Government of Wales Bill 2005: a note on the Bill's progress

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Author: Paul Bowers
Parliament and Constitution Centre

This Bill, as originally introduced, was discussed in Research Paper 05/90:

http://www.parliament.uk/commons/lib/research/rp2005/rp05-090.pdf

The Bill passed through the Commons without significant amendment. The most notable amendment made to the Bill in the Lords was the removal of the ban on dual candidacy for elections to the National Assembly for Wales. The amendment preserved the status quo to allow individuals to be candidates in a constituency and to be included on a regional list. The ban on dual candidacy was a manifesto commitment by the Labour Party in Wales, and the Government has indicated that it will seek to restore the ban when the Bill returns to the Commons.

This note traces the progress of the Bill, with links to the relevant portions of Hansard, and discusses the amendments.

Contents

A. Progress of the Bill: references

The *Government of Wales Bill* had its first reading in the House of Commons on 8 December 2005.[1] Second reading was on 9 January 2006. The committee stage was taken on the floor of the House on 23, 24 and 30 January 2006, and the report stage was on 27 and 28 February 2006.

The Bill had its first reading in the Lords on 1 March 2006 and its second reading on 22 March 2006. It was considered in committee on 19 April 2006, 3 May 2006 and 6 June 2006. It was reported on 27 and 28 June 2006. Third reading in the Lords was on 13 July 2006, and the Bill returns to the Commons for consideration of Lords amendments on 18 July 2006.

The latest printing of the Bill, with explanatory notes, is available here:

http://www.publications.parliament.uk/pa/pabills.htm#g

The full list of Lords amendments is here:

http://pubs1.tso.parliament.uk/pa/cm200506/cmbills/215/06215.1-6.html

Earlier committee reports are discussed in RP 05/90. Since then the House of Lords Constitution Committee has published a report on the Bill, HL 142 2005-06, 16 March 2006:

http://www.publications.parliament.uk/pa/ld200506/ldselect/ldconst/142/14202.htm

The Government response to that report was published in April 2006:[2]

http://pubs1.tso.parliament.uk/pa/ld200506/ldselect/ldconst/168/16802.htm

The Bill has also been reported on by the Lords Delegated Powers and Regulatory Reform Committee:[3]

http://pubs1.tso.parliament.uk/pa/ld200506/ldselect/lddelreg/160/16002.htm

The response to the earlier report of the Welsh Affairs Committee on the White Paper that preceded the Bill is available here:

http://www.publications.parliament.uk/pa/cm200506/cmselect/cmwelaf/839/83902.htm

The research service of the National Assembly for Wales has published a number of papers on the Bill and its progress, which are available here:

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1 The Bill was introduced as Bill 100 2005-06. It was reported with amendments as Bill 121 2005-06, and was introduced to the Lords as HL Bill 81 2005-06. It was then reprinted as HL Bill 121 2005-06 as amended in committee and as HL Bill 133 2005-06 as amended on report.

2 *Government response to a report on the Government of Wales Bill*, HL 168, 10th report 2005-06, 28 April 2006.

3 HL 160, 17th report 2005-06, 3 April 2006.

http://www.wales.gov.uk/keypubmrs/content/papers-e.htm

B. The Bill in the Commons

1. Second reading

Second reading was on 9 January 2006 at cc22-127:

http://pubs1.tso.parliament.uk/pa/cm200506/cmhansrd/cm060109/debtext/60109-06.htm#60109-06_head2

Peter Hain said that the Bill provided[4]

> the opportunity to settle for a long time the constitutional status of Wales, first by devolving further powers to the Assembly, and secondly the prospect of primary powers at some time in the future, if the people of Wales vote for that option in a referendum. By equipping the Assembly to face the challenges of the 21st century, we will help to achieve our objective of a Wales that is world-class, both economically competitive and with high quality public services.

The Conservatives tabled a reasoned amendment as follows:[5]

> That this House declines to give a Second Reading to the Government of Wales Bill because there has been inadequate consultation about the electoral arrangements proposed in the Bill; and because the Bill fails to provide for a referendum on the introduction of the Orders in Council mechanisms for conferring enhanced legislative powers on the National Assembly for Wales.

