Economy, Energy and Tourism Committee

4th Report, 2012 (Session 4)

Public Body Consent Motion - National Endowment for Science, Technology and the Arts

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Economy, Energy and Tourism Committee

Remit and membership

Remit:

The remit of the Committee is to consider and report on the Scottish economy, enterprise, energy, tourism and renewables and all other matters within the responsibility of the Cabinet Secretary for Finance, Employment and Sustainable Growth apart from those covered by the remit of the Local Government and Regeneration Committee and matters relating to the Cities Strategy falling within the responsibility of the Cabinet Secretary for Health, Wellbeing and Cities Strategy.

Membership:

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The Committee reports to the Parliament as follows—

Background

Public Bodies Consent Motions

1. The purpose of the relevant UK statutory instrument is to abolish the National Endowment for Science, Technology and the Arts (NESTA) as part of the UK Government's public bodies reform programme and allow NESTA to transfer to charitable trust status.

2. The procedure for consideration of this instrument varies slightly from that used when considering a Legislative Consent Memorandum (LCM). Typically, an LCM is lodged when changes are being made to a Bill in the UK Parliament which relates to devolved matters of changes the powers of the Scottish Parliament or the Scottish Ministers. However, in this case, the change to the status of NESTA is being introduced via a statutory instrument in the UK Parliament, and not through primary legislation. In any case, this change of status requires consent of the Scottish Parliament.

3. At its meeting on 11 December 2011, the Parliamentary Bureau agreed an interim arrangement for the parliamentary scrutiny of such instruments, with a view to the Standards, Procedures and Public Appointments Committee considering the procedure in the longer term. This is the first such example of this procedure being used in the Scottish Parliament.

Policy issues

4. The Public Bodies Act 2011 provides UK Ministers with the power to make orders to improve the exercise of public functions, having regard to efficiency, effectiveness, economy and securing accountability to Ministers. Section 9(1) of the Act requires the consent of the Scottish Parliament to any order that would be within the legislative competence of the Parliament.

5. As NESTA was established by legislation (Part II of the National Lottery Act 1998), legislation is required to abolish it. The Public Bodies Act 2011 confers
powers on Ministers in relation to certain public bodies and offices. Section 1 of the Act enables Ministers to abolish by order public bodies which are listed in Schedule 1, including NESTA.

6. As required by sections 9 and 10 of the Public Bodies Act 2011, the UK Government is either seeking consent to the order or consulting the Devolved Administrations. The order will not be made until consent is obtained from the Scottish Parliament (in accordance with subsection 9(1)(a) of the Act) and the Northern Ireland Assembly (in accordance with subsection 9(3)(a) of the Act). Welsh Ministers have been consulted on the proposal in accordance with section 9(1)(e) of the Act and section 63(1) of the Government of Wales Act 2006.

7. This order abolishes NESTA on 1st April 2012 or, if the order is made on or after 1st April 2012, 28 days after the day on which it is made. The order makes consequential amendments and contains an amendment to Schedule 1 to the Public Bodies Act 2011.

8. A transfer scheme will be made by the Minister using the powers under section 24 (1)(a) of the Act at the same time as the order is made. This will transfer all property, rights and liabilities of NESTA relating to the National Lottery endowment to a charitable trust, the NESTA Trust, as well as all other property, rights and liabilities and employees relating to NESTA to a charity, NESTA Operating Company, which is a company limited by guarantee and has been appointed as the sole trustee of the NESTA Trust. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) will apply to this transfer. The transfer scheme will be laid in the UK Parliament once the order has been made. A draft transfer scheme can be found in the UK Parliament's libraries.

