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30 June, 2005

Comments on the White Paper

'Better Governance for Wales' (Cm6582)

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1. These comments reflect membership of the National Assembly Standing Orders Commission 1998-1999 and of the Richard Commission 2002-04. On the first of these Commissions we were tied down by the preceding Government of Wales Act 1998, which had over seventy specific procedural requirements for the Assembly laid down in the Act in great detail, unlike in the Scotland Act, 1998 where the Scottish Parliament was left fairly free. In consequence the first standing orders for the National Assembly were deeply flawed from the outset. Further the Act, while passing into law, was radically changed from its original conception of a committee based system (on local government lines) to a cabinet system more akin to Westminster, without being withdrawn and redrafted in its entirety. The consequence was that the Act was over long, badly drafted and over-prescriptive.

2. The Richard Commission on the Powers and Electoral Arrangements of the National Assembly for Wales (hereafter 'Richard') on the other hand was set up by the National Assembly Government, led by the First Minister, Rhodri Morgan, with wide terms of reference, which in no way fettered the scope. In consequence, the Report was evidence-based and carefully reasoned. We found that Welsh devolution was evolutionary and with a dynamic of its own (p.10). The evidence suggested that Welsh devolution from 1998-2003 had been "second class" (p.12), in comparison with Scotland or N. Ireland. "Executive devolution" was muddled in conception and indeed that it was astonishing it had worked as well as it had, a reflection of the wish by all concerned, including the newly elected A.Ms to make a success of devolution and of the desire of the governments in Whitehall and Cardiff of similar political complexion to co-operate². We were repeatedly reminded of the 'Redwood' era in Welsh history, and the likelihood that sooner or later administrations of a differing political colour would occur, which would cause major problems to the National Assembly.

3. The existing Assembly has made remarkable progress given the inherently unsatisfactory nature of its present powers. If these were extended to include primary legislation, it would present a challenge to members, which would lead inevitably to a change in calibre. The existing split accountability between London and Cardiff is confusing for the citizen and unsatisfactory in terms of democratic legitimacy.

² Hearing evidence

4. It follows that my reaction to the Government White paper is one of 'two cheers', in particular that they do not follow the logic of a desire for "more accountable, participatory and effective" reformed structure of government to its conclusion, which would be more nearly on the lines of the Richard Report. In particular, they neglect the recommendations for a bigger assembly elected by STV in order to carry the legislative load, nor for the tax raising responsibilities appropriate to an elected body (even a Parish Council has such powers).

5. Richard was the first ever systematic review of the constitutional arrangements between Wales and England. Whatever the outcome of the White paper, Richard will provide material for later developments, recalling Ron Davies's oft quoted remark that Welsh devolution is "a process, not an event". Although arguably it would have been better to have done as in Scotland and had a constitutional Convention, with the carefully drafted reports of the 1990s as precursors to actual devolution story of 1997-1999, Wales is now enabled to learn from the lessons elsewhere. (see Key Proposals for Scotland's Parliament: A report to the Scottish Constitutional Convention and the subsequent Report of the Consultative Steering Group on the Scottish Parliament Dec. 1998)

Specific Comments on the White Paper

Foreword and Introduction

6. It is noticeable that although the British government now claim credit, it was the National Assembly who observed through their own experience that "executive devolution" does not work satisfactorily and set up the Richard Commission. And now HMG select only certain proposals for extending the devolution settlement.

7. Although the government in the White Paper seem not to have considered recent procedural developments in Edinburgh and Cardiff, it would be desirable that the recent changes of legislative scrutiny in the Commons, Lords, National Assembly and Scottish Parliament should be taken forward, with each parliamentary assembly willing to learn from the experience of others.

Chapter One

8. p.5 1.2 The original Labour proposals for devolution from 1995 "Shaping the Vision" prepared for the May 1995 Labour party conference - on "The Powers and Structure of the Welsh Assembly", was a typescript of 9 pages, which contained only the barest outlines of the original scheme - with many of the proposals radically different to those eventually put to the electorates in 1997 and 1998. It suggested, for example, 'the first past the post' system of election to the Assembly, instead of proportional representation.

9. p.5 1.4 It would be "Parliament" rather than "Government Ministers" which would transfer functions to the Assembly?

Chapter Two: A New Executive Structure

10. These proposals are directly based on the Richard report, and follow a lead from the Assembly in February, 2002 and are extremely welcome.