This was negatived on division by 341 to 161.

The Conservatives supported Part 2 of the Bill, which separates the legislative and executive branches of the National Assembly for Wales, but they objected that the referendum on primary powers in Part 4 was not mirrored by a referendum on Assembly Measures in Part 3, that the Measures procedure itself was flawed, and that changes in the electoral system were designed to favour the Welsh Labour Party.[6]

For the Liberal Democrats Lembit Öpik described the Bill as "flawed, patronising and limited."[7] He complained that it concentrated too much power in the hands of the Secretary of State, since he could block applications for Orders in Council to extend the range of Measures that could be made and, in some circumstances, he could block the Measures themselves. He wanted the National Assembly for Wales to have powers comparable to those of the Scottish Parliament.

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4 HC Deb 9 January 2006, c45.
5 HC Deb 9 January 2006, c45.
6 HC Deb 9 January 2006, cc47-50.
7 HC Deb 9 January 2006, c57.

For Plaid Cymru Elfyn Llwyd said that[8]

> the better governance of Wales could have been assured in a bolder, simpler and more transparent way had the Government followed the full proposals of the Richard Commission.

He welcomed the separation of legislature and executive, although he was unhappy with the Secretary of State's involvement in making the new Standing Orders for the Assembly. He criticised the Assembly Measures procedure, arguing that it was overly complex and that the Secretary of State had excessive power to thwart the Assembly. His main criticism was over the "self-serving nature of the ban on dual membership."[9]

2. Committee stage

The committee stage was taken on the floor of the House, as this is a constitutional Bill. There were three days of consideration in committee, 23, 24 and 30 January 2006:[10]

> http://pubs1.tso.parliament.uk/pa/cm200506/cmhansrd/cm060123/debtext/60123-06.htm#column_1167
>
> http://pubs1.tso.parliament.uk/pa/cm200506/cmhansrd/cm060124/debtext/60124-12.htm#column_1326
>
> http://pubs1.tso.parliament.uk/pa/cm200506/cmhansrd/cm060130/debtext/60130-11.htm#column_41

No opposition amendments nor new clauses were agreed to during the committee stage. On the final day in committee a number of Government amendments were made, to Clauses 83, 85, 124, 125, 127, 130, 132, 134, 135 and 161, and to Schedules 3, 10, 11 and 12.[11]

The Conservatives expressed concern over the time available for the committee stage, and complained that, on their calculation, in addition to the Government amendments mentioned above, some 133 clauses had not been scrutinised.[12] The Government's response, delivered during debate on the programme motion for report and third reading, was that large portions of the Bill either attracted all party support or followed closely the provisions of the existing *Government of Wales Act 1998*.[13]

The Bill as amended in committee was reprinted as Bill 121 2005-06 on 30 January 2006.

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8 HC Deb 9 January 2006, c71.
9 HC Deb 9 January 2006, c74.
10 HC Deb 23 January 2006, cc1167-1274, HC Deb 24 January 2006, cc1326-1403, and HC Deb 30 January 2006, cc41-138.
11 HC Deb 30 January 2006, cc132-37. References to Clauses and Schedules are to those in the Bill as it entered committee, Bill 100 2005-06.
12 HC Deb 30 January 2006, c137.
13 HC Deb 27 February 2006, c21.

3. Report and third reading

There was a programme motion for the report stage and third reading of the Bill:[14]

> http://pubs1.tso.parliament.uk/pa/cm200506/cmhansrd/cm060227/debtext/60227-05.htm#60227-05_head1

Report and third reading were on 27 and 28 February 2006:[15]

> http://pubs1.tso.parliament.uk/pa/cm200506/cmhansrd/cm060227/debtext/60227-07.htm#60227-07_head0
>
> http://pubs1.tso.parliament.uk/pa/cm200506/cmhansrd/cm060228/debtext/60228-08.htm#60228-08_head1

During the report stage no Opposition amendments were made, but there were a number of Government amendments,[16] and one new clause, New Clause 12.[17] This requires the Welsh Ministers to make a Business Scheme setting out how they will take account of business interests, including through consultation exercises and by considering the impact of their actions on business. This expands the provision on relations with business in Clause 75, which was removed, and which the new clause replaced.[18]

The Bill was passed on third reading by 324 to 143, the Conservatives voting against.

