

**National Assembly for Wales**  
Subordinate Legislation Committee

**Inquiry into the Scrutiny of Subordinate  
Legislation and Delegated Powers**

May 2009



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Cardiff Bay  
CF99 1NA

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Fax: 029 2089 8021  
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## **Chair's Foreword**

The National Assembly for Wales has undergone many changes since the passing of the 2006 Government of Wales Act. The remit of the Committee has greatly increased as a result of Standing Orders put in place after the act, these changes led the Committee in establishing an inquiry to consider this enhanced remit and how best it could fulfil this new role. This inquiry looked at the Committees current process and how best to approach its enhanced remit, beyond the technical scrutiny of statutory instruments.

The inquiry examined the role of the Committee in some detail. The Committee was provided with written evidence, oral evidence and undertook visits to the House of Lords and the Scottish Parliament. This was relevant, as in many ways, the new Subordinate Legislation Committee performs the work accorded to five different Committees at Westminster, and has more powers than the Scottish Parliament Legislation Committee. This evidence led to many considerations on the way the Committee works and the priorities for the Committee.

The Committee has yielded some very useful actions and recommendations with the aim of improving the scrutiny of delegated powers and the legislative process, both within the National Assembly for Wales, between Westminster and Cardiff as well as between Europe and the National Assembly for Wales. The Committee considers that should these recommendations be accepted they will lead to more effective working and re-focusing of the Committee on its role following its enhanced remit as outlined in Standing Orders. This strategic approach to the Committee's work will improve its outcomes and encourage closer working with the Welsh Assembly Government and the UK Government.

The report highlights the need for more transparency in the legislative process and following the Government of Wales Act 2006 the need to make this process more open and accessible to everyone in Wales. The evidence points clearly to the Subordinate Legislation Committee being the appropriate vehicle through which better scrutiny of delegated powers can take place, not only of legislation as it is developed with the National Assembly but also of powers being devolved from Westminster to Welsh Ministers. The report shows that the Committee should be working more broadly and considering UK Government legislative proposals. This issue is important to ensure full scrutiny of Westminster Legislation which devolves powers to Welsh Ministers and to ensure any implications for Wales are fully recognised and scrutinised.

I would also like to add my thanks to Dr Dai Lloyd who as the previous Chair of this Committee steered the Committee through most of its work together with Anna Daniel as the previous Committee Clerk, their support in drawing up this report was invaluable.

I would commend the recommendations within this report to you.

Janet Ryder  
Chair, Subordinate Legislation Committee. May 2009

## **Subordinate Legislation Committee**

### **Committee Membership**

Eleanor Burnham (26/06/07-13/01/09)	Welsh Liberal Democrat	North Wales
Alun Davies	Labour	Mid & West Wales
Mike German (13/01/09 - )	Welsh Liberal Democrat	South Wales East
Mark Isherwood	Welsh Conservative Party	North Wales
Dai Lloyd (26/06/07-13/01/09)	Plaid Cymru	South Wales West
Janet Ryder (13/01/09 - ) (Chair)	Plaid Cymru	North Wales
Joyce Watson	Labour	Mid & West Wales



## **1. Summary of actions and recommendations**

1.1 These are the recommendations and conclusions of the inquiry into the scrutiny of subordinate legislation. The inquiry was established to look at the current process and to help the Committee decide how best to approach its enhanced remit, beyond the technical scrutiny of statutory instruments which it is obliged to undertake under Standing Order 15.

1.2 The inquiry focused in particular on how it should approach the areas of work which are not obligatory and the implications for the Committee's working practices. The inquiry has led to a number of actions which will enhance the work of the committee, and a number of recommendations to improve the processes involved.

### **Actions for the Committee**

**The Committee agreed the following actions.**

#### **Action 1**

The Committee agrees that it should undertake merits scrutiny of statutory instruments, focusing in the first instance on the merits of statutory instruments subject to the affirmative procedure (also see sections: 'The role of Scrutiny Committee in relation to subordinate legislation' and 'Taking the work forward: the implications of the Committees conclusions for its future approach to scrutiny').

#### **Action 2**

Explore the option of considering draft statutory instruments before they are laid, with a view to amending Standings Orders to ensure that no ambiguity exists in respect of this function.

#### **Action 3**

The Committee considered that the potential for involving external stakeholders in the process of scrutinising Statutory Instruments would be limited bearing in mind the limited 20 day deadline for reporting set out in Standing Order 15.4. However, work should be undertaken to ensure that stakeholders better understand the subordinate legislation processes.

#### **Action 4**

The Committee agreed that it was important to monitor the quality of information provided in the Explanatory Memorandum laid with Statutory Instruments and will do this in future as part of the Committee's annual review as it develops the approach to and the amount of its merits work.

**Action 5**

Liaise with Scrutiny Committees, mainly at the level of officials in the first instance, paying particular attention to concerns about forthcoming statutory instruments which have been identified during the course of inquiries, scrutiny of ministers, and those identified by Legislation Committees during the passage of Measures and Bills.

**Action 6**

To work with the European and External Affairs Committee to consider mechanisms that would serve to link the work of the European and External Affairs Committee with the Subordinate Legislation Committee when considering European Union Directives of particular interest or concern.

**Action 7**

The Committee agrees that it should undertake systematic scrutiny of the delegation of powers from Westminster to Welsh Ministers in Bills, to address this current scrutiny gap.