11. Ministers p.13 2.6. The institutionalising of Deputy Ministers will lead to an even greater proportion of the Assembly membership being salaried front benchers, and not part of the back bench section of the Assembly. In an Assembly of only 60, to lower the percentage of members available to question the Welsh government seems questionable.

12. p.14 2.9 The approximation of the role of the Counsel General to that of the law officers at Westminster, with the important distinction that he will not be a member of the Assembly confuses the role of a member, with that of an adviser.

13. p.15 2.12 It is not clear by which authority differing statutory instruments will be made, but the suggestion is that some will be made by Welsh Ministers, with provision for either approval (the 'affirmative procedure'), or subject to annulment ('negative procedure'). At present under the complicated procedures laid down in the Government of Wales Act, SS, 58, 64, 55, the Assembly may amend S.I.S - unlike in Parliament where each House can either approve or reject instructions, but not amend them. The White Paper suggests that the details of these procedures have not been worked out - they will require careful scrutiny.

14. p.18 2.20 In order to attract good recruits, Assembly Staff must have not only broadly comparable terms and conditions as civil servants but arrangements made for loan interchange ability with the Home Civil Service, including those of Scotland and Northern Ireland and possibly with other occupations, business, academic, law, banking and others. First rate staffing will be even more required if the Assembly is to be kept at 60 and yet have additional tasks to perform. In the exchange in the Statement, reference was made to increases in the Wales Office staff in London. The White Paper may necessitate changes at Cardiff.

15. Scrutinising Ministers

pp16-18, 2.14-219 Although the Richard Report was impliedly critical of the "over-cosiness" of committee meetings and the lack of proper scrutiny of Ministers in Assembly Committees, where Ministers here in the past appeared to "rule" the committees which are supposed to be questioning them, it will be important not to go to the other extreme. The role that Ministers have played in Special Standing Committees, or, for example, in the Constitutional Reform Bill Committee could serve as a source on which to draw for a new relationship in the Assembly.

Chapter 3 Enhancing the Assembly's Legislative Powers

16. This chapter is the meat of the White Paper. It provides a thoughtful halfway house between those who wish to confer primary legislative powers on the Assembly quickly, and those who wish to procrastinate. The exact meaning of the "streamlined procedures" referred to in the Ministerial Statements will require to be probed.

17. p.20 3.6 Although *in theory* the sovereignty of Parliament is not affected by the Scotland and Government of Wales Acts, 1998, *in practice*, once an Assembly (or Parliament) elected by proportional assembly has been set up, the reality is that Parliament's sovereignty has in part been given over.¹ In saying in the White Paper that it is "now time to re-balance legislative authority towards the Assembly, without affecting

¹ See V. Bogdanor 'The Start of a New Song': the Hume Lecture 1998

the overall constitutional supremacy of Parliament..." the government expresses the theory, not the reality. The government's incremental approach in the first instance shows caution, but the wholesale extension of Henry VIII powers to Welsh legislation to be made by the Assembly will arouse doubts in Parliament, where constitutionalists believe that delegated powers ought to be tightly constrained, and not of a general nature. Criticisms of 'framework' or 'skeleton' bills have been powerfully voiced in both Houses over many years, eg on the Education (Student Loans) Bill, and governments have been constrained to listen to critics. Many instances could be cited.

18. Although there are no formal legal or constitutional rules about what should be subject to primary legislation rather than secondary legislation, there is nevertheless a well understood practice whereby parliamentary draftsmen frame legislation, whereby the broad objectives of legislation are laid down in primary legislation, and it is only the detailed application of these objectives which are left to delegated legislation. This is a matter on which the Committee may wish to take evidence from Parliamentary Counsel. Further, the House of Lords Delegated Powers and Regulatory Reform Select Committee have drawn attention to the conventional constitutional niceties on this issue in several of their reports, although they have acknowledged that there is some difference between such powers when exercised by an elected Assembly, rather than a UK Minister. The ability, up to now, of the Assembly to scrutinise the wording of S.I.s, hear evidence and amend them (which Parliament does not do) is another factor.

19. p.22 3.16.19 The precise meaning of this paragraph will become clearer when the bill is produced, but in the White Paper it is unclear.

