay a report before the Assembly or send documents to the Clerk to the Assembly, in connection with the exercise of that function.

678. Paragraph 9 makes provision for Assembly procedures (and in some cases Parliamentary procedures) to apply to subordinate legislation made (or approved or confirmed) by the Welsh Ministers, First Minister or Counsel General under powers transferred to them or otherwise made exercisable by them under an Order in Council under section 58, in those cases where a Minister of the Crown would have been subject to Parliamentary procedures when making, approving or confirming legislation under those powers.

679. Where an instrument contains provision to be made (etc.) by the Welsh Ministers, First Minister or Counsel General together with a Minister of the Crown, or which relates to an English border area or a cross-border body (other than one which only relates to the functions of that body in relation to Wales), any Parliamentary procedure (i.e. any requirement to lay a draft of the legislation before Parliament and any requirement to obtain the approval of either or each House of Parliament before making it or any power of either or each House to annul it by resolution) is to continue to apply (in addition to any Assembly procedure).

680. Provisions which require instruments made by Ministers of the Crown to be confirmed by Act of Parliament (“provisional orders”) or which apply special parliamentary procedure to an order are not to apply when they are made by the Welsh Ministers, First Minister or Counsel General instead, unless either one of the situations referred to in the previous paragraph above applies or, in the case of a “special parliamentary procedure” order, the Order in Council empowering the Welsh Ministers etc to make the order in question specifically requires it. Equivalent Assembly procedures laid down by Assembly standing orders are to apply instead.

681. Subject to the above, subordinate legislation made by the Welsh Ministers, First Minister or Counsel General under powers conferred on them by an Order in Council under section 58 is to be subject to Assembly procedures equivalent to the Parliamentary procedures which would have applied if it had been made by a Minister of the Crown, i.e. “affirmative” or “negative” procedure as the case may be, substituting a requirement for approval or liability to annulment by resolution of the Assembly for approval or annulment by resolution of either or each House of Parliament. The standing orders of the Assembly are to make detailed provision for the relevant procedures.

682. Paragraph 10 provides that where a function of making or receiving a report or statement was subject to a requirement to lay the report before Parliament, and an Order in

Council under section 58 makes that function exercisable by the Welsh Ministers, First Minister or Counsel General, the requirement to lay the report before Parliament applies as if it was a requirement to lay the report before the Assembly

683. Paragraph 11 makes provision about certain powers to lend money which may be transferred to the Welsh Ministers by Order in Council under section 58. Where, prior to transfer, the sums required to make such loans were required to be charged on the National Loans Fund, this paragraph provides that they are instead to be charged on the Welsh Consolidated Fund. Similarly, where the repayments of such loans were formerly paid into the National Loans Fund, they are instead to be paid into the Welsh Consolidated Fund.

684. Paragraph 11 also makes provision in relation to existing loans, made by Ministers of the Crown out of the National Loans Fund prior to transfer. Upon transfer of the power to the Welsh Ministers, repayments of, and payments of interest on, the outstanding loans are to be paid into the Welsh Consolidated Fund, via the Welsh Ministers. The outstanding principal amounts on such loans at the date of transfer are to be treated as loans made by the Secretary of State to the Welsh Ministers, who are obliged to repay these amounts to the Secretary of State for payment into the National Loans Fund. It is at the Treasury's discretion to set the dates and methods of repayment to the Secretary of State, and to set the rates and times at which interest must be paid to the Secretary of State.

### **Part 3: Supplementary**

685. Paragraph 12 makes it clear that where the provisions of section 58 and Schedule 3 refer to Ministers of the Crown the reference includes Ministers of the Crown acting jointly, officers of a Minister of the Crown or of a government department and that functions of such an officer may be transferred to officers of the Welsh Assembly Government.

686. Paragraph 13 makes it clear that a transfer of a function to the Welsh Ministers, First Minister or Counsel General, or the imposition on a Minister or the Crown of a requirement to obtain the agreement of, or to consult, the Welsh Ministers etc before exercising a function does not affect the validity of anything done by or in relation to that Minister of the Crown before the transfer or imposition of that requirement.

## **SCHEDULE 4: TRANSFERS OF MINISTERIAL PROPERTY, RIGHTS AND LIABILITIES**

### ***Transfers of Ministerial Property, Rights and Liabilities***

687. This schedule provides that where an Order in Council under section 58 transfers functions from Ministers of the Crown to the First Minister, the Welsh Ministers or the Counsel General, any connected property, rights and liabilities (except employment rights and liabilities relating to Crown employment) are transferred along with those functions, unless the Order in Council provides otherwise.

688. Anything relating to a transferred function, or to property, rights or liabilities transferred along with the function, and which was in the process of being done by or in relation to the Minister of the Crown when the function transferred, may be continued by or in relation to the transferee of the function. Anything done by Ministers of the Crown in relation to such functions, property, rights and liabilities pre-transfer continues to have effect as if it had been done by the transferee.

689. Instruments, contracts and legal proceedings relating to transferred functions, property, rights and liabilities continue to have effect post-transfer with the transferee of the function substituted for the Minister of the Crown.

690. The Secretary of State can also, by order, make specific transfers of property, rights and liabilities, or make transfers of property, rights and liabilities of a specific description, from Ministers of the Crown to the First Minister, the Welsh Ministers or the Counsel General. Such an order can include provisions creating interests in, or rights over, each other's property, and provisions creating new rights and liabilities between the First Minister, the Welsh Ministers or the Counsel General on the one hand and Ministers of the Crown on the other.

691. The Secretary of State can also make orders to provide for the continuation by, or in relation to, the Welsh Minister, First Minister or Counsel General of things commenced by or in relation to a Minister of the Crown. He may also by order provide that any specific thing done by a Minister of the Crown has effect as if done by the First Minister, the Welsh Ministers or the Counsel General; and can make orders substituting the First Minister, the Welsh Ministers or the Counsel General for Ministers of the Crown in any specific contracts, legal proceedings, or instruments.

692. Paragraph 4 provides that the Secretary of State can issue certificates as conclusive proof that property has been transferred under this Schedule, and provides that transfers of property, rights or liabilities by or under Schedule 4 override any provision which would restrict such transfers.

## **SCHEDULE 5: ASSEMBLY MEASURES**

### **Part 1: Matters**

693. This Part of the Schedule lists the matters, and the fields within which they fall, to which a provision in an Assembly Measure must relate if it is to satisfy the criteria in section 94 (4) (a). Section 95 allows this Schedule to be amended by Order in Council so as to add, remove or change fields and matters. A field cannot be added if the Welsh Ministers, the First Minister or the Counsel General have no functions in that field.

694. The only matters listed at the passing of this Act are ones which fall within the field "the National Assembly for Wales". The matters are concerned with Assembly Members (for example, remuneration and complaints), conferring certain functions on the Assembly Commission, the interpretation of the Welsh texts of Assembly Measures etc and procedures for the consideration of proposed private Assembly Measures.

### **Parts 2 and 3: General Restrictions and Exceptions**

695. Part 2 of the Schedule lists restrictions which a provision in an Assembly Measure must not breach. If it does breach any of them, then the provision is outside the Assembly's legislative competence and is not law (section 94 (6) (a)). The restrictions are subject to exceptions from the restrictions, and these are set out in Part 3 of this Schedule.

696. In particular, the restrictions, read with the exceptions :

- a) prevent functions of a Minister of the Crown (including functions of the Treasury) being added to, removed or changed by or under a Measure without the Secretary of State's consent;
- b) limit the penalties which can be imposed for criminal offences created by or under a Measure;
- c) protect specified legislation (including certain provisions in this Act), and certain classes of legislative provision from being modified by or under a Measure;

- d) protect any functions of the Comptroller and Auditor General from modification by or under an Assembly Measure without the Secretary of State's consent.

## **SCHEDULE 6: REFERENDUMS ON COMMENCEMENT OF ASSEMBLY ACT PROVISIONS**

697. Section 103 allows a referendum to be held in Wales on whether certain sections in this Act, which give the Assembly power to pass Acts, (referred to in this Act as "the Assembly Act provisions") should come into force.

698. The referendum is initiated by Her Majesty making an Order in Council.

699. This schedule makes detailed provisions in relation to the referendum.

### **Paragraph 1: Entitlement to vote**

700. The persons entitled to vote in a referendum are those who would be entitled to vote in an Assembly General Election which, in turn, are those who would be entitled in local government elections in Wales.

### **Paragraph 2: Conduct etc of referendums**

701. The Order in Council that Her Majesty may make under section 103 initiating the referendum may also contain other provisions relating to the referendum.

