

Paratowyd y ddogfen hon gan gyfreithwyr Cynulliad Cenedlaethol Cymru er mwyn rhoi gwybodaeth a chynghor i Aelodau'r Cynulliad a'u cynorthwyywyr ynghylch materion dan ystyriaeth gan y Cynulliad a'i bwyllgorau ac nid at unrhyw ddiben arall. Gwnaed pob ymdrech i sicrhau bod y wybodaeth a'r cynghor a gynhwysir ynddi yn gywir, ond ni dderbynnir cyfrifoldeb am unrhyw ddibyniaeth a roddir arnynt gan drydydd partion.

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## **Constitutional and Legislative Affairs Committee**

### **LEGISLATIVE CONSENT MEMORANDUM THE PUBLIC BODIES (ABOLITION OF THE PUBLIC GUARDIAN BOARD AND HM INSPECTORATE OF COURT ADMINISTRATION) ORDER 2012**

#### **Legal Advice Note**

#### 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 14<sup>th</sup> 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 not yet been considered by the Joint Committee on Statutory Instruments. 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 ie. 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.<sup>1</sup>

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.

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<sup>1</sup> 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 is recommended to consider whether it is content with the current order and also whether any lessons can be learnt from this example following consideration of the Local Better Regulation Office (Dissolution and Transfer of Functions, etc.) Order 2012 in February 2012.

**Legal Services**

**May 2012**

## **Annex**

Section 9 (6) and (7) and Schedule 1 of the Public Services Act 2011

**Section 9:–**

(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.

**Section 1, Schedule 1:–**

(1)A Minister may by order abolish a body or office specified in Schedule 1.

**Power to abolish: bodies and offices:–**

Administrative Justice and Tribunals Council.

Advisory Committee on Hazardous Substances (established under section 140(5) of the Environmental Protection Act 1990).

Advisory Committee on Pesticides and Advisory Committee on Pesticides for Northern Ireland (bodies established under section 16(7) of the Food and Environment Protection Act 1985).

Agricultural dwelling–house advisory committees for areas in England.

Agricultural Wages Board for England and Wales.

Agricultural wages committees for areas in England.

Aircraft and Shipbuilding Industries Arbitration Tribunal.

British Shipbuilders and any subsidiary of British Shipbuilders (within the meaning of section 1159 of the Companies Act 2006).

BRB (Residuary) Limited.

Child Maintenance and Enforcement Commission.

Commission for Rural Communities.

Committee on Agricultural Valuation (the body established under section 92 of the Agricultural Holdings Act 1986).

Competition Service.

Courts boards.

Crown Court Rule Committee.

Disability Living Allowance Advisory Board.

Disabled Persons Transport Advisory Committee.

Environment Protection Advisory Committees established under section 12 of the Environment Act 1995 other than the one established pursuant to subsection (6) of that section (Wales).

Food from Britain.

Home Grown Timber Advisory Committee.

Inland Waterways Advisory Council.

**Her Majesty's Inspectorate of Court Administration.**

Library Advisory Council for England.

Magistrates' Courts Rule Committee (established under section 144 of the Magistrates' Courts Act 1980).

National Consumer Council ("Consumer Focus").

National Endowment for Science, Technology and the Arts.

Plant Varieties and Seeds Tribunal.

**Public Guardian Board.**

Railway Heritage Committee.

Regional and local fisheries advisory committees established under section 13 of the Environment Act 1995 other than the one established pursuant to subsection (5) of that section (Wales).

Registrar of Public Lending Right.

Sports Grounds Safety Authority.

Valuation Tribunal Service.

Victims' Advisory Panel.