**Action 8**

In adopting the role of systematic scrutiny of all UK Bills, the Committee would be well placed to monitor relations between UK government departments and the Welsh Assembly Government across the departments, with a view to highlighting areas of good practice and areas where better relations need to be established between departments.

**Action 9**

Seek to establish a closer working relationship between the Subordinate Legislation Committee and Westminster Committees, to ensure that Committees are aware of the implications for Wales of UK Bills and to assist with notification of amendments made during the passage of a Bill. The Committee would like to pursue this dialogue on how to ensure this happens with the Welsh Affairs Committee and others in Westminster.

**Action 10**

The Committee should have the option to consider draft Bills with significant Welsh provisions (and considers that Standing Orders should be amended to reflect this).

### **Action 11**

The Committee will implement initial changes over a 6 month period on an incremental basis and will undertake a review in 6 to nine months. This review will consider the impact of the changes and new ways of working introduced and possible future changes, which could be made if more resources were made available to the Committee.

## **Recommendations of the Committee**

### **Recommendation 1**

To aid the Committee in its scrutiny of the merits of Statutory Instruments, the Committee requests that the Welsh Assembly Government notifies it of any consultations on statutory instruments undertaken by Welsh Ministers.

### **Recommendation 2**

The Welsh Assembly Government's provision of information to the public on subordinate legislation is reviewed by the Counsel General.

### **Recommendation 3**

The Welsh Assembly Government should aim to submit to the Assembly a 6 monthly forward work programme which should include:

- departmental plans for consultations on Statutory Instruments;
- all Statutory Instruments which it aims to submit to the Committee;
- department plans to exercise Ministerial delegated powers granted as a result of new Acts of Parliament and Measures adopted within the previous 6 months.

### **Recommendation 4**

The Counsel General should review the way in which information is made available to the Assembly on how European Directives will be implemented by Welsh Ministers, including the provision of transposition notes in Explanatory Memoranda to Statutory Instruments, to improve transparency to the public and the Assembly.

Once Directives are adopted and need to be transposed into regulations by Welsh Ministers, it would aid transparency if the Welsh Assembly Government were to produce transposition plans when implementing European Union Directives, similar to the proposal in Scotland.

#### **Recommendation 5**

That the Business Committee give consideration as to how Legislative Consent Memoranda under Standing Order 26 could be subject to scrutiny prior to debate in Plenary.

#### **Recommendation 6**

The Welsh Assembly Government or the Wales Office should provide a detailed legislative statement to accompany the UK Government draft and annual legislative work programme. This should detail what powers the Welsh Assembly Government wish to seek via the UK government's legislative work programme.

#### **Recommendation 7**

The Committee recommends closer liaison between the UK Government and Welsh Assembly Government to ensure it is fully informed and consulted early in the process of developing proposals for Bills, on the UK Government's draft and annual legislative work programme. The Committee believes the Wales Office should play a more active role in ensuring protocol is followed in accordance with Devolution Guidance Note 9.

#### **Recommendation 8**

The Committee requests that the Welsh Assembly Government provides it with the Delegated Powers Memorandum as soon as this is available.

To improve the level of information publicly available about Welsh provisions in UK Bills and to help the Committee effectively scrutinise these provisions, the Welsh Assembly Government should submit the equivalent of a delegated powers memorandum to the Committee on any delegation of legislative powers to Welsh Ministers included in each Bill to supplement that provided

by the UK Government. These should be submitted to the Committee as soon as possible after the Bill is introduced in Parliament.

The Memorandum should include the following information:

- Impact of the Bill in Wales
- What powers are contained in the Bill allowing Welsh Ministers to make subordinate legislation
- Explanation of enabling powers
- Explanation for use of affirmative/negative procedure
- How the powers contained in the Bill impact/change powers currently held by Welsh Ministers
- How the Government intends to implement the powers in the Bill
- How the Government has worked with UK Ministers to ensure that proposed delegated powers are adequate to achieve the outcomes of the Bill and Welsh Assembly Government's policy objectives
- What consultation has been undertaken or what consultation has been proposed

#### **Recommendation 9**

The Welsh Assembly Government should improve the information on Welsh provisions in Bills included on its website; for example, the explanatory memorandum on Welsh provisions in UK Bills as recommended above should be included on the Welsh Assembly Government's website, this will enhance transparency and ease access to information.

#### **Recommendation 10**

The Committee recommends consideration should be given, by Business Committee to changing the name of the Committee. A suggested appropriate title is 'Delegated Powers and Subordinate Legislation Committee'.

## 2. Introduction

2.1 The Remit of the Subordinate Legislation Committee (“The Committee”), which was informed by the report “The Technical Scrutiny of Legislation by the National Assembly from May 2007”<sup>1</sup>, as set out in Standing Order 15 (annex 1) is wider than that of its predecessor Committee of the Second Assembly, the Legislation Committee.

2.2 Under Standing Order 15, the Subordinate Legislation Committee is required to undertake technical scrutiny of Statutory Instruments and can report on whether the Assembly should pay special attention to the instrument or draft on a number of “technical” grounds, such as whether there is doubt that it is *intra vires* (within the legislative competence of Ministers); defective drafting; inconsistencies between the English and Welsh texts etc (SO.15.2).

2.3 The Committee may also report on what is referred to in this report as “the merits of Statutory Instruments”, under Standing Order 15.3, on the following grounds:

- “(i) That it imposes a charge on the Welsh Consolidated Fund or contains provisions requiring payments to be made to that Fund or any part of the government or to any local or public authority in consideration of any licence or consent or of any services to be rendered, or prescribes the amount of any such charge or payment;
- (ii) That it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly;
- (iii) That it is inappropriate in view of the changed circumstances since the enactment under which it is made or is to be made was itself passed or made;
- (iv) That it inappropriately implements European Union legislation; or
- (v) That it imperfectly achieves its policy objectives.”