C. The Bill in the Lords

1. Second reading

Second reading was on 22 March 2006 at cc261-329:

> http://pubs1.tso.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds06/text/60322-10.htm#60322-10_head0

It was agreed to without a vote.

2. Committee stage

The committee stage in the Lords was taken on the floor of the House on three days, 19 April 2006, 3 May 2006 and 6 June 2006:

> http://pubs1.tso.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds06/text/60419-04.htm#60419-04_head0

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14 HC Deb 27 February 2006, cc21-26.
15 Report stage was HC Deb 27 February 2006, cc28-94, and 28 February 2006, cc133-206. Third reading was HC Deb 28 February 2006, cc206-30.
16 HC Deb 28 February 2006, cc188-92.
17 HC Deb 28 February 2006, c206.
18 HC Deb 28 February 2006, cc156-61.

http://pubs1.tso.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds06/text/60503-09.htm#60503-09_head0

http://pubs1.tso.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds06/text/60606-03.htm#60606-03_head0

Some amendments were made, as detailed below.

a. Amendment no 17: dual candidacy

Lord Roberts of Conwy, for the Conservatives, moved this amendment to Clause 7,[19] which dealt with a controversial aspect of the Bill.

Clause 7 concerns candidates at general elections to the Assembly, and sub-clauses (5) and (6) effected a prohibition on candidates standing for constituency seats and also being included on a regional list. This ban on dual candidacy was a manifesto commitment for the Labour Party in Wales.

The amendment replaced these two sub-sections with the following:[20]

> (5) The list must not include a person—
>
> (a) who is included on any other list submitted for the Assembly electoral region or any list submitted for another Assembly electoral region,
> (b) who is an individual candidate to be an Assembly member for the Assembly electoral region or another Assembly electoral region,
> (c) who is a candidate to be the Assembly member for an Assembly constituency which is not included in the Assembly electoral region, or
> (d) who is a candidate to be the Assembly member for an Assembly constituency included in the Assembly electoral region but is not a candidate of the party.
>
> (6) A person may not be an individual candidate to be an Assembly member for the Assembly electoral region if he is—
>
> (a) included on a list submitted by a registered political party for the Assembly electoral region or another Assembly electoral region,
> (b) an individual candidate to be an Assembly member for another Assembly electoral region,
> (c) a candidate to be the Assembly member for an Assembly constituency which is not included in the Assembly electoral region, or
> (d) a candidate of any registered political party to be the Assembly member for an Assembly constituency included in the Assembly electoral region

This is the exact wording of Section 5 (5) and (6) of the *Government of Wales Act* 1998, and it therefore preserves the status quo.

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[19] References to clauses of the Bill during Lords committee stage are references to the Bill as sent from the Commons, HL Bill 81 2005-06. The amendment number is the one used at the time of the debate.

[20] HL Deb 19 April 2006, c1092.

The arguments against the ban were aired extensively in the Commons. Lord Roberts summarised his concerns as follows:[21]

> What is the real motivation behind the change that the Government propose? The starting point is that Labour has no regional list members. Also relevant is the fact that its hold on the Assembly Government is precarious, as we have heard, and they are totally dependent on their constituency members, some of whom have slender majorities. They must therefore be protected at all costs. The prohibition of dual candidacy strengthens the position of Labour members in their constituencies by weakening the minority parties' attempts to undermine them from a position of strength on the regional list. To put that another way, Labour immunity in the constituencies that they occupy is improved if they are walled in against attack from regional members. Furthermore, the minority parties have to find more candidates, and more numbers usually means less quality.

