

Mr David T C Davies MP  
Chair, Welsh Affairs Committee  
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House of Commons  
LONDON  
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Your ref:  
Our ref: PO/RB/TJ

28 January 2014

*Dear David*

Thank you again for the opportunity to present evidence to you during your pre-legislative inquiry into the draft Wales Bill.

I am writing to provide further information on a number of specific matters which I referred to during your Committee Meeting of 20 January.

In particular, I recommended that the Wales Bill be redrafted to provide the National Assembly for Wales with the legislative power to determine its own financial procedures. I have included further detail and outlined the technical elements associated with such a recommendation at Annex 1.

I also believe it would be helpful to expand on the comments I made during the meeting on the difficulties that the limited size of the Assembly places on Members' capacity to specialise in certain areas of scrutiny. I have set out what I see as the intrinsic relationship between the size of the Assembly and the available opportunity for Members to develop specific areas of expertise at Annex 2.

I also proposed that the Wales Bill be used as a vehicle to deliver a number of changes to the Government of Wales Act 2006. Annex 3 contains a full list of these legislative changes, which I proposed to the Silk Commission in

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**Croesewir gohebiaeth yn y Gymraeg a'r Saesneg/We welcome correspondence in both English and Welsh**

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evidence on part 2 of its remit, reflecting the Assembly's position as a mature parliamentary body, accountable to, and supported by, the people of Wales. For example, given that the draft Bill already makes provision to change the name of the Welsh executive, I believe it should amend the name of the legislature so that it is described as a Parliament rather than an Assembly. I also wish to see an amendment to the existing power of the Assembly Commission to promote public awareness of: "the current or any pending system of devolved government in Wales."<sup>1</sup> I wish to see this extended to a more general power, aimed at allowing the Commission to promote democratic participation at all levels in Wales. The objective would be to put beyond doubt the ability of the Commission to promote public understanding of a future income tax referendum as well as other important issues relating to the democratic system in Wales.

In terms of the clauses in the draft Bill itself, I can confirm that I am not concerned by the draft Bill's provisions for triggering a referendum, which essentially mirror those followed for the 2010 referendum in Wales. However, I would be grateful for any clarification you can obtain on why the period for the Secretary of State to lay an Order causing the referendum to take place is 180 days, when it was only 120 days for the previous referendum – which was on, arguably, a more complex issue.

I would suggest that clause 12 of the draft Bill could potentially be improved by it requiring the Treasury to commence income tax provisions within a set period (for example 12 months) of a 'yes vote' in an income tax referendum. This would minimise the potential for any unnecessary delays following a 'yes vote.'

Similarly, I consider that there should be a time-limit on the Treasury's power to commence sections 17 (borrowing by the Welsh Ministers) and 20 (housing revenue account changes).

I also welcome the principle of a closer and more direct relationship between Wales and the Law Commission, as proposed by clause 21 of the draft Wales Bill. However, I believe clause 21 could be improved so that the Law Commission was placed in the same position, vis-à-vis the Welsh Ministers, as the respective Law Commissions are vis-à-vis UK Ministers and Scottish Ministers. In particular, this would place a duty on the Law Commission to

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<sup>1</sup> Government of Wales Act 2006, Schedule 2, 5(1)(b)



Llywydd  
Presiding Officer



draw up programmes for the reform or consolidation of the law specific to Wales and within the Assembly's competence, and indeed to prepare draft Bills to give effect to such programmes, if approved by the Welsh Ministers. Moreover, unlike the system at Westminster, Assembly Committees can introduce Bills into the Assembly. I believe this would make it appropriate for the Law Commission also to be empowered to provide advice and information to Assembly Committees, at the Committees' request. I accept of course that any work undertaken by the Commission for Committees would have to be funded out of the Assembly's budget.

Finally, I note that clause 24 gives the Treasury power, by order, to make 'supplementary, incidental or consequential' provisions in connection with the finance aspects of the Bill. However, it provides no role for Welsh Ministers or the Assembly in making such provisions. I believe clause 24 could helpfully be amended so that there is some role for Welsh Ministers and the Assembly when Assembly Acts or Measures are being modified. In particular, I believe consideration should be given to subjecting such Orders to Assembly approval.

A handwritten signature in cursive script, reading "Rosemary".

