



Constitutional and Legislative Affairs Committee

Report on the British Waterways Board (Transfer of Functions) Order 2012

Background

1. On the 1st March 2012, the Minister for Environment and Sustainable Development gave notice of a motion in the following terms –

“To propose that the National Assembly for Wales agrees, in accordance with section 9(6) of the Public Bodies Act 2011, that the Secretary of State make the British Waterways (Transfer of Functions) Order 2012, in accordance with the draft laid in Table Office on 1 March 2012.”

Pursuant to the procedure agreed by the Business Committee, the Memorandum was referred to the Constitutional and Legislative Affairs Committee for scrutiny prior to it being debated in Plenary.

The Public Bodies Act 2011

2. The Public Bodies Act 2011 received Royal Assent on the 14th December 2011. Provisions relating to consultation and general matters such as interpretation came into force on Royal Assent, whilst almost all the remaining provisions (including all those relevant to this Order) came into force at the end of two months from that date.

3. The Act contains powers for the abolition and merger of public bodies by order, together with the transfer of their functions. Those functions are generally given to the Secretary of State, but sections 13-19 give similar powers to Welsh Ministers, primarily in relation to environmental bodies. The powers are also similar to those contained in section 28 of the Government of Wales Act 1998 in relation to the bodies set out in Schedule 12 of that Act.

Those were the powers used, for example, to transfer functions of the WDA to the Welsh Government by order.

4. Many of the bodies that may be the subject of orders made under the Act carry out cross-border functions, whether they be England and Wales, Great Britain or United Kingdom bodies. Section 9 of the Act contains specific provisions in relation to the consent of devolved legislatures and administrations. The provisions that relate to Wales only are contained in sub-sections (6) and (7) –

“(6) An order under sections 1 to 5 requires the consent of the National Assembly for Wales to make provision which would be within the legislative competence of the Assembly if it were contained in an Act of the Assembly.

(7) An order under sections 1 to 5 requires the consent of the Welsh Ministers to make provision not falling within subsection (6)—

(a) which modifies the functions of the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government, or

(b) which could be made by any of those persons.”

The Order

5. In 2009 the British Waterways Board (“the Board”) published a corporate strategy which called for the corporation to be transformed into a charitable body. The Board argued that this would enable the corporation to access new sources of funding to help close the funding gap they faced and would give stakeholders greater involvement in the running of the waterways network. Following the publication of this Strategy, the UK Government announced in October 2010 that the corporation would become a charitable body in receipt of a long term funding contract from the Government for the maintenance of the waterways. In November 2010, the Scottish Government announced that it wanted British Waterways Scotland to remain a public body and so would be seeking the separation of the organisation into a Scotland only and an England and Wales body.

6. A three month consultation on the future of waterways in the UK and on the change of status of the body in England and Wales was launched by Defra in March 2011 with the Department’s response to the consultation published in September 2011. A further consultation on the legal framework for the transfer of functions from the British Waterways Board to the new organisation was launched in September 2011 with Defra reporting on the conclusions of this consultation in December 2011. In October 2011, the UK

Government announced that the new organisation would be called the Canal and River Trust and Glandwr Cymru in Wales.

7. The Canal and River Trust/Glandwr Cymru will be a charitable trust outside the public sector and therefore be able to access alternative sources of funding in a manner that has been compared with the National Trust. The draft Order was laid before Parliament on the 29th February 2012, and will be subject to an affirmative resolution of both Houses of Parliament.

8. A related order has also been laid before Parliament – the Inland Waterways Advisory Council (Abolition) Order 2012. The consent of the Assembly has not been sought in relation to that Order, although the consent of the Scottish Parliament has been sought under section 9(1) of the Act, and Welsh Ministers have been consulted. The Inland Waterways Advisory Council is an independent statutory body, created on 1 April 2007 to advise Government, navigation authorities and other interested persons on matters relevant to Britain's inland waterways. Its sponsoring department is the Department for Environment, Food and Rural Affairs (DEFRA), and it also receives funding from the Scottish Government.

9. The functions of the Board are described on its website as follows –

“We are involved in a wide range of work to ensure Britain's inland waterways are looked after now and for many years to come.

Very importantly we work hard to make sure that the public has attractive, safe and accessible waterways to visit and enjoy. We also ensure our waterways are kept in a good condition for our many boating customers.

Our biggest work commitment is to maintain and improve our waterways, whilst providing good customer service. We use our assets to maximise our revenue through some innovative commercial ventures, as Government grants alone do not cover the cost of running British Waterways.

We also have the usual functions that you'd expect to find in a large public-facing organisation including marketing, engineering, finance, HR, Legal and ICT. Click on the Work for Us section to find current vacancies within British Waterways.”

10. The proposed order will transfer the functions of the Board in relation to England and Wales to the Canal and River Trust/Glandwr Cymru. Its length, however, is largely attributable to the need to sever the England and

Wales functions from the Scottish functions, which involves many detailed textual amendments. The appropriateness of those textual amendments will be the subject of technical scrutiny by the Joint Committee on Statutory Instruments at Westminster, and is not a role for the Assembly's committees.

The Consent Memorandum

11. This is not a Legislative Consent Memorandum within the meaning of Standing Order 30, as it does not relate to provisions contained in a Bill before the UK Parliament. Nevertheless, it is similar in that it contains provisions amending primary legislation applicable to Wales in relation to matters within the legislative competence of the National Assembly.

12. As is explained in paragraph 4 above, the role of the Assembly under the Act is to consent (or not) to "provision which would be within the legislative competence of the Assembly if it were contained in an Act of the Assembly". It is therefore important to identify the relevant scope of that competence.

13. The Legislative Consent Memorandum identifies in paragraphs 10-14 the functions that it considers come within the Assembly's legislative competence. They relate to the Welsh Language and land management. The latter point is explained more fully in paragraph 8.18 of the Explanatory Document to the Order.

14. However, it is clear from the functions quoted in paragraph 7 above that the Board has a role that relates far more broadly to the Assembly's legislative competence. The Assembly, for example, has legislative competence in relation to "Ancient monuments. Buildings and places of historical or architectural interest." (Subject 2 (Ancient monuments and historic buildings) Schedule 7 to the Government of Wales Act 2006) Canals in Wales form an important part of that heritage.

15. The Assembly also has competence in relation to "Land drainage" (Subject 6 (Environment) Schedule 7), an important role for Wales' waterways. Under Highways and Transport (Subject 10 of Schedule 7) there are indeed a number of relevant exceptions to the Assembly's legislative competence, such as "Navigational rights and freedoms" and "Harbours, docks, piers and boatslips". Nevertheless, it is not clear why the Government has considered the assembly's legislative competence in relation to Transport facilities and services to be irrelevant. Above all, the Assembly has legislative competence in relation to tourism (Subject 17 of Schedule 7), the encouragement of which appears to be a primary role of the Board according to the description quoted in paragraph 7.

16. The Consent Memorandum refers to two specific aspects of the Assembly's legislative competence, whilst ignoring others that are, to say the least, relevant. If those areas of the Assembly's competence are not considered applicable, a full explanation should have been provided.

Conclusion

17. The Committee has identified no specific objection to the making of the Order. **However, the Committee draws the Assembly's attention** to the inadequate information provided in the Legislative Consent Memorandum, which has hindered scrutiny of the Order.

Constitutional and Legislative Affairs Committee

March 2012