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Better Governance for Wales: An Analysis of the White Paper on Devolution for Wales

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Executive Summary

1. The White Paper *Better Governance for Wales* is a promising development. It offers the prospect of addressing the flaws in the present devolution arrangements by offering a step-by-step enhancement of the powers of the National Assembly for Wales. It also seeks to establish some important principles to govern the development of devolution for Wales in the future. (Paragraphs 1.3 to 1.5)
2. Formalising the split between the executive and parliamentary sides of the present National Assembly is welcome. However, it is not clear why the Secretary of State for Wales rather than the Assembly itself needs to make new standing orders for the Assembly. (Paragraphs 2.1-2.5)
3. The three-stage approach to extending the Assembly's legislative powers is problematic at each stage.
4. At stage one, the use of 'framework powers' invites objections from those concerned about the precedent that may be set for granting generous powers to the executive. These objections may manifest themselves through the House of Lords Committees on the Constitution and on Delegated Powers and Regulatory Reform. (Paragraphs 2.8-2.10)
5. There is also a need to establish clearer procedures for making legislation and ensuring framework powers are applied consistently and permissively. This could

- be best accomplished by ensuring legislative scrutiny of such powers, by UK Parliamentary or National Assembly committee. (Paragraphs 2.11-2.12)
6. The proposals for stage two leave much detail to be filled in. They raise many complex questions of constitutional principle, as the powers proposed are highly unusual, and governmental practice. There are issues about drafting and the extent to which the transfer of powers will be entrenched. There are also issues about the degree of Parliamentary scrutiny, which appears to be somewhere between that Acts of Parliament normally have and that for secondary legislation. In any case, these proposals will add to the complexity of the Assembly's powers, as England and Wales statutes will also continue to be used to confer powers on the Assembly. (Paragraphs 2.13 to 2.34)
 7. The transfer of 'full' legislative powers in stage 3 may not in fact transfer full powers, as these will be limited to the 'fields' in which the Assembly already has powers rather than the general grant of powers subject to reservations that has taken place with devolution to Scotland (and was recommended by the Richard Commission). (Paragraphs 2.35-2.41)
 8. Changes to the electoral system are controversial, but the problem is one inherent to the system chosen in 1997. The solution will cause as many difficulties as the initial problem. The Richard Commission's recommendation of the single transferable vote would have dealt with both sets of anomalies. (Paragraphs 2.42-2.43)
 9. An Assembly of only 60 AMs is unlikely to be able to handle the responsibilities of dealing with primary legislation. Rather than expand the Assembly to 80 by secondary legislation at some future date, it would be better to increase its size now. (Paragraphs 2.44-2.45)
 10. The legislative timetable for the proposals is tight but achievable. It will create problems for all political parties in selecting candidates for the 2007 Assembly elections. Moreover, legislating for the new proposals – some of which will not come into force for a number of years – will create drafting problems. (Paragraphs 3.2-3.5)
 11. These proposals should be given effect by a new Act, replacing the Government of Wales Act 1998, not by an amending Act. A clear consolidated document setting out Wales's devolved constitution is needed by all involved. (Paragraph 3.6)
 12. The White Paper will have beneficial effects on the accountability and transparency of devolved government in Wales. Its proposals are much less good for Wales's constitutional autonomy. It is unclear how stable and sustainable the proposals will be. They will not undermine, and may well strengthen, Wales's place in the United Kingdom. (Paragraphs 4.2-4.7)

1. INTRODUCTION*

- 1.1 This commentary and analysis has been prepared by the Constitution Unit, with the support of the Economic and Social Research Council's Devolution and Constitutional Change Programme, in response to the UK Government's white paper on devolution for Wales, *Better Governance for Wales*, published on 15 June 2005.¹ It is intended partly as the Constitution Unit's response to the consultation about the White Paper and partly to spur and assist other responses to that consultation, which closes on 16 September 2005. It should be noted at the outset that this is a constitutional and administrative (rather than political) assessment of the White Paper.
- 1.2 Overall, the Unit welcomes the White Paper. It has a degree of understanding of the problems arising from devolution to Wales and of solutions to those problems that has often been lacking in official UK Government statements. It is also a more detailed and cogent document than the 1997 White Paper that preceded the referendum on devolution.² That welcome is, however, tinged by concern about a number of provisions of the White Paper; there are key respects in which it does not go far enough, some provisions seem unduly restrictive or petty, some conflict with established constitutional principles, and other provisions raise problems of practical implementation.
- 1.3 The Unit is also concerned by the degree to which the White Paper does not address the proposals of the Richard Commission. The Richard Commission took a large body of evidence before producing its comprehensive, detailed and evidence-led report.³ The White Paper has come into being as a result of the decision of the Welsh Labour Party to put the question of a response to Richard in the hands of the Secretary of State.⁴ Rather than entering into a dialogue with the Commission's report, the White Paper makes its proposals in isolation from the Richard recommendations and does not even discuss those recommendations in any detail. Establishing the relationship between the two documents is a matter for careful analysis, involving a detailed knowledge of both. It is nonetheless essential background for an understanding of the White Paper's proposals.

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¹ Wales Office *Better Governance for Wales* Cm 6582 (London: The Stationery Office, 2005), available at http://www.walesoffice.gov.uk/2005/better_governance_for_wales_report.pdf

² *A Voice for Wales: the Government's proposals for a Welsh Assembly* Cm 3718 (London: The Stationery Office, 1997). See also The Constitution Unit *Commentary on the Welsh White Paper* September 1997.

³ Commission on the Powers and Electoral Arrangements of the National Assembly for Wales *Report of the Richard Commission* (Cardiff; National Assembly for Wales, 2004), henceforth 'the Richard Report'.

⁴ The party's position was set out in a document adopted by its special conference in September 2004, and bearing the same title as that adopted for the White Paper; *Better Governance for Wales: A Welsh Labour Policy Document* (Cardiff; Wales Labour Party, 2004).