**Dame Rosemary Butler AM**  
**Presiding Officer**

## **Annex 1- The need for the National Assembly for Wales to have legislative control over its budgetary procedures**

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### **Background**

The Silk Commission's part 1 report recognised that if its recommendations related to taxation and borrowing were implemented, the National Assembly for Wales' current budget procedures would no longer be fit for purpose. It states that:

“The present National Assembly procedures for the consideration of the budget are set out in the Government of Wales Act 2006. They centre on an annual Assembly budget motion which authorises the allocation of resources provided by HM Treasury. These procedures will no longer be fit for purpose once the Assembly is given legislative responsibility for borrowing and tax-raising. Where now the Welsh budget process just involves authorising the allocation of spending to programmes, if our recommendations are accepted, the Welsh Government would also need to propose tax rates and borrowing for the forthcoming year and these would therefore need to be considered and authorised by the Assembly.”<sup>1</sup>

The National Assembly for Wales budgetary procedures are set out by Part 5 of the Government of Wales Act 2006 (GOWA 2006), which cannot currently be altered by the Assembly. The Silk Commission recognised that this was a different constitutional set up to Scotland, noting that:

“In Scotland, the Scottish Parliament has, since inception, had the power to develop its own financial and budgetary procedures. The Scotland Act 1998 simply provided for the establishment of a Scottish Consolidated Fund and a few basic finance and accountability requirements. Scottish procedures are governed by the Public Finance and Accountability (Scotland) Act 2000, an Act of the Scottish Parliament. In Wales,

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<sup>1</sup> Commission on Devolution in Wales, *Empowerment and Responsibility: Financial Powers to Strengthen Wales*, November 2012, Para 8.4.26

procedures are prescribed by the Government of Wales Act 2006 and cannot be altered by the Assembly.”<sup>2</sup>

Consequently, the Silk Commission report recommended that the Assembly should be given legislative control to set and develop its own budgetary procedures (i.e. with the underpinning Westminster legislation being less prescriptive than currently), as is the case with the Scottish Parliament.<sup>3</sup>

The Silk Commission did not suggest a specific budget process for the Assembly to adopt, but proposed that:

“the Assembly’s procedures for the consideration of taxation, borrowing and spending should reflect international best practice. This would mean the integration of revenue raising and borrowing with spending into a single Finance (or Budget) Bill; a Bill process for Wales that involved enough time for proper scrutiny by the Finance Committee and other subject committees (a classic procedure is for each subject committee to feed in its views on the budget to the Finance Committee); and the full involvement of stakeholders outside the Assembly in the process of consideration of the Bill.”<sup>4</sup>

However, in order for the National Assembly for Wales to even consider integrating revenue raising, borrowing and spending proposals into the same budgetary procedure, legislative control over budgetary procedures would first have to be devolved to Wales.

### **How the National Assembly for Wales could be given legislative power over its budgetary procedures**

Powers over the Assembly’s current budgetary provisions could be devolved through one of two ways:

- Legislation introduced at Westminster, such as the Wales Bill; or
- An Order in Council made under section 109 of the *Government of Wales Act 2006*.

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<sup>2</sup> Commission on Devolution in Wales, *Empowerment and Responsibility: Financial Powers to Strengthen Wales*, November 2012, Para 8.4.29

<sup>3</sup> Commission on Devolution in Wales, *Empowerment and Responsibility: Financial Powers to Strengthen Wales*, November 2012, Recommendation 32

<sup>4</sup> Commission on Devolution in Wales, *Empowerment and Responsibility: Financial Powers to Strengthen Wales*, November 2012, Para 8.4.28

These powers would be devolved in practice by:

- adding control over the Assembly's budgetary procedures to Subject heading 13 (*National Assembly for Wales*) in Part 1 of Schedule 7 to the *Government of Wales Act 2006*; and
- extending the scope of paragraph 5(2) of Part 2 of Schedule 7, so as to allow an Assembly Act to modify the provisions dealing with Budget motions, which are included in Part 5 of the 2006 Act. (Consequential amendments to other sections of Part 5 would no doubt also be needed but competence for these would be provided by section 108(5) of the Act). My officials can provide a detailed list of the provisions that we would wish to see added to paragraph 5(2) of Schedule 7 in due course, if that would be helpful.

These changes would in turn allow the Assembly to pass an Act to replace the current budgetary procedures set out principally in sections 125 to 128 of the 2006 Act.