702. The Order in Council may, among other things, apply to the referendum other legislation which relates to elections, referendums or donations (gifts to, payments of expenses of registered political parties etc) as defined in Part 4 of the Political Parties, Elections and Referendums Act 2000.

### **Paragraph 3: Referendum Question and Statement**

703. Paragraph 3 requires the Order in Council to set out the question which voters in the referendum are to be asked.

704. In addition, if the question on the ballot paper is going to be preceded by a statement (e.g. an explanation of the effect of bringing the Assembly Act provisions into force), the statement must be set out in the Order in Council.

705. The effect of section 104(4) of the Political Parties, Elections and Referendums Act 2000 is that the Secretary of State must, at the time when the draft Order in Council is laid before both Houses of Parliament for approval, also lay a report which contains any views expressed by the Electoral Commission on how easily the referendum question or preceding statement can be understood.

706. Paragraph 3 (3) requires the Secretary of State to send a copy of the same report to the First Minister before, or at the same time, as the Secretary of State lays it before Parliament. Paragraph 3 (4) requires the First Minister to lay that report before the Assembly as soon as reasonably practicable after he has received it from the Secretary of State.

### **Paragraph 4: Date of Referendum**

707. Paragraph 4(1) requires the Order in Council to specify the date of the referendum.

708. Paragraph 4(2) gives the Secretary of State the power to change the date of the referendum, provided that the Welsh Ministers consent to the change.

709. Paragraph 4(4) says that an order made by the Secretary of State changing the date of a referendum is subject to negative Parliamentary procedure.

### **Paragraph 5: Referendum Period**

710. Section 102 of the Political Parties, Elections and Referendums Act 2000 provides for a “referendum period ” to be laid down for referendums covered by the 2000 Act. The referendum period is relevant for various provisions under the 2000 Act, such as applying restrictions on incurring referendum expenses.

711. This paragraph says that the Order in Council must set out the referendum period relating to the referendum on bringing into force the Assembly Act provisions.

### **Paragraph 6: Combination of Polls**

712. Paragraph 6 allows a referendum to be combined with any election (e.g., a local government election) or other referendum due to be held. The Order in Council can include provisions relating to the holding of such combined polls.

### **Paragraph 7: Encouraging voting**

713. The Order in Council can authorise or require the Electoral Commission to do things to encourage voting in the referendum.

### **Paragraph 8: Provision of information to voters**

714. The effect of section 108 of the Political Parties, Elections and Referendums Act 2000 is that, in a referendum on the coming into force of the Assembly Act provisions, the Electoral Commission can designate two persons or organisations, which meet certain criteria, as eligible to receive financial and other assistance to assist with their campaigns – one which will be campaigning *for* the Assembly Act provisions to come into force, and one which will be campaigning against them coming into force.

715. The purpose of this provision is to help to ensure that voters in a referendum have adequate information about the issue on which they are to vote and about the arguments *for* and *against* the possible outcomes.

716. Paragraph 8 (2) says that if the Electoral Commission has not, by the appropriate day (see note to paragraph 8 (4)), made a designation of a person or organisation campaigning *for* the Assembly Act provisions coming into force, and one campaigning *against* them coming in to force, then it can itself take steps to ensure that voters are adequately informed about both sides of the argument.

717. Paragraph 8(4) : Under section 109(6) of the Political Parties, Elections and Referendums Act 2000, the Secretary of State can make an order varying the deadline by which a person or organisation can apply to be designated to receive assistance, and the deadline by which the Electoral Commission has to decide their application.

718. Paragraph 8 (4) says that if the Secretary of State has made such an order, then the day that the order specifies is the appropriate day.

719. If the Secretary of State does not make an order, and the Electoral Commission has received, by the 29<sup>th</sup> day of the referendum period:

- a) at least one application from a person/organisation campaigning *for* the Assembly Act provisions coming into force; and
- b) at least one application from a person/organisation campaigning *against* the Assembly Act provisions coming into force, then the appropriate day is the 43rd day of the referendum period.

720. Otherwise, the appropriate day *is* the 29<sup>th</sup> day of the referendum period.



### **Paragraph 9: Referendum Material**

721. Section 126 of the Political Parties, Elections and Referendums Act 2000 lays down requirements about what must appear on referendum material.

722. This paragraph says that these requirements do not apply to any material which is required to be published by the Order in Council which initiates the referendum.

### **Paragraphs 10 and 11: Funding and Accounts**

723. Paragraphs 10 and 11 say that the Order in Council must say how the referendum is to be funded. It may say that it is to be charged on or payable out of the Welsh Consolidated Fund. It must also deal with arrangements for the preparation and audit of accounts relating to the funding of the referendum.

### **Paragraph 12: No legal challenge to referendum result**

724. The effect of this paragraph is that proceedings questioning the number of ballot papers counted or votes cast in a referendum must be brought by judicial review. The claim must be filed before the end of the permitted period set out in paragraph 12(2).

## **SCHEDULE 7: ACTS OF THE ASSEMBLY**

### **Part 1: Subjects**

725. This Part of the Schedule lists the subjects to which a provision in an Act of the Assembly must relate if it is to satisfy the criteria in section 108(4)(a). It also lists the exceptions within which a provision in an Act of the Assembly must not fall, if it is to satisfy section 108(4)(a).

### **Parts 2 and 3: General Restrictions and Exceptions**

726. Part 2 of the Schedule lists restrictions which a provision in an Act of the Assembly must not breach (section 108(6)(a)). If it does breach any of them, then the provision is outside the Assembly's legislative competence and is not law. The restrictions are subject to exceptions from the restrictions, and these are set out in Part 3 of this Schedule.

727. In particular, the restrictions, read with the exceptions:

- a) prevent functions of a Minister of the Crown which pre-date the coming into force of the Assembly Act provisions, being removed or changed by or under an Act of the Assembly, unless the Secretary of State has given his consent, or the removal or change is incidental to, or consequential on another provision contained in an Act of the Assembly;
- b) prevent functions being conferred or imposed upon a Minister of the Crown by or under an Act of the Assembly without the Secretary of State's consent;
- c) protect specified legislation (including certain provisions in this Act), and certain classes of legislative provision from being modified by or under an Act;
- d) protect functions of the Comptroller and Auditor General from modification without the Secretary of State's consent.

## **SCHEDULE 8: AUDITOR GENERAL FOR WALES**

728. Schedule 8 makes revised provision for the office of Auditor General for Wales ("AGW"). The provisions of the schedule largely replicate the equivalent provisions in the Government of Wales Act 1998 (c.38), which are marked for repeal. However, a notable

change is that the AGW is now to be appointed by Her Majesty on the nomination of the Assembly (under the Government of Wales Act 1998, there was no need for any such nomination, although the Assembly was, in practice, consulted informally).

729. Before nominating the prospective AGW, the Assembly must be satisfied that reasonable consultation has been carried out with bodies representing the interests of local government bodies in Wales (as defined in section 12(1) of the Public Audit (Wales) Act 2004 (c.23). This is because of the AGW's functions in relation to those bodies. For instance, under the Public Audit (Wales) Act 2004, the AGW appoints the auditor of the accounts of those bodies, and has functions under the best value regime created by Part 1 of the Local Government Act 1999 (c.27).

730. Paragraph 2 deals with the tenure of the AGW. The length of the appointment is not to a specified age or for a specified term, but is set by Her Majesty when she appoints the AGW. The AGW can resign, by requesting Her Majesty to be relieved from office. Her Majesty can also relieve an AGW from office if She is satisfied that the AGW is medically incapable of performing the functions of the office (and also incapable of asking to be relieved of it). In addition, Her Majesty may remove a person from office as AGW on the grounds of misbehaviour. This cannot be done, however, unless the Assembly has resolved that a recommendation to this effect should be made to Her Majesty. The resolution must be passed by at least two thirds of the total number of Assembly Members (not merely two-thirds of those voting on the motion).

731. Paragraph 3 protects the independence of the AGW, providing that neither the Assembly nor the Welsh Assembly Government can direct or control the manner in which the AGW exercises the functions of the office.

732. Paragraph 3 also provides that the AGW is not to be regarded as a Crown servant, other than for the purposes of the Official Secrets Act 1989 (c.6).

733. Paragraph 4 provides that the AGW is a corporation sole.

734. Paragraph 5 deals with the process for sealing documents by the AGW.

735. Paragraph 6 provides for the AGW's salary, and the Assembly's contribution to the AGW's pension provision, as well as the pensions of former AGWs, to be charged on the Welsh Consolidated Fund (that is, these amounts will be governed by the terms of appointment of the AGW and will not be subject to annual approval by the Assembly in Budget resolutions tabled by the Welsh Ministers).