1.4 The devolution arrangements for Wales established by the Government of Wales Act 1998 have been widely discussed and often criticised. Sometimes that criticism has come from official sources and been muted in tone and concerned with practical problems and difficulties arising from those arrangements.⁵ Academic criticism has tended to be more forceful and addressed as much to the principles (or lack of them) underlying the devolution arrangements as to their detailed working.⁶

1.5 One welcome feature of the White Paper is that it attempts to identify principles that underlie, or should underlie, a new devolution settlement for Wales. These include

- Ensuring that the division of powers within the devolved institutions is clear and can be understood by the public
- Ensuring that there is public accountability for the exercise of executive functions
- Ensuring that there is a balance of legislative authority between the UK Parliament and the National Assembly, based on ‘the principle of mutual recognition between the legislatures’ (p. 27).
- Ensuring that there is public support for major institutional change, reflecting a broader consensus among the views of the public and expressed through a referendum.

A further concern underlying the White Paper’s recommendations, though not elevated to the status of a constitutional principle, is the desire to make the devolved institutions and arrangements for Wales mirror those under the Scottish and Northern Ireland settlements wherever possible.

Establishing constitutional principles in this way will make it easier to judge the success of devolution in the future. It also creates a set of yardsticks to determine whether the institutional arrangements are adequate and appropriate.

⁵ House of Lords Select Committee on the Constitution Session 2002-03 2nd Report *Devolution: Inter-institutional Relations in the United Kingdom* HL Paper 28 (London: The Stationery Office, 2003); House of Commons Welsh Affairs Committee *The Primary Legislative Process as It Affects Wales* Session 2002-03 Fourth Report HC 79 (London: The Stationery Office, 2003); House of Lords Select Committee on the Constitution Session 2003-04 15th Report *Devolution: Its Effect on the Practice of Legislation at Westminster* HL Paper 192 (London: The Stationery Office, 2004), particularly the detailed consideration of the complexities of legislation post-devolution in the paper by C Himsforth ‘The General Effects of Devolution upon the Practice of Legislation at Westminster’ which forms Appendix 1 to that report.

⁶ See for example K Patchett ‘The New Welsh Constitution: The Government of Wales Act 1998’ in J B Jones and D Balsom (eds) *The Road to the National Assembly for Wales* (Cardiff: University of Wales Press, 2000); K. Patchett ‘The New Constitutional Architecture’ in J Osmond and JB Jones (eds) *Birth of Welsh Democracy: The first term of the National Assembly for Wales* (Cardiff: Institute of Welsh Affairs and Welsh Governance Centre, 2003); R Rawlings *Delineating Wales: constitutional, legal and administrative aspects of national devolution* (Cardiff: University of Wales Press, 2003).

2. THE KEY PROPOSALS OF THE WHITE PAPER: AN ASSESSMENT

Splitting the body corporate: separating the Welsh Assembly Government from the National Assembly

- 2.1 The White Paper rightly notes that there is a widespread agreement that this needs to be done. The present single body corporate confuses accountability to the public, the responsibility of officials, and problems with the legal framework of delegations from the Assembly as a whole to ministers. Instead, Welsh Assembly Ministers are to be put on the same footing as ministers in the devolved administrations of Scotland or Northern Ireland, and given executive powers in their own right as ministers of the crown accountable to the Assembly.
- 2.2 Tackling this has been a demand from all parties within the National Assembly. It was also a key recommendation of the Richard Commission.⁷ The Assembly has already gone as far down this path as it can within the existing legal framework, with the creation of the Presiding Office (now the Assembly Parliamentary Service) and Welsh Assembly Government as distinct entities within the shell of the body corporate, each with its own accounting officer and source of legal advice. Creating a formal separation of these will be good not just for improving accountability of the parts of the government of Wales to the outside world and the responsibility of those working for its component parts internally. It will also, as the White Paper says, make it clearer to the public who is responsible for what.
- 2.3 In the context of establishing a properly functioning executive, some of the more detailed provisions of the White Paper are to be welcomed. The establishment of the office of the Counsel General (paras 2.7-2.9) as a statutory office-holder may be tinged by the controversy about the intervention of the First Minister in the appointment process after the retirement of Winston Roddick QC, but also reflects a broader desire to model the institutional arrangements for Wales on those already applying in Scotland. The creation of a 'Welsh law officer' is an important step in the development of national institutions in Wales, and ensures that issues of legal propriety will continue to be given the importance and respect they have had up to now. The appointment procedures set out will ensure that the person appointed is of the highest calibre, and regarded as impartial in the advice he or she gives.
- 2.4 Both the separation of the executive and legislature and the extension of legislative powers are used in the White Paper to justify a review of the Assembly's standing orders (paragraph 3.32). This has already attracted criticism from the Presiding Officer.⁸ While the Assembly's standing orders will

⁷ Richard Report, chapter 13, paras. 36-7.

⁸ See 'Candidate limits may breach human rights, Assembly Speaker warns' *Western Mail* 28 June 2005.

undoubtedly need revision in the light of the proposed changes, it is questionable whether the Secretary of State (rather than the Assembly itself) should be in charge of that process. The essential point of such a review should be not to direct how the Assembly will work in future but to ensure that the Assembly is able to take charge of such powers for itself. The experience of formulating standing orders before devolution through the National Assembly Advisory Group in Wales or the Consultative Steering Group in Scotland have much to commend them in this context. With a National Assembly already in being, this would appear to be the appropriate body to revise standing orders instead.

- 2.5 At the very least, the advisory committee the Secretary of State proposes should include a strong representation from Assembly Members, including the Presiding Officer, and draw on the existing expertise and approach that has developed within the Assembly. For the same reasons, that committee should not include serving MPs.

Expanding the powers of the National Assembly

- 2.6 This is the most important, and most problematic, part of the White Paper. The White Paper sets out a three-stage process for the expansion of the Assembly's powers:
- 2.6.1 In the short term, the use of 'framework powers' to increase the scope for autonomous action by the Assembly within Westminster legislation. This is to be adopted immediately.
 - 2.6.2 Subsequently, a procedure to transfer more extensive powers to the Assembly when need for them arises by means of an Order in Council, approved by the Assembly and both Houses at Westminster. Such powers would be within areas of the Assembly's existing functions but would include powers to repeal or disapply existing Westminster legislation (so-called 'Henry VIII' powers).
 - 2.6.3 Finally, the transfer of primary legislative powers to the Assembly in those areas, again by order in council, but following a referendum showing public support for such a transfer.
- 2.7 This approach raises a number of difficult but important issues. One is the questions of principle raised by Westminster handing over powers, and the National Assembly acquiring them, by the device of an Order in Council rather than by Act of Parliament directly. A second is the difficulties raised by transferring legislative powers to the Assembly from the base of its existing functions, which are executive in nature and tightly defined by particular Westminster statutes. A third is the difficulties raised by framing at this stage legislation that may eventually create a devolved legislature for Wales with full powers over a range of key policy areas, but which will not come into being for some years and will do so without further primary legislation at Westminster.

