

GOVERNMENT OF WALES ACT 2006

EXPLANATORY NOTES

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 Council¹ 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 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:

¹ 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.

- 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.