736. Paragraph 7 makes provision regarding staff of the AGW. These provisions are closely based on the equivalent ones in the Government of Wales Act 1998, which are to be repealed.

737. Paragraph 8 is also closely based on equivalent provisions in the Government of Wales Act 1998. It deals with the ability of the AGW to delegate the exercise of functions to members of staff or persons providing services to the AGW. In both cases, the AGW's authorisation will be needed. Such a delegation does not affect the responsibility of the AGW for the manner in which that function is exercised. The AGW cannot, however, delegate the function of certifying or reporting on accounts which are required to be laid before the Assembly, unless the Presiding Officer has certified that AGW is unable to do this in person. Even if the Presiding Officer has so certified, the delegation ceases when the office of AGW falls vacant; the expectation would be that the new AGW would exercise the remaining aspect of the function in person, once appointed.

738. Paragraph 9 (1) provides that any compensation for breach of a function by the AGW is to be charged on the Welsh Consolidated Fund (i.e. is not to be subject to the approval of the Assembly in a Budget resolution).

739. Sub-paragraphs (3) and (4) provide that income which the AGW has earned through the exercise of functions related to local government in Wales is to be retained by the AGW and ploughed back into carrying out those functions (rather than paid into the Welsh Consolidated Fund or being available for the AGW to use for other purposes).

740. Paragraph 10 continues provision made in the Government of Wales Act 1998 for the AGW to be able to borrow money in order to cover a short-term deficit in funds.

741. Paragraph 11 deals with the AGW's powers to charge fees, which are equivalent to existing provisions in the Government of Wales Act 1998.

742. Paragraph 12 sets out the process whereby the AGW seeks annual funding for his or her Office. This largely replicates provisions of the Government of Wales Act 1998 which are to be repealed; the only change of substance is that the Audit Committee of the Assembly is now able to make modifications to the AGW's estimate without reference to the Secretary of State for Wales. The Audit Committee must, however, consult the AGW before laying an estimate containing such modifications before the Assembly.

743. Paragraph 13 imposes obligations on the AGW in relation to preparing accounts.

744. Paragraph 14 deals with the auditor of the accounts of the AGW.

745. Paragraph 15 sets out the time-scale within which the AGW's accounts must be audited, and also the auditor's rights of access to documents and information.

746. Paragraph 16 provides that the Accounting Officer for the Wales Audit Office is the AGW ("the Wales Audit Office" means the AGW and members of staff). Provision is also made for the appointment of a temporary Accounting Officer.

747. Paragraph 17 sets out the AGW's rights of access to documents, information, assistance and explanation for the purposes of the AGW's functions under the Act. These replace the equivalent provisions of the Government of Wales Act 1998.

748. Paragraph 18 provides that, where the Welsh Ministers have the power to appoint the auditor of a person or body, they can appoint the AGW to be that auditor, even where the AGW would not meet the normal criteria for that position. (But the Welsh Ministers cannot appoint the AGW to audit his or her own accounts). There is also provision for the AGW to audit accounts or carry out value for money examinations under a tripartite agreement between the AGW, the person or body in question, and either the Welsh Ministers or a Minister of the Crown. Further, paragraph 18 provides that where a function of preparing accounts is transferred to the Welsh Ministers by Order in Council under section 58 of the Act, the Secretary of State may by order transfer to the AGW any function of the Comptroller and Auditor General in relation to those accounts.

749. Paragraph 18 (8) deals with the AGW's functions in relation to information provided to the Treasury for the preparation of Whole of Government accounts under section 10 of the Government Resources and Accounts Act 2000 (c. 20).

750. Paragraph 19 replaces the equivalent provisions of the Government of Wales Act 1998 in respect of the AGW's power to report to the public on any matter coming to the AGW's notice while carrying out the AGW's functions. This power of report does not apply

where the AGW is carrying out a function at the request of, or by agreement with, the person or body in question. Such reports must be laid before the Assembly.

751. Paragraph 20 replaces the equivalent provisions of the Government of Wales Act 1998 in respect of the AGW's duty to certify certain claims, returns, accounts and calculations at the request of defined public sector bodies in Wales.

752. Paragraph 21 sets out the ancillary powers of the AGW. Again, these replace the equivalent provisions of the Government of Wales Act 1998.

## **SCHEDULE 9: DEVOLUTION ISSUES**

### **Part 1**

#### ***Preliminary***

753. Paragraph 1 defines "devolution issues" to include questions of both the legislative competence of the Assembly in relations to Acts and Measures which it has passed and the executive competence of the Welsh Assembly Government. It also includes alleged failures by the Welsh Assembly Government to comply with its obligations under European Community law, or the European Convention on Human Rights.

754. Paragraph 2 allows courts and tribunals a discretion not to treat a contention about any of the matters covered by paragraph 1 as a devolution issue, where it appears to the court or tribunal hearing the proceedings that the contention is frivolous or vexatious.

### **Part 2**

#### ***Proceedings in England and Wales***

755. Paragraph 4 provides that the Counsel General or the Attorney General can institute proceedings to decide a devolution issue. Where proceedings are brought by the Attorney General, then the Counsel General is entitled to defend them.

756. This does not prevent other people from bringing or defending such proceedings, but where they do so then the Attorney General and the Counsel General must be notified of the proceedings, and are entitled to take part in them (paragraph 5).

757. Paragraph 29(2)(a) gives both the Attorney General and the Counsel General a general power to require courts and tribunals to refer devolution issues in proceedings to which they are a party to the Supreme Court.

758. Paragraphs 6-11 set out further procedures by which devolution issues can be referred upwards from courts of first instance to the higher courts for resolution.

759. There are different procedures depending on whether the issue arises in criminal proceedings or civil proceedings (by virtue of paragraph 1(2), this includes all non-criminal proceedings), and the court in which proceedings originate.

#### ***Civil proceedings in the magistrates' courts***

760. A magistrates' court can refer devolution issues which arise in civil proceedings before it to the High Court (paragraph 6) to decide. Appeals from the High Court's decision on such a reference lie direct to the Supreme Court (paragraph 11), subject to permission to appeal having been granted by either the High Court or the Supreme Court.

### ***Civil proceedings begun in other courts***

761. Where civil proceedings are begun in courts other than a magistrates' court (e.g. the County Court, the High Court), those courts can refer any devolution issues direct to the Court of Appeal (paragraph 7(1)). The Court of Appeal's decision can be appealed to the Supreme Court, subject to permission having been granted by either the Court of Appeal or the Supreme Court (paragraph 11).

762. Paragraph 10 allows the Court of Appeal to refer a devolution issue to the Supreme Court of its own volition, where such an issue has arisen in proceedings before the Court of Appeal other than on a reference under this Part (for example, on an appeal from a first instance decision of the High Court in which the devolution issue was not raised).

### ***Tribunal proceedings***

763. Any tribunal (as defined by section 158(1)) can refer a devolution issue direct to the Court of Appeal. Tribunals from which there is no appeal must make such a reference (paragraph 8). In either case, the Court of Appeal's decision can be appealed to the Supreme Court, subject to permission having been granted by either the Court of Appeal or the Supreme Court (paragraph 11).

### ***Criminal proceedings – summary***

764. The magistrates' court can refer a devolution issue to the High Court (paragraph 9(a)). An appeal from the High Court's decision lies to the Supreme Court, subject to permission having been granted by either the High Court or the Supreme Court (paragraph 11).

### ***Criminal proceedings – on indictment***

765. The Crown court can refer a devolution issue direct to the Court of Appeal (paragraph 9(b)). The Court of Appeal's decision can be appealed to the Supreme Court, subject to permission having been granted by either the Court of Appeal or the Supreme Court (paragraph 11).

## **Part 3**

### ***Proceedings in Scotland***

766. Paragraph 13 provides that the Advocate General for Scotland can institute proceedings in Scotland to decide a devolution issue. Where proceedings are brought by the Advocate General, then the Counsel General is entitled to defend them.

767. This does not prevent other people from bringing or defending such proceedings, but where they do so then the Advocate General for Scotland and the Counsel General must be notified of the proceedings, and are entitled to take part in them (paragraph 14).

768. Paragraph 29(2)(b) gives the Advocate General for Scotland a general power to require courts and tribunals to refer devolution issues in proceedings to which the Advocate General is a party to the Supreme Court.

769. Paragraphs 15-21 set out further procedures by which devolution issues can be referred upwards from Scottish courts of first instance to the higher courts for resolution.

770. There are different procedures depending on whether the issue arises in criminal proceedings or civil proceedings (by virtue of paragraph 1(2), this includes all non-criminal proceedings), and the court in which proceedings originate.

