

Comments on the Wales Office White Paper "Better Governance for Wales"

BGW2 EV2

1. These comments are on the proposals in the three areas covered in the White Paper, taken in the order: electoral issues, executive structure, legislative powers.

Electoral issues

2. The proposal is directed at the perceived problem that a "list" member can take an active role in a particular constituency. The proposed change may not have the desired effect: under any additional member system, a successful "list" candidate could claim to have been elected for an area that includes the constituency.

3. Short of sweeping away the additional member system altogether (as proposed by the Richard Commission in the context of an enlarged Assembly), perhaps the only remedy is general agreement rather than legal.

Executive structure

4. I have the impression from the White Paper and also from the Richard Commission report that this proposal arises mainly from practical difficulties that have been presented by the present statutory structure, though that structure has not prevented the solution of many problems thought intractable at first. The principal awkwardness may be the danger of conflicting loyalties for advisers. That and other problems encountered in practice may justify change.

5. In so far as the Paper relies on more intangible arguments for change, it seems less persuasive. For example –

(1) The problems arising from corporate identity. But this has not stopped local authorities from moving to a "Cabinet style of government" (para 1.8).

(2) The confusion about accountability. This exists in the Westminster model too, perhaps in greater degree - are civil servants or Ministers accountable (and in either case, which one)? Agencies have created a further kind of obscurity on accountability.

(3) The effect of "clarifying" accountability. Ministers are to be appointed by (or with the approval of) the Crown, rather than by AMs elected by voters. But they are to have greater powers, including powers of making subordinate legislation. Is there not a danger of making

voters feel further removed from the government process?

(4) This danger may also be exacerbated by the reduction in the involvement of ordinary AMs in the process of developing policy, and the partial abandonment of the ideal of consensual politics.

(5) The Crown's role in the separation of powers. The White Paper (eg para 2.2-3) stresses the significance of this. But it is a matter more of (sporadic) form than substance. In both Westminster and Cardiff, the principal Minister depends on having the support of the elected body, as in practice do other Ministers. The fact that in Wales he is elected by the Assembly seems closer to reality and more transparent.

(6) The separation of powers itself is a notoriously unreliable guide in devising a structure. The White Paper suggests that in future there will be a clear division between legislative functions and executive functions. But it is now proposed that Ministers should for the first time have powers of making delegated legislation.

6. The new Counsel General is to be the adviser to the Government rather than to the Assembly. But the Assembly will have the right to question him. Will this include the right to ask for written advice? Is any of his advice to the Government to be confidential? If the Assembly cannot have free access to him, presumably it will have its own legal adviser. Will the Assembly publish its own adviser's advice where it differs from that of the Counsel General?

Legislative Powers

Paragraphs 3.1-13

7. The exposition in paragraph 3.1-7, and particularly in paragraph 3.5, seems to me accurate and useful.

8. Paragraphs 3.9-13 are welcome, and represent very closely the incremental developments that were hoped for when the 1998 Act was passed.

Paragraphs 3.14-21

9. The proposals in paragraph 3.14-21 for Orders in Council are also welcome. They will make it possible to bring some clarity into the miscellany of powers inherited by the Assembly from the Secretary of State, which have been universally agreed to be unsatisfactory. Without the new power, desirable changes are always liable to be frustrated by the shortage of time for government legislation (though the proposal for affirmative resolution procedure will also take up some Parliamentary time).

10. But the framing of the limitations proposed in paragraph 3.17 and 3.18 will raise difficult questions.

11. Para 3.17 blocks the transfer of legislative powers in new fields. This is a substantial limitation, which seems likely to prevent the organic development of the Assembly's functions into something much more like the Scottish model. The extent of the limitation depends on the gap between the Scottish and Welsh areas of competence. This is difficult to establish from the legislation, if only because the Scottish Parliament's powers are expressed to be all-embracing except for those that are reserved.

12. In addition, two areas of definition difficulty occur to me. Firstly, policy areas overlap with one another, so that there is always the possibility that changes in one will have knock-on effects in another. Second, there is no statutory definition of the policy areas for which UK Ministers are responsible in Wales, though no doubt there are working definitions. So there will be considerable scope for argument about the scope of the order-making power. This might inhibit its use.

13. The limitation proposed in paragraph 3.18 is that no Order may transfer powers over "the whole of any of the fields listed in Schedule 2" to the 1998 Act. This seems arbitrary, and the White Paper does not set out any rationale for it. On the face of it, any minor (but not derisory) exclusion from the field would satisfy the condition. This would mean that a series of Orders could come close to giving the Assembly full competence to legislate in the Schedule 2 fields.

Paragraphs 3.22-29

14. The proposals for "changing the current settlement" in paras 3.22-29 are sketchy. They are to "transfer primary legislative powers over all devolved fields direct to the Assembly". The White Paper provides little further detail. But elaboration will be needed.

15. For example, what is "primary" intended to mean in this context? How would such a power differ from a series of generally expressed powers to make (secondary) legislation in each devolved field?

16. And what is meant by "devolved fields" here? Is it (as paragraph 13.26 perhaps suggests) a reference to the list in Schedule 2 to the 1998 Act? Or is the plan to create a new list of devolved matters, or to follow the Scottish model and devolve everything except specifically reserved matters?

17. If the devolved fields are to be much the same as now, then (subject to the comment made above on paragraph 3.18) this proposal seems to offer little more than the proposed power to make Orders in Council. If liberal use is made of that power, a referendum would come too late, as the horse would already be up, away and running.

Paragraphs 3.30-33

18. It is to be hoped that the new Standing Orders made for the Assembly by the Secretary of State's will not be entrenched and that the Assembly will be free to alter them. Clarification will be needed of the intention behind the phrase "building on the foundation laid by the new Standing

Orders" in para 3.32 .

Christopher Jenkins

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