9. A six week public consultation on the proposal to abolish NESTA and establish it as an independent charity with a separate charitable trust to hold the National Lottery endowment was launched on 18 October 2011 and closed on 29 November 2011. The majority of responses supported UK Government’s proposal that NESTA does not need to be part of the public sector, and that it will benefit from having more independence from Government. The UK Government’s formal response to the consultation has been published on the BIS website at: www.bis.gov.uk/consultations/

10. The Scottish Government’s consent memorandum (see Annex) explains that the UK Department for Business, Innovation and Skills (BIS), which is promoting the order, considers that while lotteries are a reserved matter, the specific matters in relation to which NESTA exercises its functions (science, technology and the arts) are not generally reserved. It therefore concludes that the removal of NESTA’s functions is a matter that would fall within the legislative competence of the Scottish Parliament. The consent of the Parliament is therefore required before the order can be made.

Consideration by the Economy, Energy and Tourism Committee

11. The Committee considered the Public Body Consent Memorandum and the report of the Subordinate Legislation Committee at its meeting on 7 March. Members raised no issues in relation to the draft motion.
12. Consequently, it was agreed to recommend to the Parliament that the Public Bodies Consent Motion should be approved.
PUBLIC BODY CONSENT MEMORANDUM

DRAFT PUBLIC BODIES (ABOLITION OF THE NATIONAL ENDOWMENT FOR SCIENCE, TECHNOLOGY AND THE ARTS) ORDER 2012

Draft Public Body Consent Motion

The draft motion, which will be lodged by the Cabinet Secretary for Education and Lifelong Learning, is:

“That the Parliament consents to the making of the Public Bodies (Abolition of the National Endowment for Science, Technology and the Arts) Order 2012, a draft of which was laid before the United Kingdom Parliament on 19th January 2012 and which makes provision which would be within the legislative competence of the Parliament if it were contained in an Act of that Parliament.”

This memorandum has been lodged by Michael Russell, Cabinet Secretary for Education and Lifelong Learning, in accordance with interim arrangements agreed by the Parliamentary Bureau at its meeting on 20 December 2011.

Public Bodies Act 2011

The UK Public Bodies Act 2011 (“the 2011 Act”) gives UK Ministers the authority (via order making powers) to abolish, merge or transfer the functions of public bodies listed in its schedules, and some of those bodies operate in both the reserved and devolved areas. Section 9 of the 2011 Act acknowledges the scope for incursion into devolved interests by requiring orders that include provision falling within devolved competence to be consented to by Holyrood.

On 20 December 2011 the Parliamentary Bureau approved interim arrangements for handling requests for consent to orders triggering section 9 of the 2011 Act.

NESTA

The National Endowment for Science, Technology and the Arts (“NESTA”) was established by section 16 of the National Lottery Act 1998. A draft Order to abolish NESTA using powers contained in the Public Bodies Act 2011 was laid before the UK Parliament on 19 January 2012. Copies of the draft NESTA Order and the accompanying draft explanatory memorandum, as laid at Westminster, are provided in Appendixes A and B. A copy of the draft Order can be found at: http://www.legislation.gov.uk/ukdsi/2012/9780111519394/contents. The NESTA Order is the first order to be promoted under the 2011 Act which requires consent in accordance with the requirement set out at section 9 to the 2011 Act.

NESTA was established as a non-departmental public body by section 16 of the National Lottery Act 1998. Its functions are “to support and promote talent, innovation and creativity in the fields of science, technology and the arts”. It operates in Scotland as well as across the rest of the UK and receives its funding
from a National Lottery endowment out of money in the National Lottery Distribution Fund.

As a NDPB, NESTA operates at arms length from Government. Whilst the sponsor department, the Department for Business Innovation and Skills (BIS), has a role to support and challenge NESTA, it does not direct NESTA or its work programmes and its strategy is determined by its members. It has financial independence by virtue of the endowment.

In recent years, NESTA has focused on supporting and promoting talent, innovation and creativity by developing models of innovation for the wider public benefit. It achieves its objects by running practical experiments and commissioning policy and research work for wider dissemination and adoption by policy makers. NESTA’s portfolio of projects changes from year to year as it experiments and adapts to changing societal and economic challenges. It is also one of the UK’s largest seed-stage investors, combining capital investment with non-financial support to help innovative early stage companies.