***Civil proceedings in a court consisting of three or more judges of the Court of Session***

771. Such a court can refer a devolution issue, which arises in proceedings before it direct to the Supreme Court of its own volition (paragraph 18). If the court does not make such a reference but decides the issue itself, an appeal against its decision lies to the Supreme Court, subject to permission having been granted either by the court whose decision is being appealed or by the Supreme Court (paragraph 21(b)).

***Civil proceedings begun in other courts***

772. Where civil proceedings are begun in other courts, those courts can refer any devolution issues direct to the Inner House of the Court of Session (paragraph 15). An appeal against the Court of Session's decision on such a reference lies to the Supreme Court (paragraph 20).

***Tribunal proceedings***

773. Any tribunal (as defined by section 158(1)) in Scotland can refer a devolution issue direct to the Inner House of the Court of Session. Tribunals from which there is no appeal must make such a reference (paragraph 16). In either case, the Court of Session's decision can be appealed to the Supreme Court (paragraph 20).

***Criminal proceedings in a court consisting of two or more judges of the High Court of Justiciary***

774. Such a court can refer a devolution issue direct to the Supreme Court (paragraph 18), where such an issue has arisen in criminal proceedings before the court other than on a reference under this Part. If the court does not make such a reference in such a case but decides the issue itself, an appeal against its decision lies to the Supreme Court, subject to permission having been granted either by the court whose decision is being appealed or by the Supreme Court (paragraph 21(a)).

***Criminal proceedings – other Scottish courts***

775. Scottish courts which do not consist of two or more judges of the High Court of Justiciary can refer devolution issues to that Court. An appeal against the High Court of Justiciary's decision on such a reference lies to the Supreme Court, subject to permission having been granted either by the High Court of Justiciary or by the Supreme Court (paragraph 21(a)).

**Part 4**

***Proceedings in Northern Ireland***

776. Paragraph 23 provides that the Advocate General for Northern Ireland can institute proceedings in Northern Ireland to decide a devolution issue. Where proceedings are brought by the Advocate General, then the Counsel General is entitled to defend them.

777. This does not prevent other people from bringing or defending such proceedings, but where they do so then the Advocate General for Northern Ireland and the Counsel General must be notified of the proceedings, and are entitled to take part in them (paragraph 24).

778. Paragraph 29(2)(c) gives the Advocate General for Northern Ireland a general power to require courts and tribunals to refer devolution issues in proceedings to which the Advocate General is a party to the Supreme Court.

779. Paragraphs 25-28 set out further procedures by which devolution issues can be referred upwards from Northern Irish courts of first instance to the higher courts for resolution.

***Court proceedings (civil and criminal)***

780. Courts below the Court of Appeal in Northern Ireland can refer devolution issues to that Court (paragraph 25). Appeals against the Court of Appeal in Northern Ireland's decisions on such references lie to the Supreme Court, subject to permission to appeal having been granted either by that Court or by the Court of Appeal in Northern Ireland (paragraph 28).

781. Paragraph 27 provides that where a devolution issue has arisen in proceedings before the Court of Appeal in Northern Ireland other than on a reference under this Part, that Court can refer the issue to the Supreme Court of its own volition.

***Tribunal proceedings***

782. Any tribunal (as defined by section 158(1)) in Northern Ireland can refer a devolution issue direct to the Court of Appeal in Northern Ireland. Tribunals from which there is no appeal must make such a reference (paragraph 26). In either case, the Court of Appeal in Northern Ireland's decision can be appealed to the Supreme Court, subject to permission to appeal having been granted either by that Court or by the Court of Appeal in Northern Ireland (paragraph 28).

**Part 5**

***General***

783. Paragraph 30 enables the Attorney General or the Counsel General to refer any devolution issue, which is not being litigated to the Supreme Court.

784. The Attorney General must notify the Counsel General that such a reference has been made where it concerns the proposed exercise of a function by the Welsh Assembly Government, who must then refrain from exercising the function as proposed until the reference has been decided or disposed of.

785. Paragraph 31 provides that in awarding costs to litigants, courts and tribunals can take into account any additional expenses incurred as a result of joining into proceedings the Attorney General, the Counsel General, or the Advocates General for Scotland or Northern Ireland.

786. Paragraph 32 allows general court procedure rules and practice directions to make further provision about the procedure on devolution issues.

**SCHEDULE 10: MINOR AND CONSEQUENTIAL AMENDMENTS**

787. This Schedule contains the minor and consequential amendments to other enactments necessitated by the provisions of this Act .

**SCHEDULE 11: TRANSITIONAL PROVISIONS**

788. This Schedule contains detailed provisions dealing with the arrangements necessary to ensure an effective transition from the exercise of functions by the National Assembly for Wales constituted by the Government of Wales Act 1998 (for the purposes of this Schedule, "the old Assembly") to the new National Assembly constituted by this Act and to the Welsh Ministers.

**Paragraph 1: Alteration of Assembly electoral regions**

789. Schedule 1 deals with the making of alterations to the Assembly electoral regions and to the numbers of seats allocated to those regions, as a consequence of changes to the parliamentary constituencies in Wales. The Schedule places requirements on the Electoral Commission and the Boundary Committee for Wales (both of which are established under the Political Parties, Elections and Referendums Act 2000 (PPERA)) in relation to the consideration of the issue of whether any alteration would be required in the Assembly electoral regions, or in the allocation of seats to those regions, as a consequence of alterations to any parliamentary constituencies in Wales which may be made (referred to in Schedule 1 as “the Assembly electoral region issue”).

790. Paragraph 1 of Schedule 11 provides that Schedule 1 is to have effect with certain modifications, until such time as the functions of the Boundary Commission for Wales are transferred to the Electoral Commission, and functions are conferred on the Boundary Committee for Wales, by the coming into force of section 16 (1) of PERA for those purposes. As applied with the modifications, Schedule 1 will not contain provisions which relate to functions of the Electoral Commission and Boundary Committee for Wales which are not in force, and will impose requirements in relation to the Assembly electoral region issue on the Boundary Commission for Wales.

**Paragraph 2: 2007 election to be election to Assembly constituted under this Act**

791. Most of the provisions of the Act are to come into force immediately after the Welsh general election to be held in May 2007. This paragraph, (together with those which follow it), enable that election, although generally held under the existing Government of Wales Act 1998, to be an election to the Assembly as newly constituted and to take account of the changes to electoral arrangements, and other associated reforms, for which this Act provides.

**Paragraph 3: First meeting after 2007 ordinary election**

792. This paragraph provides for the date of the first meeting of this Assembly to be set by order made by the ‘old Assembly’ but that date must be within seven days of the Welsh general election.

**Paragraph 4: Date of 2011 election**

793. This paragraph provides for the date of the first ordinary Welsh general held after 2007 to be calculated by reference to the 2007 election. That is, that general election will be held in 2011.

**Paragraphs 5 and 6: No dual constituency and regional candidacy**

794. These paragraphs amend GoWA to prevent dual candidacy (see section 7(5) and (6) of this Act ), ensuring that candidates for election to the Assembly in the 2007 election cannot stand for election both as a member for a constituency and as a member for an electoral region. An individual will only be able to be a candidate to be elected to the Assembly to represent either a constituency or a region.

**Paragraph 7: Electoral region vacancies before first general election**

795. This paragraph provides that, for the period after the 2007 ordinary Welsh general election but before the ordinary Welsh general election to be held in 2011, section 11 (which deals with electoral region vacancies) is to be read as making reference to members elected at the ordinary election of 2007 and to that election.



**Paragraph 8: Election orders**

796. This paragraph provides for an order made under section 11 of GoWA, which is in force immediately before the repeal of that section, to continue to have effect until it is replaced by an order made under this Act .

**Paragraph 9: Term of office of Assembly members**

797. This paragraph provides that, for the period after the 2007 ordinary Welsh general election and until the ordinary Welsh general election to be held in 2011, section 14 (which deals with term of office of Assembly members) is to be read as making reference to members elected at the ordinary election of 2007 and to that election.

**Paragraph 10: Disqualification orders**

798. This paragraph provides that an Order in Council made under section 12(1)(b) GoWA (designating offices which disqualify persons from being Assembly members) which is in force immediately before the repeal of that section, will continue to have effect in relation to this Assembly until it is replaced by an order made under this Act .

**Paragraph 11: Disqualification of Lords of Appeal in Ordinary**

799. This paragraph disqualifies a Lord of Appeal in Ordinary from being an Assembly member, thereby applying to those disqualified from election in 2007 a minor adjustment made by the Act .

