



Canolfan Llywodraethiant Cymru Wales Governance Centre

Supplementary Evidence on Proposed Local Government Measure, Amendments tabled by WAG on 27th January

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Introduction.

The Assembly's Constitutional Affairs Committee has requested our comments on the apparent lack of criteria and guidance that would assist in determining the circumstance when the Assembly Government might make an amalgamation order under the proposed amendments tabled by the Assembly Government on 27th January to the draft Local Government Measure.

In seeking to answer the Committee's request we would still draw attention to the evidence which we submitted to the Committee last Thursday. It is considered that provision would best be made by making specific provision for individual amalgamations in primary legislation in a draft Measure if and when the need arises in a particular case. In so doing we again wish to reflect the comments of the House of Lords Select Committee on the Constitution, a committee of a Parliament whose remit is similar to aspects of the remit of the Assembly's Constitutional Affairs Committee, both in respect of the Public Bodies Bill (to which we have previously referred) and also to the conclusions of the Committee on the Legislative and Regulatory Reform Bill (2005-6).

Paragraph 44 of the report states: '**We are unconvinced that delegating order-making powers to Ministers to change the statute book and the common law is the most constitutionally appropriate way forward**'.¹

Criteria

As a result of the work of Select Committees in the House of Commons and in the House of Lords, provisions were added to the Legislative and Regulatory Reform Bill 2005 so that the powers contained in the Bill set out safeguards to which the House of

¹HOUSE OF LORDS, Select Committee on the Constitution, 11th Report of Session 2005-06, **Legislative and Regulatory Reform Bill**
<http://www.publications.parliament.uk/pa/ld200506/ldselect/ldconst/194/194.pdf>

Lords' Committee on the Constitution commented that there was now a better balance in the Bill even though the powers 'remain over-broad and vaguely drawn'².

In our report to the Assembly's Constitutional Affairs Committee we explained why we consider the amendments of the 27th January presented to the Assembly are over-broad and vaguely drawn. There is an apparent lack of safeguards other than the indistinct provisions of subsection (2) of the amendment 91 on page 2 of the Notice of Amendments together with procedural safeguards in amendment 98.

The Legislative and Regulatory Reform Act 2006 has three types of substantive safeguards as well as procedural safeguards:

- 1) The order making power in the Act relates to the 'removing or reducing any burden' s.1(2). S.1(3) defines what is meant by 'burden'. There is no definition in the amendments to the proposed Measure of what is 'effective local government'.
- 2) S.3(2) of the 2006 Act contains pre-conditions to the making of an order. A number of those conditions could usefully be considered for inclusion in the proposed Measure amendments. In particular we would draw the Committee's attention to the following section 3(2) of the 2006 Act.

3 Preconditions

(1) A Minister may not make provision under section 1(1) or 2(1), other than provision which merely restates an enactment, unless he considers that the conditions in subsection (2), where relevant, are satisfied in relation to that provision.

(2) Those conditions are that—

(a) the policy objective intended to be secured by the provision could not be satisfactorily secured by non-legislative means;

(b) the effect of the provision is proportionate to the policy objective;

(c) the provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it;

(d) the provision does not remove any necessary protection;

(e) the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise;

(f) the provision is not of constitutional significance.

Associated with these pre-conditions is the requirement in section 14(2)(c) that in laying any draft order before Parliament the Minister must explain why it is considered that the relevant section 3(2) conditions are satisfied in the particular case. The proposed requirement in amendment 98(3)(a) to the proposed Measure

² Ibid, Paragraph 5

is only a requirement that the proposals are explained not that any additional pre-conditions have been fulfilled.

- 3) Finally section 21 of the 2006 Act provides that if it is considered that relevant section 3(2) pre-conditions are fulfilled, any order made under the Act must have regard to the 5 principles set in section 21 before an order can be made.

21 Principles

(1) Any person exercising a regulatory function to which this section applies must have regard to the principles in subsection (2) in the exercise of the function.

(2) Those principles are that—

(a) regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent;

(b) regulatory activities should be targeted only at cases in which action is needed.

(3) The duty in subsection (1) is subject to any other requirement affecting the exercise of the regulatory function.

There are no such principles in the amendments to the proposed Measure.

The necessary new principles and pre-conditions which might apply to the amendments to this proposed Measure are a matter for the Assembly Government to decide upon and to draft before presenting them to the Assembly for its consideration. We only wish to draw the Committee's attention to examples of what such pre-conditions, principles and definitions might look like.

Explanatory Documents:

1) Accompanying the 2006 Act as it proceeded through Parliament was a detailed explanatory note setting out not only a summary of the proposed legislative provisions but also in what circumstances the powers might be used (this is a matter referred to in the Annex to the Constitutional Affairs recently published **Drafting Welsh Government Measures: Lessons from the first three years**³).

In addition the Explanatory Notes to the 2006 Bill/Act reflect statements explaining how the legislation would be used made by Ministers as the Bill went through Parliament. Thus paragraph 6 of the Explanatory Notes refers that a Minister gave “a clear undertaking (...) that orders will not be used to implement highly controversial reforms” (Hansard, 9 Feb 2006: Column 1058-1059).⁴

To our knowledge there is no Explanatory Notes accompanying the amendments to the Proposed Measure which set out the considerable information contained in the Notes accompanying the 2006 Bill/Act.

³ <http://www.assemblywales.org/cr-ld8393-e.pdf>

⁴ <http://www.legislation.gov.uk/ukpga/2006/51/notes/division/2>

2) A further document was issued by the Department responsible for the Bill, entitled 'Guidance for Officials'. This was issued either as the Bill was going through Parliament or soon afterwards and was certainly being prepared as the Bill proceeded. It is a very detailed and extremely useful document covering every aspect of the matters to be considered before an order under the 2006 Act could be presented to Parliament. It is on the relevant Department's website and was therefore publicly available. At the time it was the Department for Business, Enterprise and Regulatory Reform⁵. The document gives details as to when a Legislative Regulatory Order cannot be used as well as when it can be used. It also details the pre-conditions and principles applying to an order. It seems to us that a document like this is a necessity for Assembly Members local authorities, and the public in general to be fully informed as to how the proposed amendments would operate.

3) In addition Ministerial statements made during the passage of the legislation stating how the legislation would operate are very important and are often incorporated in the formal Explanatory Notes accompanying the draft and enacted legislation.

Conclusion:

The Assembly Constitutional Affairs Committee might wish to consider the nature of the provisions which were eventually included in the Legislative and Regulatory Reform Act 2006.

The definitions together with the accompanying explanatory notes reflect the principles laid down by Parliamentary Committees and in particular the House of Lords Constitution Committee. The Committee was adamant that without such Bill provisions and accompanying documents they would report against the Bill to Parliament. The Government accordingly adopted their recommendations which are fully reflected in the Guidance Note to Officials on the Act.

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⁵ <http://www.bis.gov.uk/assets/biscore/better-regulation/docs/10-774-legislative-reform-order-making-powers-guidance.pdf>