2.4 Additionally, under Standing Order 15.6 the Committee may consider and report on:

- (i) Any other subordinate legislation laid before the Assembly;
- (ii) The appropriateness of provisions in proposed Assembly Measures and in Bills for Acts of the United Kingdom Parliament that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister or the Counsel General;

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<sup>1</sup> <http://www.assemblywales.org/bus-home/bus-committees/bus-committees-second/bus-committees-second-lc-home/bus-committees-second-leg-policy/bus-committees-second-leg-policy-230506-paper1.htm>

(iii) Consequences for legislation subject to the consideration of the Assembly of draft orders under Part 1 of the Legislative and Regulatory Reform Act 2006;

(iv) The exercise of commencement powers by the Welsh Ministers;  
or

(v) Any legislative matter of a general nature within or relating to the competence of the Assembly or Welsh Ministers.

2.5 The main work of the Subordinate Legislation Committee has mainly been focused on the required “technical” scrutiny of statutory instruments under Standing Order 15.2.

2.6 The Committee agreed in its meeting on 10 June 2008 to launch an inquiry into the scrutiny of subordinate legislation and delegated powers which would look at how the process currently works and to help the Committee decide how best to approach its enhanced remit, beyond the technical scrutiny of statutory instruments which it is obliged to undertake under SO 15.2.

### ***Terms of Reference***

2.7 The agreed terms of reference for the inquiry are as follows:

(i) To review the procedures in place in relation to the scrutiny of subordinate legislation and other legislation falling within the remit of the Committee.

(ii) The Committee’s inquiry will focus in particular on how it should approach the following areas of its work and the implications for the Committee’s working practices:

- scrutiny of statutory instruments on the grounds set out in Standing Order 15.3, for example, that it is of political or legal importance (SO 15.3 (ii)); that it inappropriately implements European Union legislation (SO 15.3(iv)) or that it imperfectly achieves its policy objectives (SO 15.3(v)).
- particular considerations relating to statutory instruments implementing European directives;
- scrutiny of Bills of the UK Parliament which have an impact on Wales.

2.8 The purpose of the consultation was to invite views on how the current procedures worked in relation to the preparation and making of subordinate

legislation by the Welsh Assembly Government and the conferral of delegated powers on Welsh Ministers in UK Bills.

2.9 The Committee perceived that the inquiry would result in:

- better regulation – improved processes for the preparation of subordinate legislation and other legislation within the Committee’s remit with a view to improving the transparency of procedures and the engagement of those affected by them;
- enhanced scrutiny – the results of the inquiry will provide the basis for the Committee’s approach to its enhanced scrutiny remit to ensure effective and timely scrutiny of regulations and other legislation within its remit which goes beyond technical scrutiny.

### *Evidence*

2.10 The Committee agreed to issue a consultation letter (annex 3) to key stakeholders to whom it may be of interest and a general call for evidence was also issued. The deadline for consultation responses was 2 September 2008. The Committee received 9 written submissions (annex 5).

2.11 In addition to written submissions received, the Committee received oral evidence from the following (annex 6):

- Keith Bush, Chief Legal Adviser and Director of Legal Services, National Assembly for Wales
- Cardiff Law School
- Public Affairs Cymru
- Arthritis Care Wales
- Countryside Council for Wales
- Wales Environment Link
- Cymru Yfory
- Counsel General
- Law Society Wales

2.12 The Committee also visited the Scottish Parliament and the House of Lords to consider how they approach the scrutiny of subordinate legislation and delegated powers.

2.13 A note of the visit to the Scottish Parliament can be found here: <http://www.assemblywales.org/bus-home/bus-committees/bus-committees-third1/bus-committees-third-sleg-home/bus-committees-third-sleg-agendas-2.htm?act=dis&id=88489&ds=6/2008>

2.14 A note of the visit to the House of Lords can be found here: [http://www.assemblywales.org/bus-home/bus-committees/bus-committees-third1/bus-committees-third-sleg-home/slc\\_inquiries/slc\\_inquiries-scrutiny\\_of\\_sub\\_leg/national\\_assembly\\_for\\_wales\\_slc\\_3\\_visits/national\\_assembly\\_for\\_wales\\_slc\\_3\\_hol\\_visit.htm](http://www.assemblywales.org/bus-home/bus-committees/bus-committees-third1/bus-committees-third-sleg-home/slc_inquiries/slc_inquiries-scrutiny_of_sub_leg/national_assembly_for_wales_slc_3_visits/national_assembly_for_wales_slc_3_hol_visit.htm)



2.15 As a result of some of the issues raised during the evidence sessions, the Committee felt that it would be useful to consult further on these before discussing its recommendations. These included the role of other Assembly Committees in relation to scrutinising Westminster Bills and regulations, the Welsh Affairs Committee, the Law Commission and Wales Office.

2.16 The Committee agreed on 18 November 2008, to write to the Chairs of all the Assembly's scrutiny committees, Secretary of State for Wales, the Law Commission, the Chair of the Welsh Affairs Committee (and opposition spokespersons on Wales) (annex 4), to invite their views on the evidence received to date about the role of Assembly Committees in relation to scrutinising Westminster Bills and regulations.

2.17 The following report and recommendations represent the conclusions the Committee has reached on the evidence received during the course of its work.