**Paragraphs 12 and 13: Remuneration of Assembly members**

800. Paragraph 12 provides that determinations made under section 16 GoWA, which have effect as to salaries and allowances payable to the Assembly First Secretary, other Assembly Secretaries, the Presiding Officer and Deputy Presiding Officer, the leader of the largest political party not represented in the executive committee and other Assembly members, which are in force immediately before the repeal of that section, continue to have effect until replaced by a determination under this Act and apply, respectively, to the First Minister, the Welsh Ministers, to the Presiding Officer and Deputy Presiding Officer, to the leader of the largest political group not represented in the Welsh Assembly Government and to other Assembly members.

801. Paragraph 13 provides that an order made under section 17 of GoWA providing for the reduction of salary payable to an Assembly member (to take into account any salary that member may receive as a Member of the UK or European Parliaments) continues to have effect in relation to this Assembly until replaced by provision made under section 21 of this Act.

**Paragraph 14: Publication of information about remuneration of Assembly members**

802. This paragraph ensures that the Assembly (as constituted under the Act ) is to have responsibility for publication of information about remuneration of Assembly members relation to the financial year 2006-07 (i.e. relating to the last year of the “old Assembly” and its members). The extent of the duty is limited to that to which the “old Assembly” was under as opposed to the wider duty of publication under this Act .

**Paragraph 15: Assistance to groups of Assembly members**

803. This paragraph ensures that a determination made under section 34A GoWA, which is in force immediately before the repeal of that section, will continue to have effect in relation to the Assembly until replaced by provision made under this Act.

**Paragraph 16: First Presiding Officer**

804. This paragraph ensures that the holding of the 2007 election triggers the duty of the Assembly to elect a Presiding Officer and Deputy Presiding Officer.

**Paragraph 17: First Clerk**

805. This paragraph provides that the person who is the Clerk to the old Assembly (a post defined by the old Assembly's standing orders rather than GoWA itself) is to be the Clerk of the Assembly for the purpose of functions under this Act until the Assembly's first Clerk is appointed by the Assembly Commission.

**Paragraph 18: Promotion of awareness of election system and devolved government**

806. This paragraph provides that paragraphs 5 and 6 of Schedule 2 (which authorise the Assembly Commission to promote awareness of the election system and devolved government either directly or by financial support for the Electoral Commission) have effect until the appointment of a First Minister under this Act ) as if the reference to the Commission were a reference to the old Assembly.

**Paragraph 19: Crown status of Assembly Commission**

807. This effect of this paragraph is that if, before the first appointment of a First Minister under section 46, Her Majesty makes an Order in Council under paragraph 12 (1) of Schedule 2 providing for the Assembly Commission to be treated as a Crown body for the purposes of an enactment, the statutory instrument containing the Order may be annulled only by either House of Parliament. Where an Order is made after the first appointment under section 46, the statutory instrument in which it is contained may also be annulled by the Assembly.

**Paragraph 20: Standing Orders**

808. This paragraph places a duty on the Secretary of State to make and publish, in English and Welsh, standing orders which are to govern the proceedings of the Assembly constituted under this Act and to do so before the ordinary Welsh general election is held in 2007 (i.e. by 31<sup>st</sup> March 2007 at the latest).

809. These standing orders will be needed in order to ensure that the Assembly constituted under this Act will, from the very beginning, have a set of standing orders which will enable it to operate the new arrangements made by this Act and which comply with its various mandatory requirements.

810. The aim of the Secretary of State is, however, to ensure that the old Assembly has the greatest practicable role in the process of formulating the standing orders in question and the Act therefore provides that the Secretary of State must give effect to any proposals made by the old Assembly which have been approved by two thirds of the Assembly members voting on the proposal in question and which have reached the Secretary of State no later than 28 February 2007.

811. Once made, the standing orders will be capable of being revised or re-made by the Assembly in accordance with section 31, i.e. with the support of at least two-thirds of Assembly members.

**Paragraph 21: Witnesses and documents: penalties**

812. Sections 39(4) and 40(3)(b) fix the maximum terms of imprisonment which can be imposed for offences under sections 39(1) and 40(2), respectively. These are framed by reference to provisions relating to sentencing which are contained in section 281(5) of the Criminal Justice Act 2003. Since that section is not yet in force, provision has to be made for

fixing these maximum terms by reference to the present law, with the effect that until section 281(5) of the 2003 Act comes into force, the maximum is to be 3 months rather than 51 weeks. (The provisions of the 2003 Act mean that the effect of a term of imprisonment of 51 weeks will not, once section 281(5) of that Act is in force, be directly comparable to a term of equal nominal length under the existing law.)

**Paragraphs 22 to 25: Exercise of functions before appointment of first First Minister**

813. These paragraphs ensure that governmental functions of the old Assembly can continue to be exercised during “the initial period”, that is, the period beginning at the start of polling day 2007 (when all members of the existing Assembly, including Assembly Ministers, would normally cease to be able to exercise those functions) and ending with the appointment of a First Minister.

814. This is done by ensuring that membership of the old Assembly does not, in relation to certain office-holders, cease until the end of the initial period. These office-holders are the Assembly First Secretary, the Assembly Secretaries (i.e. members of the “Assembly Government”) and also the Presiding Officer, provided these persons are candidates for election to the Assembly as constituted under this Act .

815. These persons will however cease to be treated as members of the Assembly if they are not re-elected or if they are disqualified from being members of the Assembly as re-constituted.

816. Paragraph 23 provides that during the initial period, functions of the Assembly constituted under GoWA (other than those which are the subject of paragraph 24) will be exercisable by the person who was First Secretary immediately before the beginning of the initial period, provided he or she is still an Assembly member. If that person is no longer a member of the Assembly, or the office of First Secretary was vacant immediately before the beginning of the initial period, the functions are exercisable by a person who was an Assembly Secretary at that time, is an Assembly member and who has been designated to exercise the functions by the other Secretaries. The First Secretary (or the other Secretary designated to act as such) will be able to delegate functions exercisable to one of the other Secretaries or to staff and functions delegated to Secretaries will be able to be further delegated by them to staff.

817. Where functions are delegated to staff, the head of the Assembly staff (the Permanent Secretary) makes the arrangements for the exercise of those functions. Any condition, restriction or limitation which applied to the exercise of a function before the beginning of election day 2007 applies equally to the exercise of that function during the initial period.

818. Paragraph 24 maintains the distinction between the parliamentary and executive sides of the existing Assembly. It provides that functions of the Assembly constituted under GoWA which were delegated to its House Committee are to be exercisable during the initial period by the person who was the presiding officer immediately before election day or, if that person does not qualify to be treated as continuing in office, or ceases to be so qualified, by the person who was the Clerk of the old Assembly. The presiding officer (or the clerk) will be able to delegate functions to staff of the Assembly. Where functions are delegated to staff, the person who was the Clerk of the Assembly immediately before the beginning of the initial period is to make the arrangements for the exercise of the functions. Any condition, restriction or limitation which applied to the exercise of a function before the beginning of election day applies to the exercise of that function during the initial period.

819. Paragraph 25 provides that subordinate legislation is to be made, confirmed or approved during the initial period by being signed by the person exercising the relevant function. Any such legislation is not subject to the normal Assembly procedures but the Clerk will be required to lay it before the Assembly as soon as reasonably practicable after the end of the initial period.

### **Paragraphs 26 to 28: Saving for existing instruments conferring or imposing functions**

820. These paragraphs ensure that transfers of functions to the old Assembly under the provisions of GoWA, and various miscellaneous provisions in relation to those functions, continue in force so as to enable subordinate legislation made under them to be amended or revoked, and other kinds of action to be taken in relation to the exercise of those functions, even though the provisions of GoWA under which the functions in question were conferred on the old Assembly have been repealed by this Act.

### **Paragraph 29: First nomination of First Minister**

821. This paragraph ensures that the Assembly's duty to nominate a person for appointment as First Minister under section 47(2)(a) is triggered by the holding of the Welsh general election in 2007.

### **Paragraphs 30 to 32: Transfer of Assembly functions**

#### **Paragraph 30**

822. Sub-paragraph (1) provides that, subject to the important exceptions provided for under paragraph 31, all the functions of the old Assembly are to transfer to the Welsh Ministers at the end of the initial period (i.e. upon appointment of a First Minister).

823. Sub-paragraph (2) provides that the functions which will transfer are functions which were exercisable by the old Assembly by virtue of an Order in Council made under section 22 of GoWA, or as a result of a designation under section 2(2) of the European Communities Act 1972 (by virtue of section 29(1) GoWA), and which were so exercisable immediately before the first appointment of a First Minister. If there are further functions conferred or imposed on the old Assembly which were exercisable by it immediately before the first appointment of a First Minister, these will also be transferred to the Welsh Ministers. For the purposes of this paragraph, a function is "exercisable" even if the statutory provision which transferred the function to, or conferred or imposed it on, the old Assembly has not yet come into force.