He complained that no similar change was intended for elections to the Scottish Parliament, and he cited opinions from a number of academics and organisations to support his position, including the Electoral Commission and the Electoral Reform Society. He also mentioned the Arbuthnott Commission on Boundary Differences and Voting Systems, which considered the Scottish system in its Chapter 4.[22]

The Minister, Lord Davies of Oldham, placed emphasis on the manifesto commitment, which he described as "a clear, specific promise to the people of Wales."[23] He contested Lord Roberts's interpretation of Arbuthnott,[24] and denied any partisan intent:[25]

> I do not think that we are being partisan; the reform will affect all parties equally. No party will gain or lose a single vote or seat in the Assembly as a result of this change. Three Ministers in the Welsh Assembly Government are currently in marginal seats. They will also lose the safety net that the list system would otherwise have provided. It will not do for noble Lords to suggest that the Government are taking through a narrow, partisan matter to look after their own in Wales. Some of the crucial people who serve the Labour Party in Wales will make the inevitable sacrifice and there will be no safety net for them.
>
> It will remove unfairness in the current system. In doing so, it will improve the electoral system. We maintain that the proposals in Clause 7 to prevent candidates standing both in a constituency and on a regional list will strengthen the integrity of the system. It puts the voters in charge by enabling them to choose successful candidates and reject unsuccessful candidates who cannot then arrive in the Assembly through the back door.

The amendment was agreed to by 133 votes to 114.[26]

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21 HL Deb 19 April 2006, c1093.
22 http://www.arbuthnottcommission.gov.uk/
23 HL Deb 19 April 2006, c1105.
24 HL Deb 19 April 2006, c1104.
25 HL Deb 19 April 2006, c1105.
26 HL Deb 19 April 2006, c1108.

Peter Hain, the Secretary of State for Wales, responded by making clear the Government's intention to reverse the change when the Bill returns to the Commons:[27]

> The ban on dual candidacy was an explicit manifesto commitment put before the people of Wales in the 2005 general election.
>
> The Government is 100 per cent committed to ending the abuse of the Assembly's electoral system, putting the voters back in charge by stopping rejected constituency candidates getting into the Assembly by the back door.
>
> For the Lords to overturn this policy would be to renege on the Salisbury Convention, whereby the Lords have over the decades consistently respected the election manifesto commitments of the democratically elected government.
>
> We will reverse this decision by the unelected House of Lords when the Government of Wales Bill returns to the democratically elected House of Commons.

b. Government amendments

The Government introduced what it described as technical amendments to Clauses 2,[28] 68[29] and 160[30] and to Schedules 10, 11 and 12.[31]

On 6 June 2006 the Bill as amended in committee was reprinted as HL Bill 121 2005-06:

> http://pubs1.tso.parliament.uk/pa/ld200506/ldbills/121/2006121.htm

3. Report stage

The Bill was reported on 27-28 June 2006:[32]

> http://pubs1.tso.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds06/text/60627-07.htm#60627-07_head0
>
> http://pubs1.tso.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds06/text/60628-11.htm#60628-11_head0

Some amendments and new clauses were agreed, as detailed below.

a. Amendment no 11: composition of Assembly Commission

Lord Livsey of Talgarth, for the Liberal Democrats, moved this amendment to Clause 27 (2) (b),[33] which deals with the composition of the Assembly Commission. The amendment

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27 Wales Office press release, 19 April 2006: http://www.walesoffice.gov.uk/2006/pn_20060419.html.
28 HL Deb 19 April 2006, cc1084-85.
29 HL Deb 3 May 2006, c511.
30 HL Deb 6 June 2006, c1247.
31 HL Deb 6 June 2006, cc1246-52.
32 HL Deb 27 June 2006, cc1109-57 and 1164-84; HL Deb 28 June 2006, cc1220-52 and 1269-1312.
33 HL Deb 27 June 2006, c1127.

inserted the phrase “not belonging to the same political group” at the end of the sub-clause.[34] As amended, it would read:

> (2) The members of the Assembly Commission are to be—
>
> (a) the Presiding Officer, and
>
> (b) four other Assembly members not belonging to the same political group.

Lord Livsey explained his amendment as a way of ensuring that the Commission would always have all-party representation and be independent of the Assembly Government. All speakers in the exchanges on the amendment agreed that its aim was worthy, but the Minister, Lord Evans of Temple Guiting, argued that no such stipulation was in place for the Scottish Parliamentary Corporate Body, the House of Commons Commission nor the Northern Ireland Assembly Commission, and he pointed out that the shadow Assembly Commission already in place for planning purposes has representatives from all four political groups in the Assembly, even though there is no obligation to do so.