### 3. Background to the Inquiry

#### *What is Subordinate Legislation?*

3.1 The Legislating Body i.e. the National Assembly for Wales or the UK Parliament, can confer powers on Ministers to make further legislation. These powers are referred to as “delegated powers” and are set out in Assembly Measures or Acts of Parliament (primary legislation). Regulations or orders made by Ministers in exercise of their delegated powers are known as subordinate legislation (or secondary legislation) and set out in what are known as Statutory Instruments.

#### *Who can make subordinate legislation?*

3.2 Prior to the Government of Wales Act 2006, the National Assembly for Wales was responsible for making subordinate legislation; it had no primary law making powers. From May 2007, in accordance with the provisions of the *Government of Wales Act 2006*, the National Assembly for Wales now has the power to make some primary legislation (in relation to Wales) in the form of laws known as Assembly Measures. The powers to make subordinate legislation are now directly vested in Welsh Ministers<sup>2</sup> and not in the National Assembly for Wales.

#### *How does subordinate legislation become law?*

3.3 The procedure to which a piece of subordinate legislation is subject to will be determined by the parent Measure or Act of Parliament and Schedule 11 to the 2006 Act or by the Assembly Measure conferring the delegated power.

3.4 Most statutory instruments will be subject to either the negative or affirmative resolution procedure before they are confirmed in law.<sup>3</sup> The majority of subordinate legislation is likely to be subject to the negative resolution procedure.

3.5 Briefly, under the negative procedure, subordinate legislation is made by Welsh Ministers without the Assembly’s approval but could then be overturned (annulled) by the Assembly. Under the affirmative procedure, subordinate legislation must be approved by the Assembly before it is made by Welsh Ministers<sup>4</sup>.

3.6 Further to this, Standing Order 24 sets out certain procedural requirements in relation to subordinate legislation subject to the negative or affirmative resolution procedure.

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<sup>2</sup> Welsh Ministers, the First Minister or the Counsel General are able to make subordinate legislation.

<sup>3</sup> In very rare cases subordinate legislation will be subject to special Assembly procedure, which is set out in Standing Order 25. In addition, some subordinate legislation will be subject to no procedure e.g. commencement orders.

<sup>4</sup> On rare occasions, affirmative subordinate legislation can be made before approval but would only take effect once approval has been given.

## *The evolving role of the National Assembly for Wales*

3.7 Between its creation in 1999 and March 2007, the National Assembly for Wales, as a corporate body, made secondary legislation. In theory, this meant that the Assembly was making legislation for Wales that would be made by Ministers for England with perhaps no parliamentary scrutiny.

3.8 Since May 2007, provisions of the Government of Wales Act 2006 have been in force. The Welsh Assembly Government and the National Assembly for Wales are separate constitutional entities and Welsh Ministers now have powers to make secondary legislation comparable to Ministers in Whitehall and in Scotland. The Assembly meanwhile has acquired the powers to make primary legislation in the form of Measures, on matters where it has acquired legislative competence<sup>5</sup>.

3.9 The new arrangements raise a number of issues in respect of secondary legislation and its scrutiny:

- How subordinate legislation produced by Welsh Ministers can be most effectively scrutinised in light of the new arrangements under the Government of Wales Act and the Committee's enhanced remit to scrutinise the merits of Statutory Instruments;
- Given that the UK Parliament continues to legislate for Wales in certain respects, any scrutiny process must monitor Westminster legislation where powers to make subordinate legislation may be awarded to Welsh Ministers;
- When it is appropriate within an Assembly Measure or Act of Parliament for powers to be delegated to Ministers and whether subordinate legislation should follow the affirmative or negative procedure in the Assembly.

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<sup>5</sup> [http://www.opsi.gov.uk/acts/acts2006/ukpga\\_20060032\\_en\\_1](http://www.opsi.gov.uk/acts/acts2006/ukpga_20060032_en_1)

## 4. Scrutiny of Statutory Instruments

### *Background*

4.1 The Subordinate Legislation Committee is required to undertake “technical” scrutiny of statutory instruments under Standing Order 15.2. This formed the major part of its work during its first year of the Third Assembly.

4.2 The ability of the Committee to undertake “merits” scrutiny is outlined under Standing Order 15.3 which allows the Committee to report on statutory instruments on other grounds, such as that it is of political or legal importance (SO 15.3 (ii)); that it imperfectly achieves its policy objectives (SO 15.3(iv)) or that it imperfectly achieves its policy objectives (SO 15.3(v)).

4.3 Standing Order 15.4 states that the Committee must make any report to the Assembly under SO 15.2 or 15.3 within 20 days of an SI being laid.

4.4 As part of its inquiry, the Committee wished to consider in particular:

- the effectiveness of the Government’s consultation with stakeholders in respect of statutory instruments;
- how the Government works with the UK government when drafting statutory instruments;
- how the Committee can undertake effective and timely scrutiny of regulations in respect of their political or legal importance or policy objectives under Standing Order 15.3;
- the role of other Assembly Committees where regulations fall within their remit;
- what the Committee can learn from the House of Lords Committee on the Merits of Statutory Instruments, whose remit matches that of the Subordinate Legislation Committee’s “merits” function under SO15.3.

### *Merits Scrutiny in the House of Lords*

4.5 In the House of Lords merits scrutiny is undertaken by the Merits of Statutory Instruments Committee (“the Merits Committee”). The Merits Committee was established as a result of the Wakeham Commission<sup>6</sup> which recommended that a “sifting” mechanism should be established, either by way of a joint committee or a Lords-only committee, to identify those statutory instruments which were important and merited further debate or consideration.