Phase 1: Framework powers

- 2.8 Framework powers have long been suggested as the means by which the limited powers of National Assembly might be enhanced without altering its constitutional status.⁹ The White Paper notes that the Assembly's powers are fragmented (paragraph 3.5) and that practice regarding legislation for Wales should be more consistent (paragraph 3.12). The present ways of legislating for Wales have also deprived the Assembly and its members of making decisions about what should happen in Wales. Adopting framework powers as a way forward, both as a measure in itself and as a step toward enhancing the Assembly's powers in other ways, was an important recommendation of the Richard Commission.¹⁰
- 2.9 However, that step raises several problems. One is the concern that it will lead to differential powers being exercised in different parts of the UK under the same Westminster statute. This is both an argument of principle, but one that has in the past attracted the support of Parliament's guardians of such powers, the House of Lords Delegated Powers and Regulatory Reform and Constitution Committees.¹¹ While those Committees are now more relaxed about the grant of powers to the Assembly given the Assembly's elected and democratic nature (which provides a higher degree of control and accountability than exists where similar powers are granted to UK Government ministers), this remains a significant objection. There remain limits of principle to how far such an approach can go, and a need for a powerful policeman to enforce it.
- 2.10 That policeman needs to be external to government, however, not internal. A major problem with post-devolution legislation for Wales has been its inconsistency, which in turn results from the Whitehall processes that underlie it – in particular, the lack of any strong scrutiny for compliance with any 'devolution principles'. This has led to a lack of internal control within the UK Government over how England and Wales bills affecting devolved functions in Wales are framed before they reach Parliament (and when they reach Parliament it is too late for such problems to be remedied). Consequently, legislation for Wales is driven by a bilateral bargaining process between the UK Government department in the

⁹ See for example V Bogdanor *Devolution in the United Kingdom* (Oxford: Oxford University Press, 1999), pp. 259-62.

¹⁰ Richard Report, chap. 13, paras. 13-20.

¹¹ Both committees have expressed concern about the apparent framework powers in the Commissioner for Older People (Wales) Bill; see House of Lords Delegated Powers and Regulatory Reform Committee 2nd Report of Session 2005–06 *Commissioner for Older People (Wales) Bill [HL] Children and Adoption Bill [HL]* HL Paper 17 (London: The Stationery Office, 2005), and the letter from the Chairman of the Constitution Committee referred to in paragraph 3 of that report. The Delegated Powers Committee's report is available at <http://www.publications.parliament.uk/pa/ld200506/ldselect/lddelreg/17/17.pdf>

lead and the Welsh Assembly Government.¹² Sometimes the Assembly is able to do well out of this process, at other times not – but the outcome is uncertain, and never clearly set out in any document. No-one carries out any sort of ‘devolution audit’ of legislation, even for the purpose of preparing the note on the effect of a bill on the Assembly’s powers that is now included in the Explanatory Memorandum produced for each Westminster bill on its introduction into Parliament.

2.11 If framework Westminster legislation is to be used to enhance the Assembly’s powers, more will need to be done to bring consistency to the process than simply expressing the hope that it will happen. Constraints need to be imposed on Whitehall department to make that happen, in the form of procedures to be followed and public scrutiny of those procedures, including:

2.11.1 The formal adoption of a clear set of principles to govern Westminster legislation affecting devolved functions, perhaps along the lines of the so-called ‘Rawlings principles’ adopted by the Assembly Review of Procedure in 2002. This could take the form of a resolution of the House of Commons (a suggestion previously made by Peter Hain and in the Welsh Labour Party paper¹³) or a joint resolution of both Houses. That would serve as a powerful signal to Whitehall from Parliament of what Parliament expected of Government bills submitted to it.

2.11.2 Processes within UK Government to ensure compliance with those procedures. These could be best enforced through the Legislative Programme Committee of Cabinet, which gives approval for the drafting and introduction of all Government bills at Westminster. A figure within UK Government needs to be responsible for ensuring that all legislation relating to Wales meets the requirements of those principles, and for confirming that is so publicly as well as internally.

2.11.3 To monitor this, Explanatory Notes to Bills should therefore set out not just how the Bill affects devolved functions in Wales, but also how it complies with the requirements of those principles. This would be in keeping with the recommendation of the Lords Constitution Committee in its report on *Parliament and the Legislative Process*¹⁴

2.11.4 At least some scrutiny by legislators of how Whitehall and Westminster comply with those obligations, to act as an external check on those internal processes.

¹² See A. Trench ‘Whitehall and the Process of Legislation after Devolution’ and K. Patchett ‘Principle or Pragmatism? Legislating for Wales by Westminster and Whitehall’ in R. Hazell and R. Rawlings (eds) *Devolution, Law Making and the Constitution* (Exeter: Imprint Academic, 2005).

¹³ Welsh Labour Party *Better Governance for Wales*, paras. 19-21.

¹⁴ House of Lords Select Committee on the Constitution, Session 2003-04, 14th Report *Parliament and the Legislative Process* HL Paper 173-I (London: The Stationery Office, 2004), paras 78-81.

- 2.12 There are three options for undertaking such scrutiny: by the Lords Constitution Committee as part of its consideration of the constitutional implications of bills, by the Commons Welsh Affairs Committee, or by the National Assembly itself. For both the Constitution and Welsh Affairs Committees, this would involve a considerable extension of the work they presently undertake and so create practical problems (not least of timing and staff resources). The Constitution Committee would be better placed to do this, however, as part of its general assessment of the constitutional implications of all bills before Parliament. The Assembly similarly does not have at present the organisational arrangements or resources to undertake such a scrutiny, and there would also be problems meshing the different legislative timetables and working arrangements of the Assembly and Westminster. However, if it did so there would be a longer-term benefit as this would involve Assembly Members more closely in both the process of legislation and the means by which the National Assembly and Welsh Assembly Government acquired their powers.