### **Basic financial safeguards**

I would not propose that the Assembly should have competence to remove or modify those basic financial safeguards which are contained in the 2006 Act, and which are equivalent with those contained in the *Scotland Act 1998*.

I would, however, welcome the Wales Bill setting out that any taxation receipts should be paid into the Welsh Consolidated Fund by the authority that collects the taxes. Such receipts should not be regarded as general income of Welsh Ministers (which can, currently, be exempted from the requirement to pay into the Welsh Consolidated Fund).

### **Could the present procedures set out in Part 5 of the 2006 Act be interpreted so as to allow integrated scrutiny of revenue raising, borrowing and spending?**

It has been suggested that the Assembly could pass a Budget Bill covering all the above aspects of financial control without any need for amendment of the current section 125 of the *Government of Wales Act 2006*, the provision that requires the Assembly to pass a Budget Motion each year, authorising expenditure.

In my view, that would be to hamstring one of the most important functions of the Assembly. For one thing, a Budget Motion would still be required, as well as the Budget Bill, as section 125 would remain unchanged. Moreover, section 124(1)(b) forbids payment out of the Welsh Consolidated Fund without the authorisation of a Budget Resolution. It is true that a Budget Bill might, arguably, constitute a “relevant enactment” for the purposes of section 124(2)(b). However, the fact that expenditure is payable under a relevant enactment does not remove the need for the authorisation of a Budget Resolution also. Therefore, two procedures would be needed, instead of one; an administrative burden.

Secondly, the Bill could not deal with Welsh Ministers’ borrowing unless the Assembly’s competence had been extended to permit that.

Thirdly, given the very different system for which the present Part 5 was devised, other competence gaps would be likely to arise, restricting the Assembly in its ability to carry out a holistic process of scrutiny of revenue and expenditure plans.

### **The need to take action now, rather than later**

In responding to the Silk Commission’s recommendation that the National Assembly for Wales be devolved legislative control over its budgetary procedures, the UK Government said that:

“The Silk Commission is currently examining the legislative powers of the National Assembly for Wales under the second part of its remit. The Government noted in its evidence to the Commission that there may be a case for modifying the devolution boundary in respect of the Assembly’s budgetary procedures.”<sup>5</sup>

However, awaiting the second report of the Silk Commission, the UK Government’s associated response, and the development of subsequent legislation, may not allow time for the development of an appropriately robust and transparent budget process for Wales, prior to the use of taxation and borrowing powers.

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<sup>5</sup> UK Government (HM Treasury and Wales Office), Empowerment and Responsibility: devolving financial powers to Wales, November 2013, Page 18

Currently the draft Wales Bill contains no provision requiring that the Assembly have oversight of the Welsh Government's borrowing powers by requiring approval or authorisation of their plans to borrow. It also makes no mention of how the Barnett-determined block grant from the UK Government will be reduced to compensate for tax revenues. The draft Bill does provide for an annual report on the operation of the taxation and borrowing powers must be presented to the Assembly, but this would enable only retrospective scrutiny.

These issues could be addressed by devolving legislative control for the National Assembly for Wales' budget procedures. This would enable the Assembly as a whole to give appropriate consideration and approval to:

- the spending plans of the Welsh Government (as is currently the case);
- Welsh tax rates for devolved taxes (and any corresponding adjustments to the block grant); and
- the application and sustainability of borrowing powers.



## **Annex 2- The relationship between the size of the Assembly, and the opportunities available for Members' to develop specialist expertise**

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Since the election of 2011, the Assembly has been able to exercise the full extent of the legislative powers catered for in the 2006 Act and so has had legislative autonomy in 20 broad areas of public policy. The impact on Members of that legislative authority has been significant, not only in terms of workload, but also in the range and specialism of the skills and support that they require. The responsibility for holding the Welsh Government to account, and for the detailed examination and amendment of a much wider and more significant programme of legislation than ever before, falls solely on the individual Members of the Assembly and, in particular, those who sit on the Assembly's committees.

Robust and effective scrutiny requires that Members have an expert understanding of the subject matter within a committee's remit. This is challenging in itself, because the remits of the National Assembly for Wales' committees are by necessity broad-ranging, certainly stretching beyond the portfolio of a single Minister. Committees are responsible for the scrutiny of legislation, policy and finance within their remits. The Constitutional and Legislative Affairs Committee undertakes functions that, in Westminster, are spread between five committees whilst also having responsibility for the scrutiny of European legislation and some of the First Minister's responsibilities.