4.6 The work of the Merits Committee complements that of the Joint Committee on Statutory Instruments (JCSI). Whereas the JCSI considers technical matters about the legality of proposals, the Merits Committee’s task is to consider the policy implications of Statutory Instruments.

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<sup>6</sup> HL Select Committee on Merits of Statutory Instruments, Guidance for Departments, January 2008. <http://www.parliament.uk/documents/upload/MeritsGuidanceforDepartmentsJanuary2008.pdf>

4.7 The Merits Committee's terms of reference are wide-ranging. Its remit is to consider whether the special attention of the House should be drawn to a Statutory Instrument on any of the following grounds:

- that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
- that it is inappropriate in view of the changed circumstances since the passage of the parent Act;
- that it inappropriately implements EU legislation;
- that it imperfectly achieves its policy objectives.

4.8 As well as alerting the House to any other interesting instruments or instruments on which there may be concerns, the Merits Committee's reports often publish additional information presented in response to the Committee's questions, which may be of wider interest in the House.

## **Technical (Mandatory) and Merits (Discretionary) Scrutiny of Statutory Instruments**

### *Background*

4.9 As mentioned above, the work of the Subordinate Legislation Committee has mainly been focused on the required "technical" scrutiny of statutory instruments under Standing Order 15.2. The "merits" scrutiny function under Standing Order 15.3 is optional.

### *Evidence*

4.10 The evidence received in relation to statutory instruments mainly focused on how the Committee should approach its enhanced remit and ensure a balance between technical and merits scrutiny and some of the challenges the Committee will face in undertaking the additional merits scrutiny.

4.11 In his evidence to the Committee, the Assembly's Chief Legal Adviser<sup>7</sup> commented on the balance between technical (mandatory) and merits (discretionary) scrutiny of statutory instruments by the Committee. He highlighted the issue of the Assembly's limited resources, both in terms of the demands on a small number of Members, their time, and supporting officials. He suggested that Members would better focus their consideration on issues of policy and principle rather than to the minutiae of subordinate legislation.

4.12 Cardiff Law School noted that the Committee's scrutiny work has been limited and not covered the new criteria given to it<sup>8</sup>. Cymru Yfory<sup>9</sup> and the Law Society<sup>10</sup> also suggested that the Committee's ways of working need to be reviewed to allow Members to better focus their time, with staff undertaking

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<sup>7</sup> RoP, para 114-119 29 September 2008

<sup>8</sup> Cardiff Law School, written submission, SLC7

<sup>9</sup> Cymru Yfory, written submission, SLC1

<sup>10</sup> Law Society, written submission, SLC2

the more technical work. Cymru Yfory<sup>11</sup> suggested that the Committee may have difficulties giving the time and attention needed for the more strategic and constitutional aspects of its role.

4.13 Public Affairs Cymru<sup>12</sup> and the Law Society stressed that if the Committee were to undertake merits scrutiny then it needed to be clearly presented and differentiated from technical scrutiny.

4.14 The Law Society stated in its oral evidence:

‘Merits scrutiny is an interesting, and in some respects more fruitful, field to begin to investigate, because one recognises that, in this context, ‘merits’ has a somewhat narrow definition. It is not about ranging over the whole *raison d’être* for subordinate legislation, but, nevertheless, it is an opportunity to probe into the background in terms of the policy that the secondary legislation is intended to implement, and whether it achieves its objectives. In that sense, it is a valuable addition to the scrutiny process’<sup>13</sup>.

#### *The Committee’s view*

4.15 After reviewing the evidence presented on the scrutiny of Statutory Instruments and meeting with members of the House of Lords’ Merits Committee, the Committee agrees that scrutiny of the merits of statutory instruments is an important function to ensure the right level of checks and balances of the use of Ministers delegated powers. The Committee decided that undertaking merits scrutiny would be beneficial.

4.16 The Committee notes that the Merits Committee usually reports in a neutral way, rather than taking a stance on the policy, although it may highlight areas where the House may wish to make further inquiries. Reporting in this way on how the government proposes to implement its policies via regulations, may help improve transparency and flag up to Assembly Members and the public, when subordinate legislation of note has been laid and any potential areas of concern.

4.17 However, the Committee is aware that if it were to consider every statutory instrument, this would pose time constraints on the amount of business the Committee could undertake and would have severe resource implication for the support required by the Committee.

4.18 To resolve this issue of how best to focus its efforts, the Committee gave consideration to the practical benefits of scrutinising the merits of statutory instruments. The Committee considered whether it should scrutinise all Statutory Instruments or focus on ones falling under a particular procedure.

4.19 When a Statutory Instrument is subject to the affirmative procedure, it is always debated in Plenary before being approved. The Minister’s motion to

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<sup>11</sup> Cymru Yfory, written submission, SLC1

<sup>12</sup> Public Affairs Cymru, written submission, SLC3

<sup>13</sup> RoP, para 24, 4 November 2008

approve normally calls on Members to consider the Subordinate Legislation Committee's report on the Statutory Instrument. To date, either there will be no report on it or the report will have focused on technical faults reported under SO 15.2. The Committee feels that if the Committee were to report on the "merits" of an Statutory Instrument, this would help inform the Members' debate in plenary on the substance of the Statutory Instrument.