The amendment was agreed to on division, by 194 votes to 133.[35]

b. Amendment no 13: composition of committees

Lord Henley, for the Conservatives, moved this amendment to Clause 29,[36] on the composition of committees. The Bill as drafted had introduced a d’Hondt formula in an attempt to ensure that the committees of the Assembly were composed in a way that reflected the representation of political groups. The amendment removed the d’Hondt formula, in Clause 29 (2) to (9), and inserted the following:

> the standing orders shall include provision for ensuring that in apportioning members to committees and sub-committees regard is had to the balance of political parties represented in the Assembly.

Similar amendments were put forward in committee, and Lord Henley made his arguments in some detail there.[37] In summary, he felt that the d’Hondt formula was too prescriptive and that it would produce arbitrary and unfair results when applied to the relatively small committees likely to exist in the Assembly. In particular, it would “give an undue proportion of members to the ruling party.”[38] He preferred that the Clause be left out entirely, so that the Assembly could make its own decision. If not, his amendment was intended to provide a simple framework within which the Assembly could supply the details.

The Liberal Democrats tabled a broadly similar amendment, and supported this Conservative amendment. Lord Livsey argued that d’Hondt produced unfair results and was

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[34] References to the Bill during report stage are references to the Bill as amended in committee, HL Bill 121 2005-06. The amendment numbers are those used at the time of the debate.
[35] HL Deb 27 June 2006, c1131.
[36] HL Deb 27 June 2006, c1131.
[37] HL Deb 19 April 2006, cc1131ff.
[38] HL Deb 27 June 2006, c1131.

"a very crude form of proportionality."[39] He pointed out that the Scottish Parliament had abandoned d'Hondt on the basis of unfairness, and argued that "it favours the largest party considerably."

Lord Davies of Oldham, for the Government, said that all sides wanted the committees to be established "according to fair principles."[40] He defended d'Hondt:[41]

> d'Hondt is merely a dispassionate formula that is widely used to deal with a problem. It is ridiculous to suggest that other parliamentarians in other Assemblies have used it when they know that it is corrupt, biased and flawed and that it discriminates against smaller representations. That is not so. They use it because there is a problem that needs to be overcome.

He said that the system was not needed at Westminster, where majorities, or differences in party representation, were usually quite well defined. However, in Wales there would not always be a majority:[42]

> There is therefore no easy numerical formula to apply to the question of how one arrives at the composition of committees in quite the same way in which it is applied in the other place in the UK Parliament.

Lord Davies argued that the amendment would leave no fallback position if agreement could not be reached between the parties on the composition of committees. He said that the Conservative and Liberal Democrat amendments "take out the d'Hondt formula but put nothing else in its place, so we are left with stalemate if there is disagreement."[43] He argued that, under Clause 29 (8) of the Bill as it stood, the Assembly was free to reach any agreement it wished on the composition of committees, so long as a two-thirds majority could be achieved in favour, and that d'Hondt was the fallback if agreement could not be reached.

The amendment was agreed to on division, by 181 votes to 131.[44]

c. Amendment no 15: Audit/Accounts Committee

Baroness Noakes, for the Conservatives, moved this amendment to Clause 30.[45] The Clause concerns the Audit Committee, and the amendment was to replace its name with "Accounts Committee (or Pwyllgor Cyfrifon) or any other name that the Assembly chooses to allow through its standing orders."

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39 HL Deb 27 June 2006, c1133.
40 HL Deb 27 June 2006, c1135.
41 HL Deb 27 June 2006, c1135.
42 HL Deb 27 June 2006, c1135.
43 HL Deb 27 June 2006, c1136.
44 HL Deb 27 June 2006, c1140.
45 HL Deb 27 June 2006, c1140.