#### **Paragraph 31**

824. Sub-paragraph (1) provides for functions of the old Assembly to be excepted from the general transfer made by paragraph 30. The mechanism for achieving this is for Her Majesty to make the necessary provision by Order in Council. The kind of provision which can be made includes transfer any of the above functions specifically to the First Minister or the Counsel General instead of to "the Welsh Ministers". Functions may also be transferred to the Assembly Commission or to the Assembly itself but these may not involve functions of making, confirming or approving subordinate legislation. Such an Order in Council can also provide for functions transferred to be exercisable concurrently with another of these persons or bodies or subject to agreement of or after consultation with the Assembly Commission.

825. Where a function is one of making, confirming or approving subordinate legislation then, although it cannot be left with the Assembly (since "delegated" legislation is the province of the Welsh Ministers), an Order in Council under paragraph 31(2) and (4) can, instead, amend Schedule 5 to the Act so as to enable the Assembly to legislate on the matter

by Measure instead. This will enable the subject-matter of any framework powers conferred or imposed on the Assembly in other Acts passed in the same session as this Act to be “converted” into legislative competence so that the Assembly can legislate by way of Measure about the matter. In exercising the power in paragraph 31 (2) and (4) to “convert” such powers into legislative competence, the scheme of Part 3 of this Act be an important factor to take into consideration when determining under paragraph 29(2) what modifications are to be made to the power in the “conversion” process.

826. The paragraph makes detailed provisions for the consents and approvals which must be obtained before an Order in Council under it can be made. For example, an Order “converting” a function of the Assembly constituted under GoWA to make secondary legislation, into a power of the Assembly to pass Measures on the matter, would require the approval of the Assembly constituted under GoWA, and would also have to be laid before Parliament and be subject to annulment in pursuance of a resolution of either House.

### **Paragraph 32**

827. This paragraph provides that references in enactments, prerogative instruments and other documents to the Assembly constituted under GoWA, are to be construed as references to the Welsh Ministers, First Minister, the Counsel General, the Assembly Commission or the Assembly constituted under this Act, as appropriate, to the extent necessary for the purpose or in consequence of the exercise by those persons of a function which they have as a result of paragraph 30 or 31 of this Schedule.

### **Paragraph 33: Functions transferred by Order in Council under s.22 GOWA 1998: Parliamentary and Assembly procedures**

828. Ministerial functions of making subordinate legislation conferred by Act of Parliament are, with some exceptions, subject to Parliamentary procedures. These may either be affirmative (requiring specific Parliamentary endorsement) or negative (subject to annulment if a Parliamentary motion requires this).

829. Subject to limited exceptions, the old Assembly, where such functions were transferred to it by Order in Council under section 22 of GoWA, is required to give specific approval to subordinate legislation made in its name. Under this Act, these functions of making subordinate legislation under Act of Parliament will transfer to the Welsh Ministers. The Act therefore needs to make provision for imposing on such functions equivalent Assembly procedures (affirmative or negative) or to make it clear that no such procedure at all is to apply (for example in relation to certain local or temporary orders). This is the function of this paragraph.

830. Generally, an equivalent procedure is to apply - the Assembly equivalent of the Parliamentary procedures which applied immediately before the function was transferred to the old Assembly - to the making of subordinate legislation by a Minister of the Crown. So, if a Minister of the Crown is required by the Act of Parliament in question to obtain approval of Parliament before making subordinate legislation under a particular provision of that Act, the Welsh Ministers are to be required to obtain Assembly approval instead.

831. In some cases Parliamentary procedures will still apply, as is the case under GoWA, to certain legislation made by the Welsh Ministers, in addition to any relevant Assembly procedures. So, where an instrument contains legislation relating to an English border area or to a cross border body (if, in the latter case, the legislation relates to functions other than solely in relation to Wales) Parliamentary procedures apply. Additionally, if an Order in Council transferred a legislation making function to the old Assembly and expressly made it

subject to special Parliamentary procedure or to a requirement that the order be confirmed by Act of Parliament, the exercise of that function by the Welsh Ministers etc. will continue to be subject to that procedure.

**Paragraphs 34 and 35: Functions conferred or imposed by pre-commencement enactment: Parliamentary and Assembly procedures**

832. These paragraphs deal with the different situation of functions of making subordinate legislation which were directly conferred (or imposed) on the ‘old Assembly’ by an enactment (usually an Act of Parliament) before the commencement of this Act, and which are now to be exercisable by the Welsh Ministers, the First Minister or the Counsel General. They cover two distinct kinds of situations: firstly those where a Minister of the Crown has a corresponding function in relation to England to that which will be exercisable by the Welsh Ministers in relation to Wales and secondly where this is not the case, i.e. the function is unique to Wales.

833. If there is a particular Parliamentary procedure which applies to subordinate legislation made by a Minister of the Crown in relation to England, and a corresponding function is exercisable in relation to Wales by the Welsh Ministers, then the equivalent Assembly procedure to that Parliamentary procedure (affirmative or negative as the case may be or, sometimes, the equivalent under Assembly procedures of “special Parliamentary procedure”) is to apply.

834. If Parliamentary procedures applied to a legislation making function of a Minister of the Crown and to the exercise of the corresponding function by the Welsh Ministers, the First Minister and the Counsel General, both the Parliamentary procedure and an equivalent Assembly procedure will apply when the Welsh Ministers, the First Minister or the Counsel General exercise the function.

835. Paragraph 35 provides for the procedures applying to a function of making subordinate legislation which falls into the other category of those directly conferred (or imposed) on the ‘old Assembly’ namely those where no Minister of the Crown has a corresponding function in relation to England.

836. The paragraph specifies what Assembly procedures are to apply in such a case.

837. Unless a procedure is specified in relation to such function, none is to apply.

838. If subordinate legislation is to be made by virtue of a function listed in Table 1, it is subject to being laid before and approved by a resolution of the Assembly before it is made.

839. If subordinate legislation is made by virtue of a function listed in Table 2, it must be laid before the Assembly and can be annulled in pursuance of a resolution of the Assembly.

840. However, the provisions made in paragraphs 34 and 35 do not apply where functions of making subordinate legislation have been transferred to the Welsh Ministers, which were formerly functions of the Assembly constituted under GoWA as the result of a designation made under section 2 (2) of the European Communities Act 1972. In those circumstances, section 59 of this Act determines Assembly procedure in relation to the making of subordinate legislation.

**Paragraphs 36 and 37: Transfers of Assembly functions: laying of reports and statements**

841. Paragraphs 36 and 37 apply in relation to former Assembly functions of making or receiving reports or statements which are now exercisable by the Welsh Ministers, the First

Minister, the Counsel General or the Assembly Commission, because those functions have been transferred to one of the latter group by paragraph 30 of this Schedule, or by an Order in Council under paragraph 31. Where such functions are ones which were made exercisable by the old Assembly by an Order in Council under section 22 of GoWA and, prior to that, were subject to a statutory requirement to lay the report or statement before Parliament, then that requirement applies to the Welsh Ministers etc as if the reference to Parliament was a reference to the Assembly constituted under this Act.

842. Where such functions are ones which were conferred or imposed on the old Assembly by legislation which was passed or made prior to the first appointment of a First Minister under this Act, and that legislation required the old Assembly to publish the report or statement, then a copy of the report or statement must be laid before the Assembly.

**Paragraph 38 to 42: Transfers of Assembly functions: property, rights and liabilities**

843. These paragraphs make provision for the transfer of property, rights and liabilities of the old Assembly in connection with those functions which transfer to (or are conferred or imposed on) the Welsh Ministers, the First Minister, the Counsel General or the Assembly Commission.

844. Generally, property, rights and liabilities in connection with a function vest in the person or body in whom the relevant function is vested. This includes any instruments, contracts or legal proceedings (made or commenced before the transfer) in relation to a function or to property, rights and liabilities in connection with a function, except rights and liabilities under a contract of employment of a member of staff of the old Assembly.

845. Paragraph 40 makes provision for Her Majesty, by Order in Council, to provide for the general rule above not to apply in relation to some cases, or to apply only in some cases or to apply with modifications. No recommendation can be made to Her Majesty to make such an order unless a draft of the order has been laid before and approved by a resolution of each House of Parliament and the Assembly.

846. Paragraph 41 makes provision for the Secretary of State, by order, to provide for the transfer of specified property, rights or liabilities of the 'old Assembly' (but not property, rights or liabilities under a contract of employment of a member of staff of that Assembly) to the Welsh Ministers etc. or to the Assembly Commission. Either House of Parliament can, by resolution, annul an order made under this paragraph.