4.20 Alternatively, for Statutory Instruments subject to the negative procedure, the practical use of the report depends on whether Members take up the opportunity to table a motion to annul. The first motion to annul an SI in the Third Assembly was tabled in February 2009 by a Member. This may reflect a need for having a system to better inform Members, or alternatively that the practical effect of the Committee's reports in terms of changing legislation would be limited. If the Committee had serious concerns, the Government could voluntarily withdraw the SI, which has happened on rare occasions in the House of Lords as a result of a critical Merits Committee Report.

4.21 Given the need to prioritise its resources, the Committee feels that there is less opportunity for merits scrutiny on negative Statutory Instruments to have an impact, therefore the Committee would be better placed using the time and resources available to it at the moment to concentrate on the merits scrutiny of affirmative Statutory Instruments.

#### **Action 1**

The Committee agrees that it should undertake merits scrutiny of statutory instruments, focusing in the first instance on the merits of statutory instruments subject to the affirmative procedure (also see sections: 'The role of Scrutiny Committee in relation to subordinate legislation' and 'Taking the work forward: the implications of the Committees conclusions for its future approach to scrutiny').

### **Draft Statutory Instruments**

#### *Background*

4.22 Currently, the Committee can only consider Statutory Instruments after they are laid before the Assembly. Standing Orders state that the Committee must report to the Assembly within 20 days of a Statutory Instrument being laid.

4.23 The reason for this is so that the Committee's Reports can be taken into account by the Minister and the Assembly within good time. Under the Statutory Instruments Act<sup>14</sup>, Ministers must allow at least 21 days before the instrument comes into force. By reporting by the 20th day, the Committee makes sure that Members still have time to pursue the instrument before the

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<sup>14</sup> [http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1946/cukpga\\_19460036\\_en\\_1](http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1946/cukpga_19460036_en_1)

40-day period for rejecting a negative instrument expires and before the Plenary debate on affirmative Statutory Instruments.

4.24 The Joint Committee on Statutory Instruments and the Merits Committee have no strict constraints on the timescales for reporting, although they work on as fast a turnaround as possible due to the reasons mentioned above which apply equally in Westminster.

#### *Evidence*

4.25 The Assembly's Chief Legal Adviser's<sup>15</sup> evidence to the Committee compares the approach adopted by Committees in the Second Assembly which was unique, to the approach of the third assembly. In the Second Assembly Subject Committees could scrutinise the merits of the Statutory Instruments and recommend amendments before they were made, whereas the system of scrutiny in the Third Assembly is based on the Westminster model and allows scrutiny of Statutory Instruments only after they are made or laid. His evidence highlighted the advantages and disadvantages of both approaches.

4.26 The Chief Legal Adviser<sup>16</sup> suggested that one obvious improvement to the scrutiny process would be if the Committee could be allowed to undertake pre-legislative scrutiny of Statutory Instruments i.e. looking at a draft before it is laid, normally during the WAG consultation process. If so, it would require a change of Standing Orders to allow consideration of draft Statutory Instruments before they are laid.

4.27 The Countryside Council for Wales<sup>17</sup> also thought it would be a good idea for the Subordinate Legislation Committee and the Scrutiny Committees to receive a list of draft legislative proposals, so that they all have the opportunity to scrutinise significant items.

4.28 Generally, Scrutiny Committees have not considered Statutory Instruments in the Third Assembly; however they do not discount having a role in scrutinising Statutory Instruments which are likely to impact on their areas of work, although they have a limited capacity to undertake this work. The Committees felt that if Statutory Instruments were of concern to them, then they should be involved in the scrutiny of Statutory Instruments at the drafting stage or as early as possible in order to exert the greatest influence over the process.

#### *The Committee's view*

4.29 Once a Statutory Instrument has been laid, the tight timescales within which the Committee has to work, allows very little time for it to consider taking evidence if it identifies areas which it would wish to scrutinise more

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<sup>15</sup> SLC(3)-20-08 : Paper 3 : Evidence to Inquiry, 29 September 2009

<sup>16</sup> RoP, para 114, 29 September 2009

<sup>17</sup> Countryside Council for Wales, written evidence, SLC6



closely the merits of the statutory instrument under SO 15.3. This limits the potential to develop the role of the Committee in this respect.

4.30 The Committee agrees with the Chief Legal Adviser that the Committee should have the option of considering scrutiny of Statutory Instruments at the draft stage. This would ensure that the views of the Committee on the merits of the Statutory Instrument could be taken into account before the final version is laid before the Assembly and formally considered by the Committee, by which point there is no opportunity to influence its content, only to reject or approve it.

4.31 The Committee is mindful that there should be close liaison with the Scrutiny Committees on this matter, to avoid any duplication of effort.

### **Action 2**

Explore the option of considering draft statutory instruments before they are laid, with a view to amending Standings Orders to ensure that no ambiguity exists in respect of this function.

### **Recommendation 1**

To aid the Committee in its scrutiny of the merits of Statutory Instruments, the Committee requests that the Welsh Assembly Government notifies it of any consultations on statutory instruments undertaken by Welsh Ministers.

## **Engaging Civic Society**

### *Background*

4.32 Under Standing Order 15.4 the Committee is required to report on SIs no later than 20 days after it is laid. Often, depending on the actual day of the SI is laid, there are only two clear meetings available for the Committee to review the SI. The opportunity for consultation with civic society is severely limited by these timescale.

### *Evidence*

4.33 Evidence from the Countryside Council for Wales<sup>18</sup> thought that consideration should be given to extending the scrutiny time for more detailed consideration of the issues, and scope for further engagement.