She argued that Audit Committee was "simply the wrong name" for the functions of this unit, which would be similar to those of the Public Accounts Committee in the Commons, and she prayed in aid the Auditor General for Wales and the Assembly Committee on the Bill.[46]

Lord Evans argued that the Assembly was happy with this name, and that it would have the power, under Part 3 of the Bill, to apply for an Order in Council giving it competence over the name and functions of the committee, so that it could pass an Assembly measure to change the name if it wished.[47]

The amendment was agreed to on division, by 155 votes to 127.[48]

A number of consequential amendments, changing references to the name of the Committee, were agreed without a vote.[49]

d. Government amendments

Several Government amendments were accepted without a vote.[50] The opposition parties acknowledged that most were technical and minor. One exception was Amendment 36, which inserted a new clause requiring the Welsh Ministers to adopt and publish a "Welsh language strategy" and a "Welsh language scheme."[51] The strategy would explain how they proposed to promote and facilitate the use of Welsh. The scheme would include measures to achieve equality of Welsh and English in the conduct of public business. The Ministers must publish and lay before the Assembly an annual report on the implementation of the strategy and the scheme, and on the effectiveness of the strategy.

The amendment was welcomed on all sides, and was agreed to without a vote.

The Government moved a number of amendments in response to the recommendations of the Delegated Powers and Regulatory Reform Committee.[52] These amendments had the effect of extending the use of the affirmative procedure to orders under Clause 161, which empowers the Secretary of State to make transitional provisions. Some transitional orders will still be made under the negative procedure, but those amending or repealing paragraphs 28 to 33 of Schedule 11 (transfer of functions to Welsh Ministers) or paragraphs 47 and 48 of the same Schedule (method for giving the Assembly enhanced legislative powers) will be subject to the affirmative procedure. This is in recognition of the fact that an exercise of transitional powers in those two areas could affect the powers of the new Assembly. The Delegated Powers and Regulatory Reform Committee considered that "the transitional provisions are more significant than in most other bills and that the affirmative procedure should apply to orders which modify Schedule 11."[53]

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46 HL Deb 27 June 2006, c1141.
47 HL Deb 27 June 2006, c1142.
48 HL Deb 27 June 2006, c1145.
49 HL Deb 27 June 2006, c1145, & 28 June 2006, c1302.
50 HL Deb 27 June 2006, cc1149-50, 1164, 1167; 28 June 2006, cc1306-12.
51 HL Deb 27 June 2006, cc1178- 79.
52 HL Deb 28 June 2006, cc1307-09.
53 HL 160, 17th report 2005-06, 3 April 2006, para 45.

On 28 June 2006 the Bill as amended on report was reprinted as HL Bill 133 2005-06:

> http://pubs1.tso.parliament.uk/pa/ld200506/ldbills/133/2006133.pdf

4. Third reading

Third reading in the Lords was on 13 July 2006:[54]

> http://pubs1.tso.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds06/text/60713-0949.htm#06071361000003

The Bill was passed and returned to the Commons with amendments, as detailed below.

a. Amendment no 4: retrospectivity

Lord Kingsland, for the Conservatives, moved this amendment to Clause 95.[55] This clause comes in Part 3 of the Bill, concerning Assembly Measures. It provides for Orders in Council to grant the Assembly power over new or amended fields, or new or amended matters, when passing Assembly Measures. Clause 95 (4) provides that "an Order in Council under this section may make provision having retrospective effect." The amendment added at the end of this sub-clause,

> ", provided that such an Order is not to the detriment of those who have either benefited from or acted in reliance upon the state of the law before the retrospective Order is made."

The Conservatives had sought to remove retrospectivity altogether during the committee and report stages.[56]

Lord Kingsland summarised his concerns in the form of a question: "can an Order change, retrospectively, the decision of a court and the consequences that flow from that decision?"[57] He gave an example of this worry in the debate on report:[58]

> We are concerned that the retrospective power will be used to change decisions in litigation. If, for example, an Assembly measure is in issue in a trial, which has been authorised under one field or another of Part 1 of Schedule 5, and the judge concludes that the Assembly measure is *ultra vires* that field, we do not want an Order in Council made under [Clause 95 (4)] to widen the scope, retrospectively, of the field in Part 1 of Schedule 5 so as to make what was decided by the judge as *ultra vires*, *intra vires*, thereby changing the decision of the court.

He stressed that this was not to dispute the right of legislators to change the law for the future.

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54 HL Deb 13 July 2006, cc837-71.