Phase 2: Transfer of powers by Orders in Council

- 2.13 While framework powers present significant difficulties, the second stage in increasing the powers is more problematic. These problems operate on two levels, of principle and of technical practicality. The White Paper's proposals are lacking in crucial details that would make it clearer what phase 2 would involve. This key part of the White Paper, more than most of the rest of the document, smacks of political compromise rather than a thought-through approach to problems of principle.
- 2.14 It is worth discussing at this stage what an order in council is. It is an instrument made using the Crown's prerogative powers (hence the reference to the council, meaning the Privy Council, in its title), but usually under statutory powers and following a statutory procedure. The exact procedure for an order in council is set out in the legislation under which it is made. It appears that the form of an order in council (rather than some other instrument of delegated legislation) has been chosen to follow precedents set in the Government of Wales Act 1998 and other devolution statutes, and to recognise the constitutional nature of the instrument. In the case of Wales, the proposal in the White Paper is for consideration by some form of Parliamentary joint committee or committees in each House, followed by a debate in each House and an affirmative resolution. The order would therefore not be made if either House voted against it. It is not clear what the status of the committee stage of deliberation would be, and in particular whether it could reject obstruct a draft order in council altogether or merely produce a critical report. The suggestion is that there would be a debate lasting an hour and a half in each House about an order.
- 2.15 This differs from the normal sort of procedure for secondary legislation made under the affirmative procedure. Very few such instruments are scrutinised on the

- floor of the House and most are considered in standing committee instead. In 1999-2000, for example, of about 2000 statutory instruments in total, 180 were affirmative procedure instruments, only 17 were considered on the floor of the Commons, and 157 in standing committee.¹⁵ Instead, it appears that orders transferring functions to the National Assembly will routinely be considered both in committee and on the floor of each House of Parliament.
- 2.16 This approach also contrasts with the sort of procedure and scrutiny to which an Act of Parliament is subject. Before being enacted, a bill receives a substantive debate on its principles (at second reading), detailed discussion of its specific provisions (committee and report stages), and a further substantive debate on its content (third reading). It can be amended at committee or report stages (or third reading in the Lords). A bill goes through this procedure in each House of Parliament, with further consideration by the first House of amendments made in the second House. In principle, therefore, this provides for detailed legislative scrutiny of the Government's proposal before it can be enacted. In the case of legislation relating to Wales, this is true for Wales-only bills. However, the level of scrutiny of Wales-only provisions in bills extending to England and Wales or further is much more limited. There is likely only to be one MP from Wales on a Commons standing committee, with a short debate which that MP may not even attend. The technique of incorporating separate legislation for Wales within England and Wales bills may have enabled the National Assembly to secure provisions it wished to have enacted, but without ensuring thorough scrutiny of those provisions at Westminster (or, it would seem, Cardiff Bay).
- 2.17 The level of scrutiny being proposed for orders in council transferring functions to the National Assembly seems intermediate between the normal level for an affirmative procedure statutory instrument and that of an Act of Parliament.
- 2.18 When and how, exactly, orders in council would be made is far from clear. One suggestion is that they would be made as and when the Assembly seeks them. That would imply varying frequency, but with the possibility of much Parliamentary (and Assembly) time being spent on them. Another (suggested by an official) is that there would normally be only one such order a year. The Assembly would make its requests for legislation in the spring of each year, as it does at present. Currently this leads to a bargaining process between the Assembly, the Wales Office and Whitehall departments to find appropriate places for such requests, whether in Wales-only bills or in other legislation affecting England and Wales, Great Britain or the whole of the UK. That would be replaced by an order in council, authorising the Assembly to pass the legislation itself instead. Whitehall, in the form of the Wales Office, would retain control of what the Assembly could enact – but the Assembly would get greater latitude to enact it. At the same time, there would be flexibility to pass other orders in council adding to the Assembly's functions, if need arose.

¹⁵ See R Blackburn and A Kennon *Griffith & Ryle on Parliament: functions, practice and procedures* Second edition (London: Sweet & Maxwell, 2003), p. 348.

- 2.19 A further question is what functions of the Assembly might be increased by orders in council. These will relate to narrower ‘policy areas’ within larger ‘fields’ of policy, a ‘field’ apparently being one of the headings in Schedule 2 to the Government of Wales Act 1998. The question is quite how far this would go, particularly in relation to matters (notably the fire service) added to the Assembly’s functions since 1998 and not part of Schedule 2 to the 1998 Act.¹⁶ The point is not simply a technical one; there needs to be clarity about when and how orders in council will be used to extend the Assembly’s powers, and what the limits to such extensions are.
- 2.20 Part of the problem with this lack of clarity is that the situation could change with a change in political control at Westminster, or with a different Secretary of State. While Peter Hain may indicate that one approach will be adopted, there can be no guarantee that that approach will be permanent even under Labour UK Governments, let alone ones of different parties. This will be important for the next few years, but all the more so if the proposed third phase of devolved powers does not in fact happen.
- 2.21 Powers to transfer functions in such a sweeping way are extremely unusual in British constitutional practice, but not entirely without precedent. The power to make an order to remedy legislation that is in breach of Convention rights was established under section 10 of the Human Rights Act 1998. Perhaps more familiar to lawyers are the powers under section 2(2) of the European Communities Act 1972 to use secondary legislation to implement European Community obligations – which is effectively a power to pass secondary legislation doing all an Act of Parliament could do (including ‘Henry VIII’ type provisions). Powers for UK ministers to repeal existing primary legislation exist under the Deregulation and Contracting Out Act 1994 and the Regulatory Reform Act 2001. In all these cases, the powers were controversial on enactment and have sometimes been criticised on their subsequent use.
- 2.22 A less controversial parallel is the powers under the Scotland Act 1998 to negotiate the boundary of devolved and reserved competence. The Act contains numerous powers which have been widely used both to extend and in some cases to reduce the competence of the Scottish Parliament or the Scottish Ministers.¹⁷ These powers have been very useful in removing legal uncertainty about whether matters are devolved or not, and (in a context of general goodwill between administrations) have also helped prevent differences between governments about their functions from reaching the courts. However, these powers are much more

¹⁶ David Miers has carefully analysed this point in his evidence to the National Assembly’s ad hoc Committee on the Better Governance for Wales White Paper, which will be published with the Committee’s report.