4.34 Public Affairs Cymru<sup>19</sup> and the Law Society<sup>20</sup> stated that the work of the Committee needed to be clearly set out to external stakeholders to help them understand what opportunities existed to engage with the Committee's work.

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<sup>18</sup> Countryside Council for Wales, written evidence, SLC6

4.35 Public Affairs Cymru<sup>21</sup> commented that it was difficult to identify appropriate Subordinate Legislation in time for stakeholders to be informed properly and engage in the process. They suggested that a “user group” of experts could be established to discuss in more detail how they / external stakeholders could work with the Committee.

4.36 Some respondents also suggested that guides to law-making to cover all legislation, and the inclusion of flowcharts showing the relevant committees and support staff would improve their ability to respond.

4.37 The House of Lords’ Merits of Statutory Instruments Committee has produced a joint briefing with the Delegated Powers and Regulatory Reform Committee to explain in simple terms what delegated legislation is and what their role is in the process. The Merits Committee has also produce “Guidance on submitting evidence”<sup>22</sup> for the public, which is available on its website.

#### *The Committee’s view*

4.38 Given that the majority of Welsh legislation is still in the form of Statutory Instruments produced by Welsh Ministers, the Committee felt that ensuring awareness of the subordinate legislation process was very important. The Committee recognises that the 20 day deadline for consultation will limit the opportunity to take evidence from the public, therefore steps need to be taken to raise the general awareness of stakeholders about the role of the Committee and to ensure that they are able to submit views to the Committee if they wish.

4.39 The evidence submitted to the Committee made varying suggestions for improving stakeholder engagement, which the Committee will take forward. These include:

- making better use of the website to seek external views;
- improving the website to flag up what Statutory Instruments have been laid and when they are due to be considered;
- producing simple guidance which would explain to stakeholders how and when to submit evidence;
- better information to other Assembly Members regarding what Statutory Instruments were under consideration.

4.40 Steps can also be taken by the Welsh Assembly Government to improve stakeholder awareness of subordinate legislation, in particular at the consultation stages. This is addressed below (see section ‘Access to information on Welsh subordinate legislation’).

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<sup>19</sup> Public Affairs Cymru, written evidence, SLC3

<sup>20</sup> The Law Society, written evidence, SLC2

<sup>21</sup> Public Affairs Cymru, written evidence, SLC3

<sup>22</sup><http://www.parliament.uk/documents/upload/Merits%20Committee%20Guidance%20for%20Public%20July%202006.pdf>

### **Action 3**

The Committee considered that the potential for involving external stakeholders in the process of scrutinising Statutory Instruments would be limited bearing in mind the limited 20 day deadline for reporting set out in Standing Order 15.4. However, work should be undertaken to ensure that stakeholders better understand the subordinate legislation processes.

## **Information accompanying Welsh Statutory Instruments**

### *Background*

4.41 Currently an Explanatory Memorandum is issued with each Statutory Instruments. This describes the purpose and intended effect of the Statutory Instruments, what consultation has taken place on it and the Regulatory Impact Assessment and post implementation review. It is published on the Assembly's website along with the Statutory Instrument.

4.42 The Welsh Assembly Government is preparing a Regulatory Impact Assessment Code of practice for subordinate legislation, setting out how and when they will assess the regulatory impact of the legislation they make on those affected. The Welsh Assembly Government consulted on it in the autumn of 2008. This is a requirement of Section 76 of the Government of Wales Act 2006. When finalised, the code will cover a wide range of orders, regulations and other subordinate legislation.

### *Evidence*

4.43 Some evidence was received calling for an improvement of the information included in Explanatory Memorandum, although the evidence was not specific in suggesting how the Explanatory Memorandum should be improved.

4.44 The Countryside Council for Wales<sup>23</sup> suggested that the Committee should take into account information contained in Regulatory Impact Assessments on the financial implications of Statutory Instruments during its scrutiny of Statutory Instruments.

4.45 Cardiff Law School<sup>24</sup> and the Law Society<sup>25</sup> suggested that the Committee should consider issuing guidance to the Welsh Assembly Government on the level of information required in Explanatory Memoranda (this issue is also raised in relation to Statutory Instruments implementing European Directives) which would help it undertake its scrutiny function.

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<sup>23</sup> Countryside Council for Wales, written evidence, SLC6

<sup>24</sup> RoP, para 78-79, 29 September 2008

<sup>25</sup> The Law Society, written evidence, SLC2

4.46 Cardiff Law School<sup>26</sup> was strongly in favour of such an approach and suggested using the Merits Committee Guidance to UK Departments and the Scottish Subordinate Legislation Committee's report on "Inquiry into the Regulatory Framework in Scotland"<sup>27</sup> as a starting point for considering guidance to the Welsh Assembly Government departments and developing co-operation with the Welsh Assembly Government.

#### *The Committee's View*

4.47 The Committee noted the Merits Committee's practice of issuing guidance to departments on the content of Explanatory Memoranda and Regulatory Impact Assessments.

4.48 The Committee felt that it was important to monitor the quality of the information contained in the Explanatory Memorandum and assess their compliance with the Regulatory Impact Assessment Code.

#### **Action 4**

The Committee agreed that it was important to monitor the quality of information provided in the Explanatory Memorandum laid with Statutory Instruments and will do this in future as part of the Committee's annual review as it develops the approach to and the amount of its merits work.