This challenge is compounded by the fact that Members are often on multiple committees, limiting the time available to them develop relevant skills and requiring them to develop a still wider breadth of knowledge. By way of illustration, the Chair of the Finance Committee noted in her evidence to you that in addition to chairing the Finance Committee, she is also a member of the Public Accounts Committee, and of the Communities, Equalities and Local Government Committee. Sitting on three different Committees is not uncommon for Assembly Members.

I am constantly amazed by individual Members' capacity to develop both a wide range and depth of expertise. However, I believe that a system which routinely relies upon a large proportion of Members

developing expertise in two or three wide ranging committee remits is inherently flawed. There is an obvious risk that the relentless demand of committee work diminishes the ability of Members to fulfil their role of developing policy and holding the Welsh Government to account.

My argument for increasing the number of Members at the Assembly is not based upon decreasing individual Members' workload. Rather it is founded upon enabling Members to have the time and opportunity to develop the specialist knowledge and expertise to deliver robust scrutiny to policy, administration and legislative proposals. This is a subtle, but significant difference, which I am sure the Committee will appreciate. I hope that the Welsh Affairs Select Committee will take it into consideration when deliberating upon my request that the Wales Bill is amended, to increase the number of Members at the National Assembly for Wales to 80.

**Annex 3- additional legislative changes to the Government of Wales Act 2006 which the Wales Bill could take forward**

Provision	Prescription/Issue	Recommended Action	Detailed view
S. 1	Name in English and Welsh set by GOWA <sup>1</sup>	Amend via Wales Bill.	Appropriate for name to be set in UK primary legislation; however the name should be changed. The legislature should be described as a Parliament rather than an Assembly.
S. 3(2)(b) and S. 4(2)(b) and S. 5(4)(c)	Requirement that NAW <sup>2</sup> meet, and therefore elect a Presiding Officer, within 7 days of an ordinary general election.	Amend via Wales Bill.	This is overly restrictive. It cuts down the time for political negotiation, which is particularly important in an electoral system which is less likely than the Westminster system to produce a majority for one party. It should be amended so that there is 14 days for NAW to meet and elect a Presiding Officer.
S. 4	Power of SoS <sup>3</sup> to vary date of ordinary general election.	Amend via Wales Bill to bring the legal position in line with that in Scotland.	The draft Wales Bill announced by the UK Government would not alter the existing situation in that the power to change the date of an election by one month either side would still lie with the Secretary of State. The Presiding Officer's view is that it should lie with her office, as it does with that of her counterpart in Scotland (section 2 Scotland Act 1998).

<sup>1</sup> Government of Wales Act 2006

<sup>2</sup> National Assembly for Wales

<sup>3</sup> Secretary of State

Provision	Prescription/Issue	Recommended Action	Detailed view
S. 5	SoS power to call extraordinary general election.	Amend via Wales Bill to bring the legal position in line with that in Scotland.	This is constitutionally inappropriate and should be amended to give the Presiding Officer this power, as is the case in Scotland (s. 3 Scotland Act 1998).
S. 10(5)	By-election within 3 months of vacancy arising/coming to Presiding Officer's notice.	Amend via Wales Bill	This should be amended so that the 3-month period always starts to run from the time the vacancy comes to the Presiding Officer's notice. Otherwise, practical problems could be caused, for example, where a vacancy arises in recess.
S. 13	SoS controls NAW electoral arrangements.	Consider amending via Wales Bill.	<p>Currently the Secretary of State controls NAW electoral arrangements. Moreover, the Statutory Instruments through which this control is exercised are considered only by the UK Parliament. The Assembly has no role in relation to them.</p> <p>The Presiding Officer considers that the Assembly should have competence over its own electoral arrangements, subject to appropriate safeguards.</p> <p>However, if the SoS were to retain the power to control these arrangements, the Presiding Officer considers that the Statutory Instruments should at least be subject to Assembly procedure as well as Parliamentary.</p> <p>In the Scottish settlement, the power to make arrangements about Scottish Parliament elections</p>