¹⁷ Key powers include those under the following provisions of the Scotland Act 1998: section 63 (power to transfer executive functions); section 107 (power to remedy ultra vires acts of the Scottish Parliament or Executive) and section 108 (power to make agreed redistributions of executive functions).

- limited in scope; for the most part, they have been used not to accomplish major transfers of powers but to manage the often-difficult boundary between devolved and reserved matters. Major transfers of functions to the Scottish Parliament or Executive have been accomplished by primary legislation (for example, the transfer of powers over railway franchising, by the Railways Act 2005).
- 2.23 A similar case arises with the categories of powers established under the Northern Ireland Act 1998. Like the Scotland Act 1998, the Northern Ireland Act gave the devolved legislature power to legislate for all matters save those expressly kept out of its hands. There were, however, two sorts of such powers, ‘excepted’ and ‘reserved’ ones. Excepted powers were to remain in the hands of the UK Parliament no matter what – issues such as the status of the Crown, foreign affairs, currency or defence. ‘Reserved’ matters included many areas reserved under the Scotland Act – most notably criminal law, policing and security matters, but also many matters normally dealt with by the Department of Trade and Industry such as post offices, financial services or the minimum wage. Reserved matters could be transferred to the Assembly by an order in council, if the UK Government thought this was warranted.¹⁸
- 2.24 The use of secondary legislation to accomplish transfers of functions raises other concerns. As Chris Bryant MP noted in the Commons, such instruments cannot be amended and must either be passed or rejected by Parliament (again, in contrast to procedure on primary legislation).¹⁹ The level of scrutiny will also vary greatly depending on whether an order in council is of the ‘composite’ sort made in response to the Assembly’s annual request for legislation, where a single order could authorise a dozen or more provisions by the Assembly, or in a sequence of one-off specific transfers. In the former case, the hour and a half’s debate would merely touch on any individual transfer; in the latter, it could prove a detailed examination of whether to transfer powers that might extend into the proposed use by the Assembly of the powers it was seeking. The debate would therefore scrutinise not merely the principle of transfer but also the use of those powers that the Assembly proposed – an apparent contradiction with the goal of devolving power.
- 2.25 To address this, there needs to be clarity about the principle of Parliamentary consideration of such orders. This clarity will need to be embodied in appropriate Parliamentary procedures, so that MPs and Peers are aware of the scope of their debates and so that debate that goes beyond that scope can be ruled out of order. That is particularly important given the suggestion in paragraph 3.21 of the White Paper that Parliamentary consideration “could be informed by understanding the

¹⁸ In the event, the UK Government never used this provision, even when it was willing to contemplate devolving policing or criminal justice. Instead, there was new primary legislation at Westminster, the Police (Northern Ireland) Act 2000 and Justice (Northern Ireland) Act 2002, reshaping the services involved as well as providing for subsequent transfer (the mechanisms for which have also not been used).

¹⁹ HC Deb, 15 June 2005, col 273.

use the Assembly might propose to make of these powers in the immediate future”.

- 2.26 From the point of the National Assembly, orders in council have to be regarded as potentially a vulnerable way to acquire powers. Supporters of the White Paper’s proposals assume that powers granted under order in council will be generous in extent, and transferred unconditionally and irrevocably. While this assumption may be valid, there is little in the White Paper or the ministerial statements made when the White Paper was introduced into Parliament to support it. Even if the powers are used in this way initially, there is nothing to stop a future UK Government taking a different approach. Depending on the drafting of the new legislation, it might even be possible for Parliament to revoke orders already made – although that would imply a very different approach to that presently applying to powers transferred to the Assembly under the Government of Wales Act 1998.²⁰
- 2.27 From a UK point of view, orders in council are also difficult. This device involves Westminster agreeing to the exercise of legislative powers by a delegated body without itself fully considering each transfer. Public statements by the First Minister suggest that such orders will go through ‘on the nod’. That would be regrettable if true. It runs contrary to many established principles of the UK’s constitution about the nature of the legislature’s control of the executive. Orders in council may raise important issues of principle, and for Westminster to enable the Assembly to legislate by such a mechanism undermines established principles of parliamentary control and accountability of the executive, which are also under assault from other quarters. Especially if the order is drafted broadly (which would be attractive to the Assembly), that further weakens Parliamentary control. The broader the powers granted, the more likely a bill will be to attract criticism from the Lords Delegated Powers and Constitution Committees.
- 2.28 A further set of objections relates to the technical working of the orders. This is also important, and difficult. At present the Assembly’s powers are a complex hotch-potch of specific statutory functions, some transferred by transfer of functions orders made under section 22 of the Government of Wales Act 1998 and others conferred directly in a variety of ways by subsequent Westminster legislation. The picture of them is complex and hard to map, and can only be understood by looking at that detail. The extent of powers conferred on the Assembly varies from policy area to policy area, and from bill to bill. To transform that pattern of powers into the more broadly-framed powers now contemplated will be very difficult. It will involve considerable legal work, and also a shift in approach and attitude both in the Assembly (meaning principally the Assembly Government) and in Whitehall. That shift is essential if devolution

²⁰ Section 22 (4)(b) provides that the Assembly has to approve by resolution an order varying or revoking a previous transfer order, as well as for it to be approved by Parliament. There is no requirement for the Assembly to approve orders transferring new powers to it, however.

to Wales is to make sense to the person on the Caerphilly omnibus, but will be hard to accomplish.

- 2.29 The drafting of such orders would also become a crucial issue. If powers were to be defined narrowly, or their grant were to be conditional or for only a limited time, the value of this approach would be greatly undermined – the more so if it is intended to serve as the basis for yet further transfers of power in the future. Moreover, there may be problems with the sort of varying attitudes and inconsistent practice across Whitehall which have affected transfers of powers under section 22 of the Government of Wales Act 1998 (especially the 1998 ‘jumbo’ transfer of functions order), and subsequent Westminster legislation. Very clear guidance needs to be issued to Whitehall, and means of ensuring compliance with that guidance put in place, if this mechanism is to be stable or durable.
- 2.30 The need for clear guidance may be underlined by the fact that, it appears, much legislation for devolved matters in Wales will continue to be made through Acts of Parliament affecting England and Wales (or Great Britain, or the United Kingdom). The process of negotiation with Whitehall about the effect and scope of such legislation will continue (even if the principles of framework legislation apply in such cases). Similarly the political and policy agenda at Westminster will drive a range of developments in Wales, whether or not they correspond to priorities west of Offa’s Dyke.
- 2.31 Moreover, the present patchwork nature of the Assembly’s powers will become even more complex. The Assembly will, as a result of the orders in council be able to acquire powers:
- 2.31.1 By Act of Parliament at Westminster
 - 2.31.2 By order in council
 - 2.31.3 By transfer of functions order under section 22 of the Government of Wales Act 1998 (unless the 1998 Act is repealed and there is no replacement for section 22 in the new Act)
 - 2.31.4 By designation order under the European Communities Act 1972 in respect of EU matters

Consequently, at least in the short and medium term it will become harder to tell what the Assembly’s powers are, to identify them conveniently, or to explain to the public what they are and where they are to be found.

