



Constitutional and Legislative Affairs Committee

Report on the Public Bodies (Abolition of Her Majesty's Inspectorate of Courts Administration and the Public Guardian Board) Order 2012

Background

1. The Minister for Health and Social Services has given notice of a motion—
“To propose that the National Assembly for Wales agrees, in accordance with section 9 (6) of the Public Bodies Act 2011 (“the Act”), that the Secretary of State make the Public Bodies (Abolition of HM’s Inspectorate of Courts Administration and the Public Guardian Board) Order 2012 (“the Order”), in accordance with the draft laid in Table Office on 14th May 2012.”
2. This Memorandum was considered in accordance with the arrangements agreed by the Business Committee on the 7th February 2012. The plenary debate for this motion is scheduled for 17 July 2012 subject to the view of the Constitutional Affairs and Legislative Affairs Committee.
3. The Parliament Under-Secretary of State for Justice, wrote to the Welsh Government in March 2012 to seek agreement to lay a consent motion in the National Assembly for the provisions within this Order which come within section 9 (6) of the Act. This agreement was given. The Order was laid under section 11 of the Act on 10 May 2012 before the House of Commons by the Secretary of State Kenneth Clarke. The Instrument has been considered by the Joint Committee on Statutory Instruments on the 23rd May, which did not identify any matters to be reported to the two Houses. The scrutiny period in the House of Commons expires on 25 June 2012.

The Order:-

4. The Order is made under sections 1, 6 (1), (2) (a) and (5) and 35 (2) of the Act.
5. 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 in Wales in relation to a matter within the legislative competence of the National Assembly, i.e. Mental Capacity. A comparison can be made with the Local Better Regulation Office (Dissolution and Transfer of Functions, etc.) Order 2012, which extended the application of the legislative consent principle to amendments to primary legislation made by Order by UK Ministers.¹

6. The Order abolishes the Public Guardian Board (“the Board”) established under the Mental Capacity Act 2005 (“MCA”). The duty of the Board is to scrutinise and review the way in which the Public Guardian discharges his functions and to make appropriate arrangements to the Lord Chancellor. The functions conferred upon the Public Guardian are set out under section 58 of the MCA and include supervisory functions in relation to individuals who lack mental capacity for making decisions. The decision to abolish the Board follows the outcome of the UK Government’s 2010 review of public bodies. The intention following abolition of the Board is to replace the functions of the Board by strengthening governance arrangements within the Office of the Public Guardian, which exists as an executive agency of the UK Government. There is no transfer of functions in respect of the Board. As well as abolishing the Board, the Order would make repeals and revocations associated with the abolition.

7. This is a Composite Order which also includes the abolition of the HM Inspectorate of Court Administration (“HMICA”). HMICA was set up under section 58 of the Courts Act 2003 and has a statutory duty to inspect and report to the Lord Chancellor on the system that supports the carrying on of the business of the Crown, County and Magistrates’ courts and the services provided for those courts. For HMICA, two functions are transferred to HM Chief Inspector of Prisons. However, HMICA does not fall within the legislative competence of the National Assembly.

The Consent Memorandum

8. The National Assembly has legislative competence in relation to “mental capacity” (under Subject 9 (Health and Health Services) of Schedule 7; and Subject 15 (Social Welfare) of Schedule 7 to the Government of Wales Act 2006. It is within the competence of the National Assembly to establish some sort of regime which makes provision of the prevention, treatment and alleviation of mental disorder and/or for the protection of vulnerable persons. This competence is considered sufficiently broad enough to establish a board that is tasked with supporting and protecting the rights of individuals who have a mental disorder and to also establish a body which exercises similar functions to the Board in relation to Wales. To the extent that the National Assembly has the competence to create such a body, it would also have the power to abolish it.

¹ Minister’s Consent Memorandum for the Local Better Regulation Office (Dissolution and Transfer of Functions, etc.) Order 2012 and guidance contained in Devolution Guidance Note 9.

9. Section 9 (6) of the Act provides that an order to abolish, merge or transfer the functions of a public body requires the consent of the National Assembly to make provision which would be within the legislative competence of the Assembly if it were contained in an Act of the Assembly. Section 9 (7) of the Act states that an order requires the consent of the Welsh Ministers to make provision not falling within subsection (6) which either modifies the functions of the Welsh Ministers, the First Minister or the Counsel General.

10. The Order, in abolishing the Board, is legislating for a purpose which falls within the legislative competence of the National Assembly, and for this reason the consent of the National Assembly is sought pursuant to section 9(6) of the Act, in so far as the Order makes provision to abolish the Board in relation to Wales. Abolition of the Board meets the criteria set out under section 9(6) of the Act, as the National Assembly has competence in relation to medical treatment and health services, social welfare and care of vulnerable persons. Abolition of the Board does not meet the criteria under section 9(7) of the Act. Abolition of HMICA meets neither the criteria under section 9(6) nor section 9(7) of the Act.

Conclusion

11. The Committee considered CLA CM4 - Consent Memorandum for The Public Bodies (Abolition of Her Majesty's Inspectorate of Courts Administration and the Public Guardian Board) Order 2012. Although it was observed that it would be clearer if the abolition of the Public Guardian Board and the HM Inspectorate of Court Administration were achieved through the making of two different orders, the Committee identified no reason why consent should be withheld.

12. The Committee is content with the information available and reports to the Assembly that it has identified no objection to the making of the Order.