Recent Scottish-based activities include the “Starter for 6” enterprise training programme that supports up-and-coming creative entrepreneurs across Scotland; investments in Aquapharm Biodiscovery and Design LED products; and participation of a number of Highland schools in “idiscover” which offers students credits to spend on on-line learning experiences. Under its new remit as a charitable organisation, NESTA will continue to operate in Scotland as before but with revised and more broadly inclusive remit that will, for the first time, include activities in the voluntary sector and in social enterprises.

There are no anticipated risks for NESTA or its activities as a result of the proposed changes, and the Charity Commission has indicated that there will be no negative effect on NESTA’s work as a consequence of its transition to charity status.

**Legislative issues**

NESTA is funded through payments from lottery funds the specific matters in relation to which NESTA exercises its functions - science, technology and the arts – are not on the whole reserved matters in Scotland. And although the Scottish Parliament does not have the competence to abolish NESTA across the whole of the UK (which is the effect of article 2 of the Order), it is the effect of the abolition itself, in particular in relation to the removal of NESTA’s functions in Scotland, which falls within the competence of the Scottish Parliament. This is because the functions which NESTA exercises in Scotland relate broadly to devolved matters and accordingly, it would be open to the Scottish Parliament to legislate to provide that some or all of NESTA’s devolved functions are no longer to be exercisable in Scotland.

This type of analysis is already accepted in relation to “cross-border public authorities” within the meaning of section 88(5) of the Scotland Act 1998. Section 90(1) of the Scotland Act assumes that the Scottish Parliament has a degree of legislative competence to remove functions from such cross-border bodies in so far as those functions are exercisable in Scotland within devolved competence.
UK Government reform proposal

In October 2010, the UK Government announced that it proposed to abolish NESTA as a NDPB and reconstitute it as a charitable trust in the public sector, which would hold NESTA’s National Lottery endowment; and a charity in the voluntary sector which would apply the endowment in its capacity as trustee of the trust. This would allow NESTA to continue its work while protecting the endowment and further distancing it from Government.

In reaching the decision to reconstitute NESTA as a charity, and in line with its wider review of public bodies, the UK Government applied three tests to determine whether NESTA should remain a public body:

- Does it perform a technical function?
- Do its activities require political impartiality?
- Does it need to act independently to establish facts?

It was the UK Government’s view that NESTA did not meet these three criteria and so did not think it necessary that NESTA remain as an NDPB or continue to be part of the public sector in order to carry out its functions.

In assessing NESTA’s future, several options were explored by the UK Government before identifying its preferred policy option. These were:

- **Do nothing.** This option was considered alongside the UK Government’s three tests for a public body and NESTA did not meet these three criteria.

- **Abolition.** NESTA could be abolished and the endowment returned to the National Lottery Distribution Fund for redistribution. This option was rejected as there is currently no other suitable body to perform NESTA’s functions, its programmes for wider public benefit would cease and the public investment in NESTA via the National Lottery Distribution Fund would be lost.

- **Merger.** NESTA could merge with another body which carries out similar functions or operates in a similar policy area. This option may enable NESTA to enhance its impact by providing a wider array of stakeholders and opportunities for future programmes and could include efficiencies and savings from sharing accommodation and back office costs. However, this option was rejected as there was no comparable organisation to merge with without considerably altering NESTA’s direction, brand, mission and activities.

- **Reconstitution of NESTA as a private sector body.** NESTA’s activities could be transferred to a private sector (non-charitable) body; either a company limited by guarantee incorporated under the Companies Act 2006 or a company incorporated by royal charter. The body should be non-profit as the potential for private shareholders to profit from National Lottery funds in the form of the endowment was deemed to be inappropriate. This option was ultimately rejected as the need for suitable controls to ensure propriety
of expenditure of the endowment is at odds with ensuring the level of UK Government control does not cause the new body to be classified to the public sector.