- 2.32 No matter how carefully or broadly drafted, questions about the precise extent of powers conferred on the Assembly by an order in council will inevitably arise. Paragraph 3.17 of the White Paper indicates a UK Government determination not to allow orders in council to be used to develop ‘function creep’ by the Assembly, with the Assembly using grants of powers in one area to develop a competence in others. However, such an approach is naïve: issues about how exactly powers are

construed at the margin are routine but difficult problems in all cases of divisions of powers, and regularly occur even with the Scottish devolution settlement (although hitherto they have been kept behind the scenes).

- 2.33 Nothing in what the White Paper says about phase 1 or phase 2 will remove one major problem of the present arrangements for Wales – the need for Wales to bid for Parliamentary time for orders in council, and to secure at least the tacit agreement if not actual support of MPs and Whitehall departments for policies it wishes to implement. Depending on how matters work in practice, it is possible that the need to secure special slots at Westminster for orders in council, on top of the existing legislative programme, may make it more difficult to secure powers for Wales, not less.²¹ Wales may still get caught up in legislative log-jams at Westminster, or difficulties caused by MPs or UK Government departments unsympathetic to the Assembly's goals.
- 2.34 The White Paper addresses the difficult question of what would happen if the Assembly sought powers which the Secretary of State thought it should not be granted (paragraph 3.20). That paragraph suggests a safeguard for the Assembly – that the Secretary of State should not decline to lay an order for 'trivial' reasons, and that if he did decline to make an order he should be obliged formally to explain why to the Assembly, and that the response be published. That safeguard is neither rigorous nor formal enough. An alternative approach would be for another minister (say, a Law Officer) formally to lay the order sought by the Assembly, with the Secretary of State then free to speak in opposition to it. His views would then be public, and it would then be open to MPs rather than the Secretary of State to decide whether such powers should be transferred or not. As the powers transferred are Westminster's not the Secretary of State's, it seems constitutionally improper for decisions about these powers to be left in his hands alone.

Phase 3: The transfer of legislative powers to the Assembly

- 2.35 The White Paper proposes, subject to various conditions, that broader legislative powers could subsequently be transferred to the Assembly. This would not require another Act of Parliament (so provision for such a transfer will be included in the bill that will be placed before Parliament in late 2005 or 2006). However, a referendum would have to be held before such a transfer could take place.
- 2.36 Although a super-majority would not be required in a referendum, the White Paper proposes that the referendum could not be triggered without (simple)

²¹ That has not been the case for Scotland, but the Scottish Executive arranges in advance for about two slots a year at Westminster to consider further transfers of functions to Holyrood as a matter of routine. If there were in fact no such business, officials say they would simply abandon the slot – but that has never happened.

- majority support in Parliament and the support of two-thirds of the Assembly. Presumably the rationale for this derives from the absence of a consensus about further powers for the National Assembly, although that absence of consensus is itself disputed.²² The Secretary of State has also said that he does not expect such a referendum to occur before 2011 at the earliest.²³ The constitutional rationale for such a super-majority in the Assembly is not at all clear, and this requirement seems redundant.
- 2.37 Again, the White Paper seems to envisage that phase 3 of the transfer of powers to the Assembly will be made using secondary legislation. As it is uncertain at this stage whether powers will be transferred at all or, if a transfer ever happens, what powers will be transferred, this creates serious difficulties of both principle and practicality in framing primary legislation now that may not have effect for a long time. To do this requires considerable staring into the crystal ball, and the assumptions made now about what will be needed in five or ten years' time may well prove to be mistaken.
- 2.38 The effect of phase 3 will presumably be to confer a legislative competence on the National Assembly that is concurrent with Westminster's, and the UK Parliament will remain sovereign. With the emergence of such concurrent legislation, there will need to be an analogue for Wales of the Sewel convention providing that, in areas where an order in council gives the Assembly legislative power, Westminster will not legislate without the Assembly's consent.
- 2.39 Even if such a change were to take place, what Wales would end up with would resemble the Scotland Act 1978 more than the Scotland Act 1998 – even though the 1998 Act is used as a model for Wales elsewhere in the White Paper. The Assembly would only have the powers to act where it was expressly authorised to do so, unlike the situation for Scotland where the Scottish Parliament may legislate on all matters except those expressly reserved to Westminster.²⁴ In this respect, the White Paper departs in an important way from the recommendation of the Richard Commission, which expressly recommended the 'Scottish model' to avoid these difficulties.²⁵
- 2.40 There is an argument that this 'model' is less necessary for Wales because Wales is not a separate legal jurisdiction.²⁶ Unlike Scotland, Wales does not have a

²² See paragraph 3.8 of the White Paper, and for Peter Hain's comments HC Deb, 15 June 2005, col. 264, and Assembly Record, 21 June 2005, p. 37.

²³ HC Deb, 15 June 2005, col. 264.

²⁴ For an earlier discussion of this approach, see A. Trench 'The Assembly's Future as a Legislative Body' in J. Osmond (ed) *Welsh Politics Come of Age: Responses to the Richard Commission* (Cardiff: Institute of Welsh Affairs, 2005), especially pp. 39-40. The resemblance to the Scotland Act 1978 will be more in structure; the proposals appear to avoid the worst flaws of that Act, which were the extensive powers given to the Secretary of State to regulate actions of the devolved institutions and the peculiar and complicated way in which devolved functions were framed.

²⁵ See Richard Report, especially chapter 13.

