

GOVERNMENT OF WALES ACT 2006

EXPLANATORY NOTES

COMMENTARY ON SECTIONS AND SCHEDULES

Legal issues

Section 41: Proceedings by or against Assembly etc.

189. This section makes provision in relation to legal proceedings by and against the Assembly.
190. Where proceedings are brought by or against the Assembly these are to be instituted by or against the Assembly Commission. Proceedings by or against the Presiding Officer, the Deputy Presiding Officer or any member of the staff of the Assembly are to be brought by or against the Assembly Commission on their behalf.
191. Where proceedings are brought against the Assembly the court may not grant a mandatory, prohibiting or quashing order or an injunction or make an order for specific performance. It may instead make a declaration.
192. A similar restriction applies to such remedies in legal proceedings against any Assembly member, the Presiding Officer or Deputy Presiding Officers, members of the staff of the Assembly or the Assembly Commission, if the effect of granting such a remedy would be to give relief against the Assembly which could not be given against the Assembly itself. This is intended to prevent the protection for the Assembly being circumvented by taking action instead against individual members or office-holders. The approach is similar to that taken in section 21(2) of the Crown Proceedings Act 1947.
193. The protection would not extend to proceedings taken against Assembly members arising for example out of their constituency work, since remedies granted in such proceedings would not be equivalent to remedies granted against the Assembly itself.
194. The effect of the equivalent provision in Scotland (section 40(4) of the Scotland Act 1998) was considered by the Scottish Court of Session in *Whaley v Lord Watson of Invergowrie* 2000 SLT 475 where it was held that it did not prevent an interdict (equivalent to an injunction) being granted against a MSP from introducing a Bill on the grounds that he would thereby be breaching some provision of the [Scotland Act 1998 \(Transitory and Transitional Provisions\) \(Members' Interests\) Order 1999 \(SI 1999/1350\)](#). As the Lord President stated at page 482:

“... the subsection does not bar a remedy against a member simply because it may have some consequential effects on the working of the Parliament: the bar applies only where the interdict against the member would have the effect of granting relief, i.e. a legal remedy, against the Parliament.”
195. Subsection (5) provides that the prohibition on certain remedies is not limited to final orders. So, for example, it would prohibit the granting of an interim injunction against the Assembly (or the Assembly Commission, in so far as it is acting on the Assembly's behalf).

Section 42: Defamation

196. This section replicates the provisions in section 41 of the Scotland Act 1998, rather than the more detailed provisions in section 77 of the Government of Wales Act 1998, which reflected the fact that the Assembly as a unitary corporate body had both legislative and executive functions. The protection afforded to the newly constituted Assembly by this section is intended to be the same as that afforded to the legislative and scrutinising arm of the current Assembly by the 1998 Act.
197. This section confers absolute privilege for the purposes of the law of defamation on any statement made in Assembly proceedings and on the publication of any statement under the authority of the Assembly.
198. The provision is intended to ensure that Assembly members are free to debate and the Assembly is free to report on matters of public interest without fear of an action for defamation being raised.
199. The privilege of freedom of speech is part of the law and custom of the UK Parliament. It is also reflected in Article 9 of the Bill of Rights 1688-9 which confers on “proceedings in Parliament” protection from being “impeached or questioned” in any court. No similar general privilege is conferred upon proceedings in the Assembly. However, this section and section 43 protect statements made in such proceedings and their publication against proceedings for defamation and contempt of court.
200. The regulation-making power in section 42(2) allows the Welsh Ministers to specify how it may be proved conclusively in legal proceedings that a statement was made in Assembly proceedings or published under the authority of the Assembly, and therefore attracts absolute privilege – for example, by the Clerk of the Assembly providing certification of the fact. The making of the regulations is subject to Assembly affirmative procedure.
201. The Act contains other provisions which make provision in relation to defamation.
202. The amendments made to the Defamation Act 1952 and the Defamation Act (Northern Ireland) 1955 by paragraphs 5 and 6 of Schedule 10 limit privilege in relation to defamation at elections of Assembly members.
203. [Paragraph 40](#) of Schedule 10 amends paragraph 11(1)(c) of Schedule 1 to the Defamation Act 1996 to provide that the reports and statements of any commission, tribunal, committee or person appointed for the purposes of any inquiry by a Welsh Ministers or by the Counsel General attract qualified privilege subject to explanation or contradiction.
204. [Paragraph 19](#) of Schedule 10 amends section 26(1) of the Public Order Act 1986 to protect reports of Assembly proceedings against offence under Part 3 of the 1986 Act relating to racial hatred.

Section 43: Contempt of court

205. Assembly proceedings, unlike those of the UK Parliament, are subject to the law of contempt of court. No express provision is needed to make them so, because the law of contempt of court and particularly the strict liability rule in the Contempt of Court Act 1981 will apply automatically unless expressly disapplied.
206. This section disapplies the rule of strict liability for contempt of court in relation to publications made in or for the purposes of Assembly proceedings, or in certain reports of Assembly proceedings.
207. The strict liability rule is defined by section 1 of the Contempt of Court Act 1981 as that whereby conduct may be treated as a contempt of court regardless of intent to interfere with the course of justice in particular legal proceedings. In terms of section 2 of that Act the rule only applies to a publication which creates a substantial risk that the course

of justice in active legal proceedings will be seriously impeded or prejudiced. Section 5 of the Act provides that the rule does not apply to publications made during a discussion in good faith of public affairs if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion.

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

Section 44: Corrupt practice

209. The effect of the section is to make members and staff of both the Assembly and the Assembly Commission subject to liability for criminal offences under the Prevention of Corruption Acts 1889 to 1916. It does so by making both the Assembly and the Assembly Commission (by whom staff of the Assembly are employed) public bodies for the purposes of those Acts.
210. The Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916 are known together as the Prevention of Corruption Acts 1889 to 1916. The Acts create certain offences related to bribery and corruption of and by members, officers or servants of local authorities, government departments and other public bodies in connection with those bodies’ business.
211. The Welsh Ministers, Deputy Welsh Ministers, the Counsel General and their staff will also be covered by the Prevention of Corruption Acts 1889 to 1916 to the extent that Ministers of the Crown and Crown servants are covered.

Part 2: Welsh Assembly Government

Overview of Part 2

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