

EVIDENCE TO CONSTITUTIONAL AND LEGISLATIVE AFFAIRS COMMITTEE ON THE GRANTING OF POWERS TO WELSH MINISTERS IN UK LAWS

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1. The UK Public Bodies Bill raises questions for the National Assembly about how Welsh ministers would use powers they are being given by the UK Parliament. My purpose here is to provide a Scottish perspective, especially on the use by ministers of similar powers on the reorganization of public bodies in the Public Services Reform (Scotland) Act 2010.

2. The committee's investigation seems to me to relate to two areas of concern:

- i) the way that the definitive separation of executive and legislature in the Government of Wales Act 2006 and confirmed in the March 2011 referendum might lead ministers to behave in a 'heavy' manner, asserting executive prerogatives in relation to Assembly scrutiny;
- ii) the role of 'quango' bodies that are not departments under the direct control of ministers or local authorities, but have more arm's length governance structures, usually appointed boards. These are of particular sensitivity in Wales because devolution was meant to promote rationalisation and accountability in the 'quango state'.

3. The Public Bodies Bill has substantial content about Welsh bodies, and it might seem that the UK Parliament is granting powers directly to Welsh ministers and so implicitly bypassing the Assembly. It is more plausible to see the Bill as clearing up the legislative legacy of bodies that are cross-border or were specified in UK statute. The powers given to Welsh ministers are to make orders in respect of the bodies, and so the question becomes the way that these orders are scrutinized in the National Assembly. This is where Wales intersects with - and is free to embrace or resist - a UK policy agenda promoting a simplified approach to changing the structure and operation of quangos.

4. Under pressure to accelerate public sector reform, there is a UK legislative trend to withdraw the reshaping and direction of quangos from the arena of primary legislation. The Public Service Reform (Scotland) Act 2010 allowed the Scottish Government to approach rationalize quangos in some areas and have extensive rights to intervene in the business of those that remain. Section 14 allows quangos (as listed in schedule 5) to be abolished by order and the list of bodies includes the great majority of quangos targeted in the Scottish Government's *Simplifying Government* strategy.

5. These powers were part of a wider 'catch-all' provision (section 14 (1)) allowing ministers, in respect of bodies listed in schedule 5 to 'by order make any provisions which they consider would improve the exercise of public functions', having regard to efficiency, effectiveness and economy. Clause 8 of the UK Public Bodies Bill echoes this wording, adding 'securing appropriate

accountability' and it also recurs in clause 17 in relation to Welsh minister's order-making powers in the Bill. The 3 Es have economics definitions – economy is doing the same things more cheaply; efficiency is about producing more outputs with the same or fewer inputs; effectiveness is about the way that inputs, outputs produce desired outcomes. All public policy should 'have regard' to these considerations and it is difficult to see how ministers can be held to account about the propriety of their interventions under this wording. Safeguards in section 16 of the Scottish Act, including that the use of powers must be 'proportionate to the policy objective', are hard to evaluate and apply.

6. The key concept is 'by order' and here the debate shifts to the scrutiny of such secondary legislation. Here we can draw on Scottish experience. The first two orders made under the Act were the Public Services Reform (General Teaching Council) Order 2011 and the Public Services Reform (Agricultural Holdings (Scotland) Order 2011. These were considered thoroughly by the Subordinate Legislation Committee in its 58th report (2010) and its 19th report (2011), under a 'super-affirmative' procedure in which a draft order was tabled for consultation. Detailed questions were put to and answered by the Scottish Government. The Committee expressed reservations that the General Teaching Council order allowing the GTC to make rules about teacher qualification was an *ultra vires* law-making function. The Education, Lifelong Learning and Culture committee took oral evidence from the Minister on 2 March 2011, and, with some continuing reservations, recommended approval; the order was passed by resolution of the Scottish Parliament without plenary debate.

7. The Committee is also interested in Legislative Consent Orders. This is less an area of my own expertise but my perception of the Scottish Parliament's approach is that it was realised early on that the distinction between devolved and reserved functions was less clear-cut than might be thought and that there need be no qualms about letting Westminster legislation pick up usually small and consequential matters. But, unusually, at the moment two controversial legislative consent issues are in progress – on the Scotland Bill and the Welfare Reform Bill. In their report on the Scottish Government's legislative consent memorandum on the Welfare Reform Bill (27th report, 2011 session 3) the Subordinate Legislation Committee note that the power to make consequential provision in relation to the introduction of Universal Credit would be exercised by negative procedure in Scotland but by affirmative procedure in Wales.

10. The wider issue is about the use of secondary legislation in these matters. Wales has already been a pioneer in discussing how quango activity is to be brought under democratic control. Order-making power in Scotland and the UK has become a lesser stratum of democratic scrutiny, and despite well-working procedures in the Scottish Parliament there remains concern that the Government can have its way too easily on the reconstruction of public authorities. The Committee's present investigation is well-placed to investigate how this issue might play out in Wales.

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