²⁶ See, however, T.H. Jones and J.M. Williams 'Wales as a Jurisdiction' [2004] *Public Law* pp. 78-101.

distinct criminal or civil law, which added greatly to the range of functions to be transferred in Scotland and would have complicated the framing of transfer arrangements. However, this approach constitutes a significant narrowing of the Assembly's powers, as it will be under a greater burden to show that it did have the power to legislate if it is challenged.²⁷ This will also put more burden on drafting issues, as major questions of legislative competence could hang on the way powers are framed and the words used to do so. Even more than for Scotland, much will depend on how the courts construe the Assembly's legislative powers. In the interests of legal certainty, it would be desirable to have the 'Scottish model' rather than the 'defined functions' model.

- 2.41 A further consequence of the 'defined functions' model is that it increases the importance of what powers are transferred, and in what terms, to some extent during phase 1 but particularly during phase 2. Phase 1 will expand devolved powers in areas that are already devolved and happen to be subject to Westminster legislation. Phase 2 will transfer additional powers, relating to specific 'policy areas', but not so as to cover a whole 'field'. In both cases, the present jigsaw of tightly-defined powers will be opened up, with the edges of Assembly functions becoming less jagged. In phase 3, powers relating to a number of policy areas presumably adding up to a 'field' will be transferred. There will, it appears, be some overlap between phases 1 and 2 depending in part on the Westminster legislative programme. But collectively these need to add up to transferring powers over a large number of 'policy areas', because the final stage relates to 'primary legislative powers over *all devolved fields*' (paragraph 3.23, emphasis added). At that point, it appears it will not be possible to add to the number of devolved fields, so they must be got right earlier.

Electoral arrangements

- 2.42 The White Paper has attracted much attention (and much criticism) for its proposals to alter the electoral system, and prevent candidates standing for both a constituency and on the regional list. Clearly this has given rise to much tension between AMs elected in the two ways, and this may have been exacerbated by perceived competition between them over constituents' case-work.²⁸
- 2.43 While this provision is a matter for constitutional concern, the problem is an inherent one in the system of election originally chosen for the Assembly in 1997.

²⁷ The Constitution Unit discussed these issues at some length in the Scottish context in *Scotland's Parliament: Fundamentals for a new Scotland Act* (London: The Constitution Unit, 1996), paragraphs 83-108.

²⁸ See J. Bradbury, O. Gay, R. Hazell and J. Mitchell *Local Representation in a Devolved Scotland and Wales: Guidance for Constituency and Regional Members – Lessons from the First Term* The Devolution Policy Papers, ESRC Devolution & Constitutional Change Research Programme, 2003; ESRC Devolution and Constitutional Change Devolution Briefing no. 28 *Learning to Live with Pluralism? Constituency and Regional Members and Local Representation in Scotland and Wales*, March 2005; both available from <http://www.devolution.ac.uk/Publications2.htm>

The solution to the problem identified by the Richard Commission – changing the electoral system to the single transferable vote instead of the additional member system – would have remedied the anomaly that has exercised the mind of the Secretary of State and many Labour MPs and AMs, without creating the new anomalies that will arise with this provision.

- 2.44 What is of greater concern is the White Paper's rejection of increasing the size of the Assembly, or creating any means for that to happen. It is clear that the Assembly of 60 members is already stretched; members simply do not have time to service all their various obligations. While the White Paper's changes to committee arrangements may improve matters somewhat, that will still be marginal. With only 60 members and an increasing range of legislative functions under phase 2 of the plans to extend its powers, there will already be problems. With the legislative powers proposed under phase 3, there will be serious grounds to doubt the quality of scrutiny and accountability that the Assembly could ensure. If legislative powers are to be conferred on the Assembly without increasing the numbers of members (or creating a mechanism for doing so), the Assembly may have difficulties in discharging its obligations – and this may create a necessity for new primary legislation to increase its size, although the White Paper is seeking to avoid that.
- 2.45 At a conference in Cardiff on 11 July 2005, Peter Hain suggested that an order-making power might be included in the new Wales Bill to provide for an increase in the size of the Assembly as part of the third phase. While this approach would be better than no response to the problem, it would be better to accept the need for a larger Assembly at this stage and increase its size straight away. That would avoid a further instance of empowering a minister to change the devolved constitution of Wales, would be good for transparency and clarity about how the National Assembly operates, and would enable Assembly Members and staff to become more accustomed to new ways of working before they acquire primary legislative powers.

3. PRACTICAL AND IMPLEMENTATION ISSUES

- 3.1 The White Paper refers to implementation of its proposals over a long timescale, with no referendum on legislative powers until 2011. However, it notes that legislation will be introduced in the present session, to give effect to phase 2 of the enhanced legislative powers and the new electoral arrangements by the time of the next Assembly elections in May 2007.
- 3.2 Consultation on the bill is open until 16 September 2005. The present session of Parliament is expected to end in the autumn of 2006, so a new Wales bill must be passed by then. However, time will be needed to consider the response to the

consultation exercise, and for new legislation to be drafted – so a bill is unlikely to be ready for introduction before the New Year.²⁹

- 3.3 Moreover, the Government have made that task more complicated by the commitment (in paragraph 2.11) to disentangle the present functions of the Assembly and allocate them to the Assembly or the Welsh Assembly Government according to whether they are legislative or executive in nature. That is likely to be a difficult and time-consuming exercise. It should be comparatively simple for functions transferred under transfer of functions orders, as those conferred powers on UK Ministers and then passed them to the Assembly in respect of Wales, so they were clearly executive functions. The difficult part will relate to functions acquired by the Assembly since 1999; these functions have been deliberately conferred on the Assembly because it combines both executive and legislative functions, and in ways which often combine the two aspects. The White Paper commitment is therefore to unravel what was deliberately ravelled in the first place. The only recent parallel to this is not an inspiring one; a similar job had to be undertaken following the Government's commitment in 2003 to abolish the office of Lord Chancellor, and the various and numerous functions conferred on the Lord Chancellor over centuries had to be identified and allocated as a consequence.³⁰ The job proved to hugely time- and labour-intensive, more so than had been expected, and ultimately was rendered superfluous by the decision not to abolish the office after all, but merely to strip it of many of its functions. The scale of this task in relation to Wales is obviously much less than it was for the Lord Chancellor, but it remains potentially difficult. If work on this has not already begun behind the scenes, this has the potential to act as a source of further, unwanted, delay.
- 3.4 This timetable is practicable, but it will be tight given the controversy the bill is likely to cause with its proposals for transfers of powers (especially in the Lords), and the fact that the legislative programme for this session is already crowded.
- 3.5 Achieving Royal Assent for a new Wales Act in late 2006 will put pressure on the political parties in Wales. All will be selecting their candidates for the 2007 elections during late 2006 and early 2007. The effect of the bill will be to increase significantly the number of candidates needed by all parties, since even more candidates will be needed who have little hope of actually being elected (most constituency candidates for the Conservatives, the Liberal Democrats and Plaid Cymru, and most regional list candidates for Labour). This will considerably complicate the task of the political parties and election administrators. Local election administrators are already under pressure from the

²⁹ The Secretary of State told the National Assembly that the bill would be introduced 'late this year or early next year': Assembly Record, 21 June 2005, p. 38.