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Scottish Government position

The Scottish Government is supportive of the proposal to reconstitute NESTA as a charitable organisation. The order-making powers in the Public Bodies Act are designed to enable UK Ministers to take forward the reform of a substantial number of public bodies for which the UK Government is responsible. This is consistent with the Scottish Government’s continuing commitment to simplify and streamline the public bodies landscape in Scotland.

The responses to the consultation provided no evidence of opposition within Scotland to the proposals, nor any evidence that the reconstitution of NESTA would give rise to any detriment to the existing relationship between NESTA and Scottish organisations or to the programmes that NESTA supports in Scotland.

As a charitable organisation, NESTAs remit will include the ability to undertake research and fund activities in the voluntary and third sector areas. This revised remit accords with the Scottish Government’s Economic Strategy which acknowledges the role that social enterprises have in relation to economic activity and encourages the third sector to increase its economic contribution.

Order to abolish NESTA

The UK Government laid the draft Public Bodies (Abolition of the National Endowment for Science, Technology and the Arts) Order 2012 before the UK Parliament on 19 January 2012 in exercise of the powers conferred by sections 1(1), 6(1) and (5) and 35(2) of the Public Bodies Act 2011. The Order is due to come into force on 1st April 2012 or, if the Order is made on or after 1st April 2012, 28 days after the day on which it is made.

This order if passed would abolish NESTA. At the same time, a transfer scheme made by UK Ministers under section 23(1)(a) of the Act would transfer all property, rights and liabilities of NESTA relating to the National Lottery endowment to a charitable trust (“the NESTA Trust”), as well as all other property, rights and liabilities and employees relating to NESTA to a charity (“the NESTA Operating Company). The charity - constituted as a company limited by guarantee - would be appointed as the sole trustee of the NESTA Trust. A copy of the draft transfer scheme is provided in Appendix [C].
Reasons for seeking a Legislative Consent Motion

Most of the bodies listed in the schedules to the Act operate wholly in the reserved area. However, the public body landscape across the UK includes bodies operating in both the reserved and devolved areas. Section 9 of the 2011 Act requires orders under section 1 to 6 of the Act which make provision affecting these public bodies which would be within the legislative competence of the Scottish Parliament to be consented to by the Scottish Parliament.

The Order makes provision which has the effect of abolishing certain functions of NESTA in or as regards Scotland (namely the promotion of talent, innovation and creativity in the fields of science, technology and the arts). As provision to abolish these functions is within the legislative competence of the Scottish Parliament, the Order requires the consent of the Scottish Parliament before it can be made by a UK Minister.

Scottish interests

The reconstituted NESTA will continue to operate in Scotland and, under its new charitable remit, its revised objectives will include specific reference to activities undertaken in the voluntary sector and social enterprises.

Consultation

A public consultation on the proposal to abolish NESTA as a public body and reconstitute it as a charitable body was held by BIS and closed on 29 November 2011. The results indicated strong support for the proposed policy of abolition as a NDPB and reconstitution as a charity.

Financial Implications

We do not anticipate that any new costs will fall on the Scottish Government or public bodies in Scotland as a direct result of the provisions in the Order.

Charitable status in Scotland

The presence of an office in Dundee requires NESTA to present itself as a charity in Scotland. The Office of Scottish Charity Regulator has confirmed that registration has been completed and a Scottish charity number (SCO42833) has been allocated.

Conclusion

Accordingly the Government invites the Parliament to consent to the making of the Public Bodies (Abolition of the National Endowment for Science, Technology and the Arts) Order 2012, a draft of which was laid before the UK Parliament on 19 January 2012 and which makes provision which would be within the legislative competence of the Parliament if it were contained in an Act of that Parliament.

Scottish Government, February 2012
Members who would like a printed copy of this *Numbered Report* to be forwarded to them should give notice at the Document Supply Centre.