



THE DEVOLUTION POLIYC PAPERS No. 13

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

Alan Trench

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.

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 a

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.

* I am grateful to Robert Hazell, David Miers, Rick Rawlings, Keith Patchett, Richard Wyn Jones and a number of civil servants who must remain anonymous for their comments, questions and suggestions about this briefing. I am also grateful to Charlie Jeffery for arranging its speedy production and publication. I am solely responsible for the views it expresses and any errors it contains.

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 *Accession to the European Union* Cm 3718 (London: The Stationery Office, 1997). See also The Constitution Unit *Constitutional Change* 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 Labour Party 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

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 tHhger

undoubtedly need revision in the light of the proposed changes, it is questionable

- 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 Deleg

lead and the Welsh Assembly Government.¹² Sometimes the Assembly is able to

- 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.

e n fe ofpo e y O de n Co nc

- 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 stand

- 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 .96388(r)-162(o)-2016 heil then endus bute ‘rs erikcttr tnd

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

2.26

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 bWB 3(W)7540559(i)0.441715(l)-9.6388(r)4.04195(d)6.568149(f)4.04195(o)-3.771568(e)1.96388

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

distinct criminal or civil law, which added greatly to the range of functions to be transferred in Scotland and would have complicated

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

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.

The author

Alan Trench is Honorary Senior Research Fellow, The Constitution Unit, School of Public Policy, University College London. He was part of the research team working on the ESRC Devolution Programme project on 'How the Law and Devolution Disputes Shape the Devolution Settlement'. He is editor of *The Dynamics of Devolution: The Case of the Nations* (Imprint Academic, 2005) and was specialist adviser to the House of Lords' Select Committee on the Constitution during its inquiry into *Devolution: The Next Steps* in 2002-03.

Alan Trench

The Constitution Unit
School of Public Policy
UCL
29–30 Tavistock Square
London
WC1H 9QU
Email: a.trench@ucl.ac.uk

The Devolution and Constitutional Change Programme was set up by ESRC in 2000 to explore the series of devolution reforms which have established new political institutions in Scotland, Wales, Northern Ireland, London and the other English regions since 1997. It has commissioned 35 projects around the UK to carry out top-class academic research and to contribute to the policy debates surrounding devolution.

For more information see the Programme website at www.devolution.ac.uk or contact the Programme Director, Professor Charlie Jeffery at ESRC Devolution Programme, School of Social and Political Studies, Adam Ferguson Building, George Square, University of Edinburgh. Tel 0131 650 8489, Fax 0131 650 6546, Email charlie.jeffery@ed.ac.uk