³⁰ Department for Constitutional Affairs Consultation Paper *Constitutional Reform: reforming the office of the Lord Chancellor* CP 13/03 (London: Department for Constitutional Affairs, 2003), paragraphs 7-9.

practical burdens of dealing with postal votes, which proved particularly problematic in the 2005 UK general election.

- 3.6 A further question for the legislation is whether the new Act will replace the Government of Wales Act 1998 or simply amend it. The case for replacing the 1998 Act rather than amending it is a very strong one. The implications of a single body corporate run through the whole of the 1998 Act. Simply picking out certain functions and transferring them to a new body is an unattractive prospect, as it will gravely complicate the statutory framework for the government of Wales and make it all the harder for members of the public to understand how Wales is governed or find materials that set this out. In the interests of making that framework transparent, straightforward, comprehensible and workable, it is important that there be a wholly new piece of legislation, repealing the 1998 Act and transferring the functions, assets, staff and liabilities to the new institutions.
- 3.7 At the same time, however, these new institutions need to be clearly the successors of the existing National Assembly. To the extent that there needs to be a legal successor to the present Assembly (to handle legal claims and the like), that should logically be the Welsh Assembly Government rather than the National Assembly; the present functions of the Assembly are largely executive, and the liabilities which may exist will derive overwhelmingly from those functions, so the liability should go with those functions.

4. AN ASSESSMENT OF THE WHITE PAPER

- 4.1 This section will briefly assess the White Paper overall for its effect on five aspects of government in Wales:
- 4.1.1 The accountability of the National Assembly and Welsh Assembly Government to the electorate
 - 4.1.2 The transparency and comprehensibility of the new arrangements
 - 4.1.3 The stability and sustainability, in constitutional and administrative terms, of the new arrangements
 - 4.1.4 The constitutional autonomy of the devolved institutions
 - 4.1.5 Wales's place in the United Kingdom.
- 4.2 The White Paper's proposals will generally improve the accountability of the National Assembly and Welsh Assembly Government to the electorate. It will be easier for the public at large to understand who is responsible for what and to seek appropriate action or remedies if they are discontented. This is largely a consequence of separating the executive from the legislature, however. The two other changes have a less helpful effect. The revised electoral system will have little effect on accountability (although it may make the life of elected AMs slightly more straightforward). The increase in the powers of the Assembly without increasing the number of AMs will make it harder for the Assembly to

- scrutinise the executive. Moreover, the means by which the Assembly's powers will be increased (particularly during phase 2, under orders in council) may make it harder to identify whether the UK or Welsh authorities are responsible for particular matters, and to what degree. This risk increases if orders in council are framed in limited or conditional ways.
- 4.3 Similarly, on the whole the White Paper's proposals are good for transparency. The separation of executive and legislature will make it clearer who is responsible for what within the devolved institutions. That is helped by the way the White Paper seeks to establish principles to govern devolution for Wales. However, it is important that the devolved constitution of Wales be laid out in a clearer way than it is – meaning a new Wales Act, not amendments to the existing one, and a clearer framework for UK legislation affecting devolved matters.
- 4.4 The White Paper is much less good for Wales's constitutional autonomy – that is, for Wales to develop its own indigenous constitutional approach (what Rawlings calls, more accurately, 'constitutional autochthony'), and for the devolved institutions to determine internal matters themselves.³¹ This is inevitably a balancing act, as Wales remains part of the United Kingdom and its constitutional development reflects a developing (and shifting) relationship with UK institutions. The process and report of the Richard Commission were themselves prime examples of an autochthonous approach. In numerous respects – the electoral system, the office of Counsel General, the general attempt to increase the powers of the National Assembly – the White Paper's proposals reflect the developments in the relationship and shift the balance toward Welsh rather than UK institutions. The proposals to give the Assembly control of its own committee structure and arrangements (paragraphs 2.14-2.17) and to make the Auditor-General for Wales accountable to and appointed by the Assembly (paragraph 2.19) are particularly laudable. The only point that gives material cause for concern in these matters is the fact that these are UK proposals, which in some cases have been determined by the Secretary of State for Wales with little obvious reference to the Richard Report. However, given the present structure of devolution for Wales it is hard to see how it could have been otherwise.
- 4.5 More serious are the provisions providing for the Secretary of State to decide on the new standing orders for the Assembly. This is clearly an internal matter for the Assembly and for the Secretary of State to seek to determine these matters is both inappropriate and likely in the longer term to be futile or even counter-productive, causing tension where there is no obvious UK interest so no need for UK involvement.
- 4.6 The stability and sustainability of the new arrangements are open to question. Much will be improved by separating the executive and legislative parts of the Assembly. However, the effect of the new arrangements for transferring powers –

³¹ See R. Rawlings *Delineating Wales: constitutional, legal and administrative aspects of national devolution* (Cardiff: University of Wales Press, 2003).

again, particularly the second phase – are problematic. This is unlikely to prove a sustainable mechanism in the longer term. That adds to the importance of ensuring that the provision for the third phase of legislative powers are properly framed, even though they may not be brought into force for a decade.

- 4.7 Nothing in the White Paper affects Wales's place in the United Kingdom. Even an enhanced Assembly under phase 3 of the proposals to increase its legislative powers would emphatically be part of the UK. If anything, the proposals maintain the UK dimension of Wales's governance too strongly, prompting the possibility of a reaction against UK Government control of devolved institutions and matters. If the UK Government wishes to safeguard Wales's place in the Union, greater autonomy for Wales will not harm it – and may very well help.

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