847. Paragraph 42 provides that a certificate of the Secretary of State that any property has been transferred by paragraph 39 or 41 is conclusive evidence of the transfer.

848. The paragraph further provides that transfers under paragraphs 39 and 41 have effect in relation to property, rights or liabilities to which they apply despite any provision which would otherwise prevent, penalise or restrict the transfer of the property or liabilities and that a right of pre-emption, right of return or other similar right is not to operate or become exercisable as a result of any such transfer of property or rights. Further, any such right has effect in the case of any such transfer as if the transferee were the same person in law as the transferor and as if no transfer of property had taken place.

849. Additionally, paragraph 42 provides for just compensation to be paid to any person in respect of a right which would have operated in favour of (or be exercisable by) that person but which in consequence of paragraph 40(3) cannot subsequently operate in the person's favour (or be exercisable by the person). Any compensation payable is to be paid by the transferor, transferee or both.

850. The Secretary of State can, by order, provide for the determination of any disputes as to whether, to whom or by whom such compensation is to be paid, and how much that compensation should be. Any such order can be annulled by a resolution of either House of Parliament.

**Paragraph 43: Staff of the Assembly**

851. This paragraph provides that from the beginning of the day after the appointment of a First Minister, staff of the old Assembly are to be deemed to have been appointed as members of staff of the Welsh Assembly Government. This is subject to a power of the Secretary of State, by order, to make a scheme for the transfer of staff to the Assembly, by transferring to the Assembly Commission the rights and liabilities of listed employees under their contracts of employment.

852. Any such transfer does not break the relevant employee's employment and the transfer scheme must provide for the terms and conditions of the employee's employment with the Commission to be no less favourable to the employee than they were immediately before the transfer.

853. If an employee listed in the scheme objects to becoming employed by the Assembly Commission, there will be no transfer of that employee but the employee's contract will be terminated at the beginning of the day after a First Minister is appointed. However, the employee will not be treated for any purpose as having been dismissed.

854. Before making an order under this paragraph, the Secretary of State must consult the old Assembly and such an order can be annulled by a resolution of either House of Parliament.

**Paragraph 44: Powers to lend money**

855. This paragraph deals with a power to lend money which was transferred to the old Assembly by an Order in Council under s. 22 GoWA and which is transferred to the Welsh Ministers under paragraph 30 of this Schedule.

856. The paragraph provides that any sums which would be required for the purpose of, or as a result of, the exercise of such a power to be issued by the Treasury out of, or to be paid into, the National Loans Fund are to be instead charged on the Welsh Consolidated Fund (WCF) or to be paid into that Fund.

857. Where a power was exercised by a Minister of the Crown before its transfer to the old Assembly, or was exercised by the old Assembly after transfer and the sums required were issued by the Treasury out of the National Loans Fund, the paragraph further provides that repayment of a loan is to be paid to the Welsh Ministers and by them into the WCF. However, amounts received by the Welsh Ministers in repayment of principal are treated (on the date of transfer of the power to them) as loans made to the Welsh Ministers by the Secretary of State and have to be repaid to the Secretary of State at such rates and times as the Treasury may determine. The amounts paid are to be charged on the WCF and corresponding receipts by the Secretary of State are to be paid into the National Loans Fund.

858. There is a power for Her Majesty, by Order in Council, to disapply this paragraph in relation to any power to lend money but no recommendation to Her Majesty to make an order can be made unless a copy of the statutory instrument has been laid and approved by a resolution of each House of Parliament.



**Paragraph 45: Local Government scheme**

859. This paragraph provides for the local government scheme made by the old Assembly under section 113(1) of GoWA to continue to have effect (with appropriate modifications) as if made under this Act .

**Paragraph 46: Voluntary sector scheme**

860. This paragraph provides for the voluntary sector scheme made by the old Assembly under section 114(1) of GoWA to continue to have effect (with appropriate modifications) as if made under this Act.

**Paragraph 47: Equality of opportunity arrangements**

861. This paragraph provides for equality of opportunity arrangements made by the old Assembly under section 120(1) of GoWA to continue to have effect (with appropriate modifications) as if made under this Act.

**Paragraph 48: Welsh Language Strategy and Scheme**

862. Section 78(1) requires the Welsh Ministers to adopt a Welsh Language strategy, which must set out how the Welsh Ministers propose to promote and facilitate the use of the Welsh language. Paragraph 48 provides that when section 78 comes into force (which will be immediately after the first appointment of a First Minister under section 46), then the National Action Plan for a Bilingual Wales (or Iaith Pawb), in whatever form it exists at that time, is to operate with appropriate modifications from then on as if it were a Welsh Language strategy adopted under section 78(1). In addition, any Welsh language scheme which the Assembly constituted under GoWA has adopted under section 21 of the Welsh Language Act 1993 and which is in force when section 78 comes into force, is to operate with appropriate modifications from then on as if it were a Welsh language scheme adopted under section 78(2).

863. The effect of paragraph 48(3) is that the Welsh Ministers are not required to re-publish the National Action Plan for a Bilingual Wales, nor any Welsh language scheme, which is operating as if made under section 78. The effect of paragraph 48(4) is that the Welsh Ministers are not required to publish a report under section 78(8) in relation to the financial year ending 31 March 2007.

**Paragraph 49: Sustainable development scheme**

864. This paragraph provides for the sustainable development scheme made by the old Assembly under section 121(1) of GoWA to continue to have effect (with appropriate modifications) as if made under this Act.

**Paragraph 50 and 51: Orders in Council amending Schedule 5**

865. These paragraphs provide for sections 95 and 96 to have effect with modifications until the beginning of the day after the day in which a First Minister is appointed. Sections 95 and 96 come into force on Royal Assent, in order to allow Schedule 5 (and therefore the Assembly's legislative competence to pass Assembly Measures) to be modified between Royal Assent and the Act coming fully into effect in May 2007. The modifications which this paragraph applies are necessary to allow sections 95 and 96 to operate in advance of May 2007.

**Paragraph 52: Assembly Measures: criminal penalties**

866. This paragraph provides that, until the coming into force of sections 281(5) and 154(1) of the Criminal Justice Act 2003, the maximum term of imprisonment which can be imposed on conviction of an offence (whether summary or triable either way) under an Assembly Measure is six months (again making provision for the different rules in relation to sentencing which apply until those provisions of the 2003 Act come into force).

**Paragraph 53: Welsh Consolidated Fund**

867. This paragraph imposes a duty on the old Assembly to pay, on 2 April 2007, all monies standing to its credit immediately before that day into the Welsh Consolidated Fund.

**Paragraph 54: Grants**

868. This paragraph ensures that section 118(2), that is, the power of Ministers of the Crown to make payments to the Welsh Ministers, has effect as a power to make payments to the old Assembly (including that Assembly as it continues in existence by virtue of Schedule 11, paragraph 22) until the first First Minister is appointed under the Act.

**Paragraph 55: Statement of estimated payments**

869. This paragraph provides that in relation to the financial year beginning on 1 April 2007, section 119 has effect also in relation to the old Assembly, so that the Secretary of State is required to lay a written statement of estimated payments before that Assembly, and to include, in that statement, estimated payments destined for the old Assembly.

**Paragraph 56: Destination of receipts**

870. This paragraph provides that section 120 (which governs which sums need to be paid into the Welsh Consolidated Fund and which do not) has effect, until the first First Minister is appointed under the Act, as if references to the Welsh Ministers etc. and to the Assembly Commission were references to the old Assembly. It also allows the old Assembly to make the initial decision as to which receipts can be retained, rather than paid into the Welsh Consolidated Fund.

**Paragraph 57: Borrowing**

871. This paragraph provides that section 121 has effect, until the first First Minister is appointed under the Act, as if the references to the Welsh Ministers were references to the old Assembly. This allows the old Assembly to continue to borrow from the Secretary of State, if necessary, until it completely ceases to exist. It further makes provision for relevant amounts outstanding immediately before 1 April 2007 to be treated as outstanding (and therefore counting towards the maximum that can be borrowed from the Secretary of State) as if borrowed under the section.

**Paragraphs 58 and 59: Payments out of the Welsh Consolidated Fund**

872. Paragraph 58 provides that section 124 has effect, until the first First Minister is appointed under the Act, as if the reference to the Welsh Ministers etc. or the Assembly Commission were references to the old Assembly. This gives a legal basis for sums to be paid out of the Welsh Consolidated Fund to meet expenditure of the old Assembly.