Provision	Prescription/Issue	Recommended Action	Detailed view
			<p>is now divided between Scottish Ministers and the Secretary of State (since the Scotland Act 1998 was amended by the Scotland Act 2012).</p>
S. 25	<p>Rules as to the Presiding Officer ("PO") and Deputy Presiding Officer ("DPO")</p> <p>Subsection (1) - Only one DPO is permitted .</p> <p>Subsection (3) - Only the PO remains in office through a dissolution.</p> <p>Subsection (12) - Restrictions on when the Standing Orders can provide for the PO's or</p>	<p>Amend via Wales Bill.</p> <p>Amend via Wales Bill.</p> <p>Amend via Wales Bill.</p>	<p>Several provisions relating to the office of the PO and DPO, though they have not caused any operational difficulty, are matters which would be more appropriate for the Assembly to decide for itself. These are as follows.</p> <p>Subsection (1) - The Act only allows the Assembly the power to appoint one DPO. This could instead be determined by the Assembly in its Standing Orders. The Scotland Act provides for 2 mandatory deputies; others are permitted if the Assembly so elects at any time.</p> <p>Subsection (3) - This restriction could be amended so as to allow the Assembly to decide that any person who was a DPO immediately before the dissolution could assume the office of PO (and draw the salary as such) if the PO was unable to act in dissolution.</p> <p>Subsection (12) - The Act restricts when the PO's or DPO's functions can be exercised by others (i.e. when a temporary</p>

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	<p>DPO's functions to be exercised by others. The Act states that this can only be done when the office is vacant or they are for any reason unable to act.</p>		<p>PO can be elected). While the Act needs to give the Assembly the possibility of electing a temporary PO, the circumstances in which it can do this should be a matter for the Assembly to set out in its Standing Orders (delete sub-sections (12)(a) and (12)(b)).</p>
<p>S. 27</p>	<p>Subsection (1) - name of the National Assembly for Wales Commission ("NAWC")</p> <p>Subsection (2) - requires four NAWC members and that the Presiding Officer must be a member.</p>	<p>Amend in consequence of amendments to s. 1</p> <p>Amend via Wales Bill.</p>	<p>In line with the amendment proposed to section 1 (the name of the National Assembly for Wales), the name of NAWC needs to be aligned with name of the Welsh legislature.</p> <p>Subsection (2): The Assembly should decide the number of members of the NAWC in its Standing Orders. The Assembly could then take account of any change in the political group make-up of the Assembly in the future. However, the requirement for the Presiding Officer to be a member should be retained.</p> <p>The Scotland Act 2012 amended the Scotland Act 1998 to give the Scottish Parliament more flexibility as to the number of Members appointed to their Scottish Parliamentary Corporate Body. The Act now requires "at least 4 Members", rather than</p>

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S. 29	<p>Section 29 imposes two constraints:-</p> <ol style="list-style-type: none"> <li>1) Committees should be party-balanced;</li> <li>2) Appointments to committee places need at least a 2/3 majority (of those voting).</li> </ol>	Repeal via Wales Bill.	<p>"4 Members" .</p> <p>These are key constraints and should be removed. The composition of committees should be decided by the Assembly itself through its Standing Orders, as is the approach in Scotland.</p>
S. 32	<p>Subsection (1) - entitles SoS to participate, but not vote, in NAW proceedings.</p> <p>Subsection (2) - requires Assembly documents to be made available to SoS at same time as all AMs.</p>	<p>Repeal via Wales Bill</p> <p>Repeal via Wales Bill.</p>	<p>The SoS should no longer have the right to participate in any Assembly proceedings at this stage of devolution, unless invited to do so by the Presiding Officer.</p> <p>It is not necessary to make Assembly documents available to SoS at the same time as all AMs. These documents are generally public documents and are made available to everyone through publication on the website.</p> <p>The Scotland Act does not include provisions equivalent to either of these.</p>