55 HL Deb 13 July 2006, c840. References to the Bill during third reading are references to the Bill as amended on report, HL Bill 133 2005-06. The amendment numbers are those used at the time of the debate.

56 HL Deb 6 June 2006, cc1169ff, and HL Deb 28 June 2006, cc1275ff.

57 HL Deb 13 July 2006, c840.

58 HL Deb 28 June 2006, c1275.

Lord Evans rested the Government's opposition to the amendment on several factors.[59] He argued that the retrospective power was necessary in order to correct technical defects, for instance if persons had acted in good faith under the provisions of an Assembly Measure which was later ruled to be *ultra vires*. If the Measure were retrospectively made *intra vires*, by using Clause 95 to extend the fields or matters available to the Assembly, then some protection was given to those persons. In reaching the decision to use this power the Welsh Ministers and Secretary of State would weigh a range of factors, including the possible detriment to individuals. He went on,[60]

> however, we cannot accept the amendments, as that is not the only consideration that they would have to take into account. There may be considerations in the public interest that greatly outweighed an arguable detriment to an individual.

He said that existing human rights legislation was the best constraint on Ministers in these cases. He also made the point that Orders under Clause 95 would be subject to parliamentary approval under the affirmative procedure. He argued that it would be impossible to identify with certainty all persons who might be detrimentally affected, and that "it would never be clear, therefore, whether any order could lawfully be made, even if there was an overwhelming public interest in making it."[61] Finally, he referred to similar provisions in Sections 107 and 114 of the *Scotland Act 1998*, which had been used on one occasion.

Lord Kingsland argued that the possibility remained that a court might rule that a person had certain rights in law, but that those rights might be removed if Parliament assented to a request for a retrospective Order from the Welsh Ministers through the Secretary of State. He argued that this went further than the powers available to Parliament in respect of delegated legislation, where *ultra vires* defects were corrected for the future but not for the past.[62]

The amendment was agreed to on division by 110 votes to 106.[63]

Two related amendments, Nos 12 and 13, were agreed to without a vote. These were amendments to Clauses 150 (power to make consequential provision) and 151 (power to remedy *ultra vires* acts) respectively.[64]

b. Amendment no 9: referendum on full legislative powers

Lord Roberts of Conwy, for the Conservatives, moved this amendment to Clause 104, on a referendum to bring in full legislative powers under Part 4 of the Bill. The amendment removed the power of the Secretary of State, under Clause 104 (3) (b), to refuse to put an Order in Council authorising a referendum before Parliament, when properly requested by the Assembly.

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59 HL Deb 13 July 2006, cc841-3.
60 HL Deb 13 July 2006, c841.
61 HL Deb 13 July 2006, c842.
62 HL Deb 13 July 2006, cc843-4.
63 HL Deb 13 July 2006, c845.
64 HL Deb 13 July 2006, c862.

He argued that the Secretary of State's power of refusal was "extraordinary" and "interventionist," given that there must be a two-thirds majority in the Assembly for the request to be made.[65] He felt that the "only credible reason" for a refusal would be a Government's disapproval of the decision to request a referendum, and its determination "to resist it at all costs."[66] He felt that it should be for Parliament, not the Secretary of State, to agree or to overrule the request.

Lord Davies argued, first, that removal of the Secretary of State's power of refusal would not secure its intended aim, since a Government hostile to a move to full legislative powers could introduce primary legislation to remove Part 4 of the Bill.[67] Secondly, he drew attention to the Secretary of State's constitutional role:[68]

> If the order is to be laid before Parliament, that is the proper responsibility of the Minister of the Crown. It is not constitutionally defensible for the Assembly to be able to demand that the Secretary of State does this regardless of whether he has the will to do so.