20. pp 23-4, 3.18-21 The proposals for enabling the Assembly Government to achieve "its legislative priorities more quickly, within its current areas of responsibility" are generally desirable, and the proposal to do so by Orders in Council, with Henry VIII powers to "modify provisions of Acts of Parliament, or to make new provision" uses a well recognised process. As said in the White Paper, the procedure proposed for affirmative resolution orders is well understood, and the safeguard of Parliamentary Committees or a Joint Committee to scrutinise them before consideration on the floor of each House would enable evidence, both written and oral to be taken as desired, and would allow the transfer to be probed in depth. It would be important to ensure that the parliamentary committees with whom this work is done should be of the Special Standing Committee variety, and not Standing Committees.

21. pp25 3.22-29 The government further suggests that, possibly in the next Assembly, after 2011, following a referendum of the Welsh people, means to transfer primary legislative powers over all devolved areas to the Assembly should be provided for in the new legislation. The government propose that such a referendum would need to be previously agreed to both in Parliament, and in the Assembly by a two-third majority. This transfer would be initiated by the Secretary of State, after appropriate consultations, tabling an Order. The referendum would be decided by a simple majority of those voting. It is envisaged that a procedure (like Sewel motions in the Scottish Parliament) would be put in place to allow Westminster to continue to legislate in appropriate cases with the consent of the Assembly. Incidentally, the suggestion that the Parliament Acts could be made to apply to orders (H.C. Hansard, 15 June, 2005, c.271) is mistaken.

22. It is suggested that the reasons for this delay, and for the various complicated procedural requirements for the conferring of primary powers, lies in existing uncertainties of the electorate's views. Nevertheless the White paper's proposals appear cumbersome for no clear reasons. A referendum would leave the decision to the appropriate authority, namely the Welsh electorate.

Standing Orders

23. pp. 26-27 3.30-32 The proposal to make a bonfire of the procedures of the Assembly laid down in the Government of Wales Act 1998 is welcome. But to do so by a further set of Standing Orders to be drawn up by the Secretary of State, assisted by "an advisory committee" with "broad based representative membership" is more questionable.

Parliamentary procedure is normally left to the Assembly concerned to regulate. This was the case for the new Scottish Parliament, which drew up their procedures after careful consideration and prior advice from experts, including proceduralists from Westminster and the European Parliament and political scientists and others (see the Crick-Millar Report). This was also the case for Northern Ireland, where after the initial Standing Orders drawn up by the Secretary of State, the Assembly set up in 1988 a Committee to draft Standing Orders. Similarly, in New Zealand in 1993-95, after their Parliament was transformed by the adoption of the mixed member proportional voting system for the electorate, in replacement of 'first past the post'. Such instances could be multiplied.

24. At the least, it is to be hoped that the proposed advisory committee would listen to, and be guided by, representatives of the National Assembly, where wishes should be regarded as paramount. The proposed provision for simpler procedures is welcome. In addition to shorter Standing Orders, it would be desirable to draft a Companion to the Standing Orders, in which much of the practice could be clarified and explained, as exists in other assemblies.

25. The implications of the recent Puttnam Report on the Communication of Parliamentary Democracy Members Only? Parliament in the Public Eye (Hansard Society Commission 2005), which draws on the Welsh experience of the National Assembly (pp 61-62), will need to be considered carefully when the revision of the Standing Orders is undertaken. The Report contains a number of far-reaching recommendations, which need to be addressed.

Relations between the Assembly and Westminster

26. p.27 3.33 The White Paper proposals to continue and increase the practice of submitting Wales only bills to prelegislative scrutiny is welcome, as is the suggestion that such scrutiny should be conducted on a bipartisan basis, with the relevant Assembly committees meeting together with the appropriate Commons and Lords Committees - whether in Westminster or Cardiff as convenient. In so doing they will be building on the precedents of recent years referred to in Chapter 8 of the Richard Report, and on the practice between the wars in the case of the Joint Committee on the Indian Constitution in the 1920-30s.

27. In the proposed rewriting of the Standing Orders of the Assembly, it would be desirable that consideration should be given, not only to practice to date at Cardiff, but also

to procedures at Edinburgh, Westminster and elsewhere in other Parliaments in the Commonwealth and elsewhere. One possibility which should be examined would be the regular enlargement of parliamentary committee by the co-option of non-parliamentarians as expert members.

Chapter 4: Electoral Issues

28. p.28 41-44 These proposals are likely to be unwelcome to all political parties, except one. The implications of the change suggested for Wales will have repercussions for Scotland, which may be unwelcome. Chapter 12 of the Richard Report accurately states my views and there is no point in repetition.