873. Paragraph 59 makes transitional provision in respect of certain minor amendments made to other Acts, in Schedule 10 of the Act. Those amendments come into force on 1<sup>st</sup> April 2007. They provide that, where the Welsh Ministers are guaranteeing certain loans, the sums required for fulfilling the guarantee will be charged on the Welsh Consolidated Fund, rather than on the UK Consolidated Fund, and that sums required by the Welsh Ministers for

the making of payments under Part 3 (Non-Domestic Rating: Distribution) of Schedule 8 to the Local Government Finance Act 1988 will be charged on the Welsh Consolidated Fund. Paragraph 59 operates so that, until the Welsh Ministers come into existence at the end of the initial period, sums required for fulfilling guarantees given by the old Assembly under the provisions in question, or for making payments which that Assembly is required to make under Part 3 of Schedule 8 to the Local Government Finance Act 1988 will also be charged on the Welsh Consolidated Fund.

**Paragraph 60: Annual Budget motions**

874. This paragraph provides that the requirement that a Budget resolution of the Assembly be passed before sums can be paid out of the Welsh Consolidated Fund etc. can be satisfied by a resolution of the old Assembly so far as section 125 has effect in relation to the financial year beginning on 1 April 2007.

**Paragraph 61: Supplementary Budget motions**

875. This paragraph ensures that in so far as section 126 has effect in relation to the financial year beginning on 1 April 2007, supplementary Budget motions can be moved in the old Assembly (except as it continues in existence during the initial period). Where a supplementary Budget motion under the Act is moved in the old Assembly, references to the First Minister or a Welsh Minister are to members of the “executive committee” under GoWA.

**Paragraph 62: Contingencies**

876. This paragraph provides that the power to use resources or to have cash paid out of the Welsh Consolidated Fund for an emergency situation (any such amounts not having been approved under a Budget resolution), applies to the old Assembly until the first First Minister is appointed under the Act. Paragraph 62 limits to £50 million the total amount that can be used during that period. The overall ceiling for the financial year, set down in section 128, still applies.

**Paragraph 63: Approvals to draw**

877. This paragraph provides that the provisions in section 129, requiring the approval of the Auditor General before payments can be made out of the Welsh Consolidated Fund, apply to the old Assembly until the first First Minister is appointed under the Act.

**Paragraph 64: Auditor General**

878. This paragraph provides that the person who immediately before the repeal of section 90 GoWA is the Auditor General for Wales, is to be taken, after such repeal, to have been appointed under paragraph 1 of Schedule 8.

**Paragraph 65: Advocate General for Northern Ireland**

879. This paragraph makes provision necessary for the period before the coming into force of section 27 (1) the Justice (Northern Ireland) Act 2002.

**Paragraphs 66 and 67: The Supreme Court**

880. These paragraphs make provision necessary for the period before the coming into force of section 23(1) of the Constitutional Reform Act 2005.

## **SCHEDULE 12: REPEALS AND REVOCATIONS**

881. This Schedule makes the usual provision for repeals and revocations of other enactments consequent upon this Act.

### **COMMENCEMENT**

882. The provisions of the Act when enacted will be brought into effect immediately after the Welsh general election in 2007, except the following sections which are the subject of special commencement provisions:

#### ***Provisions which come into force on Royal Assent:***

883. Schedule 2, paragraphs 5, 6 and 12 (promotion of awareness of Assembly elections etc.) ; Sections 95 and 96, and Schedule 5 (power to amend Schedule 5, which details the extent of the Measure-making competence); Section 109 and Schedule 7 (power to amend Schedule 7 which details the extent of primary legislative competence); Section 119 (requires written estimate of payments to be made by Secretary of State); Section 120 (3) and (7) (designation by Treasury of receipts); Section 125 (requirement of annual Budget motion); Sections 157-159, 160(2)-(4), 161-162, 164-166, the amendment made by paragraph 61 of Schedule 10 in section 13 of the Political Parties, Elections and Referendums Act 2000, Schedule 11 ( various transitional etc provisions), and various consequential repeals under Schedule 12.

#### ***Provisions which come into force on 1<sup>st</sup> April 2007:***

884. Sections 117, 118, 120(1) and (2), (4) to (6) and (8), 121, 122, and 124 all of which make provisions in relation to the Welsh Consolidated Fund.

885. Section 126, which allows one or more supplementary Budget motions to be moved in any financial year, and sections 128 and 129.

886. Amendments made to the Local Government, Planning and Land Act 1980, the Local Government Finance Act 1988 and the Housing Act 1988 by Schedule 10, consequential upon the creation of the Welsh Consolidated Fund.

887. The repeal by Schedule 12 of sections 80, 82, 84, 85 (1) and 89 of GoWA.

#### ***Provisions which come into force immediately after the first appointment of a First Minister under section 46:***

888. Unless already brought into force on Royal Assent or on 1<sup>st</sup> April 2007 by section 161, and subject to section 161(6), which makes provision as to when certain repeals of GoWA will come into force, any provision which relates to functions of the First Minister, the Welsh Ministers, the Counsel General or the Assembly Commission, any provision relating to the Auditor General or the Comptroller and Auditor General, provisions which consist of an amendment to GoWA by schedule 10 and any repeals by Schedule 12 of provisions which fall to be repealed as consequence of provisions which fall within sections 161 (a), (b) or (c).

#### ***Repeal by Schedule 12 of sections 83, 88, 93(8), 97 and 101A GoWA:***

889. These repeals come into force when those sections (which make various provisions in relation to the preparation of accounts by the Assembly and by the Secretary of State) have been complied with for the financial year ending 31<sup>st</sup> March 2007 ( and for earlier financial years), and sections 123, 131, 132 and 141 do not apply for that financial year.

**Assembly Act provisions:**

890. Sections 103 and 105 come into force immediately after the Welsh general election in 2007. Section 103 provides for the holding of a referendum on whether the Assembly Act provisions (Sections 107-108 and Sections 110-115) should be brought into force. Section 105 provides that if the majority of voters in such a referendum vote in favour of bringing the Assembly Act provisions into force, then the Welsh Ministers can bring them into force on such date as they may specify by making a commencement order. Section 104 comes into force (by virtue of section 161 (4) (a)) on the first appointment of a First Minister under the Act .

**GLOSSARY OF TERMS**

891. In these Explanatory Notes, the terms set out in the left-hand column of the table below have the meanings attributed to them in the right-hand column of the table.

AGW	the Auditor General for Wales
Assembly	the National Assembly for Wales
Clerk	the Clerk of the Assembly as described in section 26 of the Act
First Minister	as described in sections 46 and 47 of the Act
GoWA	Government of Wales Act 1998
Supreme Court	As established by section 23 of the Constitutional Reform Act 2005, once that section is brought into force by an order made by the Secretary of State under section 148 of that Act.  Until section 23 of the Constitutional Reform Act 2005 is brought into force, references to the Supreme Court shall be modified as set out in paragraphs 66 and 67 of Schedule 11.
Welsh Ministers	as described in section 48 of the Act

**HANSARD REFERENCES**

The following table sets out the dates and Hansard references for each stage of this Act's passage through Parliament.

*These Notes refer to the Government of Wales Act 2006 (c. 32)  
which received Royal Assent on 25 July 2006*

<b>Stage</b>	<b>Date</b>	<b>Hansard reference</b>
<i>House of Commons</i>		
Introduction	8 December 2005	Vol. 440 Col. 1020
Second Reading	9 January 2006	Vol. 441 Cols. 22 - 126
Committee of the whole House	23 January 2006	Vol. 441 Cols. 1167 – 1274
	24 January 2006	Vol. 441 Cols. 1326 - 1403
	30 January 2006	Vol. 442 Cols. 41 - 138
Report and Third Reading	27 February 2006	Vol. 443 Cols. 28 - 94
	28 February 2006	Vol. 443 Cols. 133 - 229
Commons Consideration of Lords Amendments	18 July 2006	Vol. 449 Cols. 191 – 241
<i>House of Lords</i>		
Introduction	1 March 2006	Vol. 679 Col. 258
Second Reading	22 March 2006	Vol. 680 Cols. 261 - 328
Committee of the whole House	19 April 2006	Vol. 680 Cols. 1058 – 1114 and 1128 - 1154
	3 May 2006	Vol. 681 Cols. 483 – 562,
	6 June 2006	Vol. 682 Cols. 1138 – 1197, and 1215 – 1252
Report	27 June 2006	Vol. 683 Cols. 1109 – 1157 and 1164 – 1184
	28 June 2006	Vol. 683 Cols. 1220 – 1252 and 1269 – 1312
Third Reading	13 July 2006	Vol. 684 Cols. 837 – 871
Lords Consideration of Commons Amendments	24 July 2006	Vol. 684. Cols. 1551 – 1578

**Royal Assent** – 25 July 2006

House of Lords Hansard Vol. 684 Col 1744

House of Commons Hansard Vol. 449 Col 837

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