Provision	Prescription/Issue	Recommended Action	Detailed view
S. 33	Subsection (2) - Requires SoS to participate in NAW proceedings as part of this consultation.	Repeal via Wales Bill.	While it is still appropriate for the SoS to consult NAW about the UK Government's legislative programme, it is inappropriate that the SoS is required to participate in Assembly proceedings as part of this consultation, given the evolution of the constitutional settlement.
S. 36	Subsection (6) - requirement for code on regional/constituency Members.	Amend via Wales Bill.	Section 36(6)(a) and (b) make explicit provision governing the behaviour of regional and constituency Members. These are matters for the Assembly to determine itself and should be removed from the Act. The Scotland Act 1998 does not contain an equivalent provision.
S. 38	Rules about how the Clerk notifies witnesses.	Repeal via Wales Bill.	This is restrictive. There need to be safeguards for individuals but these should be left to the NAW to decide in Standing Orders.
S. 107	Subsection (5) - UK Parliament's continuing power to legislate for Wales.	Consider amending via Wales Bill.	<p>We advocate including a statutory version of the convention on legislative consent motions (set out in <i>Devolution Guidance Note 9: Parliamentary and Assembly Primary Legislation Affecting Wales</i>).</p> <p>This sets out that:</p> <p>“the UK Government would not normally bring forward or support proposals to legislate in relation to Wales, on subjects in which the Assembly has legislative competence, or which</p>



Provision	Prescription/Issue	Recommended Action	Detailed view
Sched 2, Para 5	Narrowness of grant-making power.	Amend via Wales Bill	<p>affect the Assembly's competence, without the Assembly's consent. If the UK Government agrees to include provisions which are within the Assembly's legislative competence (or affect that competence) in a Parliamentary Bill, Welsh Ministers will need to gain the consent of the Assembly via a Legislative Consent Motion. This should be laid in the Assembly as soon as possible after the Bill's introduction in Parliament."</p> <p>The NAWC has the power to promote public awareness of the current or any pending system for the election of Assembly members or of devolved government in Wales.</p> <p>We recommend that that this should be updated to a more general power to:</p> <ul style="list-style-type: none"> <li>(a) promote public awareness of issues relating to the devolved government in Wales (ensuring that "government" is understood to include law-making, democratic scrutiny and public administration at all levels); and</li> <li>(b) promote participation in the process of election of AMs (though not of any individual AM) and democratic participation at all levels in Wales.</li> </ul>

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			<p>The intention is to put beyond doubt the ability of the Commission to promote understanding of important issues which contribute to the maturing of Wales as a largely self-governing nation. For example, we would wish to put beyond doubt the ability of the Commission to promote public awareness of, and understanding of the issues in, any future income tax referendum.</p> <p>The Commission's ability to use the power should be subject to a prohibition on using it for the purposes of promoting the interests of any political group.</p> <p>The wider power should also be made specifically subject to, or aligned with, the provisions of the Political Parties, Elections and Referendums Act 2000, to ensure that the Commission could not take one side or the other in a referendum, and to limit use of the power in designated campaign periods.</p> <p>Further controls on the use of the power would be provided by the Budget process and the role of the</p>

Provision	Prescription/Issue	Recommended Action	Detailed view
Schedule 7- Legislative Competence	The National Assembly for Wales does not currently have legislative competence to amend its own budgetary procedures.	Amend via Wales Bill	<p>Accounting Officer.</p> <p>The advent of taxation and borrowing powers will almost certainly make the National Assembly for Wales' existing budgetary procedure not fit for purpose. Legislative power to amend the procedure set out in Section 5 of the Government of Wales Act 2006 would be devolved by:</p> <ul style="list-style-type: none"> <li>- adding control over the Assembly's budgetary procedures to Subject heading 13 (<i>National Assembly for Wales</i>) in Part 1 of Schedule 7; and</li> <li>- extending the scope of paragraph 5(2) of Part 2 of Schedule 7 to allow an Assemblies Act to modify certain of the provisions contained in Part 5 of the 2006 Act.</li> </ul>
Schedule 8 para. 2(4)	Removal of Auditor General for Wales - gap in provision	Amend via Wales Bill.	<p>The Auditor General for Wales may be removed from office by Her Majesty on the basis of a recommendation, supported by a resolution by the Assembly passed by at least two-thirds of the total number of Assembly Members (i.e. at least 40 votes).</p> <p>There is nothing in the Act to say who should make the recommendation in question. It would be</p>

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			<p>helpful to clarify this in the Act or for the Act to provide that it is a matter for the Standing Orders. We would suggest that the PO is the appropriate person.</p> <p>The same issue arises in relation to the removal of the Public Services Ombudsman for Wales (Public Services Ombudsman (Wales) Act 2005).</p>