He also made the point that the removal of the power to refuse would constrain the Secretary of State to lay the instrument within 120 days, under the remaining parts of Clause 104. This might lead to practical difficulties with drafting and, perhaps, statutory consultation.[69]

The amendment was agreed to on division by 142 votes to 105.

c. Government amendments

Lord Evans moved a number of Government amendments, which were minor and technical, and which the Conservatives and Liberal Democrats accepted.[70]

D. Final version of Bill

1. Consideration of Lords amendments

The amendments made in the House of Lords were considered in the Commons on 18 July 2006:[71]

http://pubs1.tso.parliament.uk/pa/cm200506/cmhansrd/cm060718/debtext/60718-0995.htm#column_191

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65 HL Deb 13 July 2006, c852.
66 HL Deb 13 July 2006, c853.
67 HL Deb 13 July 2006, cc855-6.
68 HL Deb 13 July 2006, c856.
69 HL Deb 13 July 2006, c856.
70 HL Deb 13 July 2006, cc868-71.
71 HC Deb 18 July 2006, cc191-241.

The Commons disagreed to all the Lords amendments except the Government ones. The Government introduced new amendments in lieu of the Lords amendments on the composition of the Assembly Commission, the composition of committees and the name of the Audit Committee.

In particular, the Commons reinstated the ban on dual candidacy, by disagreeing with the amendment to Clause 7,[72] discussed above under the committee stage in the Lords. The House divided, and the motion to disagree was carried on division by 294 votes to 213.[73]

The Commons restored the unconstrained nature of the capacity to make retrospective provision in Orders in Council under Clauses 95 and 151, or in orders under clause 150.[74] Lord Kingsland's amendments, discussed above,[75] had placed the constraint that retrospective orders could be made only so long as they were not to the detriment of persons who had benefited from the law in its previous state. The Minister, Nick Ainger, was not prepared to read into the record a reassurance using exactly the language of Lord Kingsland's amendments, but he did say that the retrospective power "will not be used in those circumstances" (i.e., of causing such detriment), "that there is no intention of using the procedure to overturn any court decision, and that the rights of the individual will be protected."[76]

The motion to disagree was carried on division by 287 to 153.[77]

The only other amendment to be debated and divided on was the amendment to Clause 104, which had removed the Secretary of State's power to refuse to lay a draft Order in Council calling a referendum on the move to full legislative powers.[78] The motion to disagree was carried on division by 294 to 189.[79]

2. Consideration of Commons amendments

The Commons amendments and reasons were considered in the Lords on 24 July 2006:[80]

http://pubs1.tso.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds06/text/60724-1054.htm#06072410000004

The Lords did not insist on any of their amendments. They agreed to all the Commons amendments in lieu, as discussed below.

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[72] The amendment was number 17 when passed, and it was number 3 when the Lords amendments were considered in the Commons, printed as HC Bill 215, 13 July 2006.

[73] HC Deb 18 July 2006, cc213-7.

[74] In the Commons debate the clause numbers were 94, 149 and 150. This is because the Commons was referring to Lords amendments to its Bill, whereas the Lords subsequently added a new clause on the Welsh language strategy and scheme. The Act will reflect the numbering from the Lords, given that the new clause was not removed (in fact it was added by the Government).

[75] Amendments numbers 4, 12 and 13 in the Lords, numbers 17, 21 and 22 in the Commons.

[76] HC Deb 18 July 2006, cc227 & 228.

[77] HC Deb 18 July 2006, cc228-31

[78] Clause 103 during the Commons debate, see footnote 74 above. The amendment was number 9 in the Lords, number 18 in the Commons.

[79] HC Deb 18 July 2006, cc237-41.

[80] HL Deb 24 July 2006, cc1551-78.

On the Assembly Commission the amendment in lieu was to replace the prescription, in the original Lords amendment, that the members of the Commission other than the Presiding Officer must not belong to the same political group, with a provision that there should be no more than one such member from any single political group "so far as it is reasonably practicable to do so."[81]

On the composition of committees the amendment in lieu was designed to make explicit that the d'Hondt formula was a fallback mechanism, to be used only if agreement could not be reached between the parties. It inserted the provision that appointments to committees would be made by resolution of the Assembly, reflecting, as far as reasonably practicable, the balance of political groups in the Assembly, or, if not, by d'Hondt.[82]

On the name of the Audit Committee the amendment in lieu was to restore the original name "Audit Committee," but to allow the Assembly discretion to change the name if it wished.[83]

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[81] HL Deb 24 July 2006, c1561.
[82] HL Deb 24 July 2006, c1561-6.
[83] HL Deb 24 July 2006, cc1566-7.