### **Access to information on Welsh subordinate legislation**

#### *Background*

4.49 A full list of Statutory Instruments is available, as laid, on the National Assembly for Wales's website, this list is maintained by the Subordinate Legislation Clerking team in the Subordinate Legislation section of the website. There is no equivalent list on the Welsh Assembly Government website, despite the legislation now being Welsh Assembly Government legislation, not National Assembly for Wales legislation, as a result of the Government of Wales Act 2006.

4.50 The Welsh Assembly Government website only lists local Statutory Instruments and non statutory instruments, such as some directions, guidance or code of practice. These are generally not submitted to the Subordinate legislation Committee for consideration. The Welsh Assembly Government website notes that general Statutory Instruments (of the type which are submitted to the Committee) are published by the Office of Public Sector Information (OPSI).

<sup>26</sup> Cardiff Law School, written evidence, SLC7

<sup>27</sup> <http://www.scottish.parliament.uk/business/committees/subleg/inquiries/regfram/su04-001-regfram.htm>

## *Evidence*

4.51 Several respondents, including the Law Society<sup>28</sup>, and Public Affairs Cymru<sup>29</sup>, were critical of the difficulty in accessing subordinate legislation made by the Welsh Assembly Government, and identifying consultations on legislation, which are currently listed amongst policy consultations. Public Affairs Cymru<sup>30</sup> felt that the Welsh Assembly Government should consider how to make it more easily accessible, and that it fell to the Office of Public Sector Information<sup>31</sup> or Wales Legislation Online<sup>32</sup> at the moment to provide public access to Ministerial legislation. They also felt that there was room to improve Welsh Assembly Government consultation on subordinate legislation.

4.52 In his evidence to the Committee, the Counsel General<sup>33</sup> was willing to consider whether Statutory Instruments should be published on the Welsh Assembly Government website as well.

## *The Committees view*

4.53 The Committee strongly feels that it is important for stakeholders to have clear and easy access to information about subordinate legislation which may affect them. The Committee believes there is room for improvement regarding the information available on subordinate legislation on the Welsh Assembly Government's website.

4.54 The Committee believes that Welsh Assembly Government departments should clearly identify when they are consulting on subordinate legislation or policy issues which require implementing legislation in the form of regulations.

## **Recommendation 2**

The Welsh Assembly Government's provision of information to the public on subordinate legislation is reviewed by the Counsel General.

## **Subordinate Legislation Forward Work Programme**

### *Background*

4.55 In the Second Assembly, when the National Assembly for Wales was responsible for making subordinate legislation, Welsh Assembly Governments

<sup>28</sup> RoP, para 71-72, 4 November 2008

<sup>29</sup> Public Affairs Cymru, written evidence, SLC3

<sup>30</sup> Public Affairs Cymru, written evidence, SLC3

<sup>31</sup> <http://www.opsi.gov.uk/>

<sup>32</sup> <http://www.wales-legislation.org.uk/>

<sup>33</sup> RoP, para 98, 11 November 2008

Ministers would submit a forward work programme of subordinate legislation to the Assembly's Subject Committees and Legislation Committee. This practice is no longer in place as they are not required to submit all draft legislation to the Assembly before they are made by Ministers.

4.56 As noted by the Counsel General<sup>34</sup>, there is an informal process by which Committee officials are kept informed of subordinate legislation developments (i.e. which Statutory Instruments to expect in the coming months). Committee officials note that this is mainly to aid them manage the workload of the Committee's advisers and agendas. It flags up what Statutory Instruments should be submitted to the Committee in the 4 -6 weeks ahead, but it is not suitable for publication, as it is a live document (i.e. subject to change).

### *Evidence*

4.57 The Committee was informed by the Merits Committee that some UK government departments produce forward work programmes, e.g. the Department for the Environment, Food and Rural Affairs' "Statement of Forthcoming Legislation 2008 and 2009"<sup>35</sup>.

4.58 In their evidence, Wales Environment Link<sup>36</sup> flagged up examples of when Welsh Assembly Governments delay consulting on their plans for bringing forward subordinate legislation as a result of new Acts of Parliament, and that regulations are brought forward later than they are in England. They considered that this may be because the powers may not have been given the same level of consideration in Wales, or there may be delays in securing the necessary resources.

4.59 When put to the Counsel General, he did not accept that there are delays in Wales and explained that the Welsh Assembly Government prioritises legislation according to its priorities<sup>37</sup>.

4.60 Some of the Scrutiny Committees indicated that a forward work programme of subordinate legislation would be helpful to inform their own forward work programmes, although some noted that this would not mean that they intended to return to the practice of the Second Assembly where every Committee systematically considered the forward work programme of Statutory Instruments and identified those for further scrutiny.

### *The Committee's view*

4.61 The Committee recognises there has been a change in approach to the procedures applying to the making and scrutiny of statutory instruments as a result of the Government of Wales Act 2006. However, the Committee does

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<sup>34</sup> RoP, para 85, 11 November 2008

<sup>35</sup> <http://www.defra.gov.uk/corporate/regulat/pdf/forthcomingleg-update-august2008.pdf>

<sup>36</sup> Wales Environment Link, written evidence, SLC4

<sup>37</sup> RoP, para 82, 11 November 2008

not feel that this means that the publication of a forward work programme of subordinate legislation is no longer desirable nor possible.

4.62 The Committee believes that such a forward work programme is key to ensuring a greater transparency of process for the public and stakeholders. It will facilitate their engagement with the Welsh Assembly Government on regulatory matters and with the work of the Committee in scrutinising Statutory Instruments. It would also enable Assembly Committees to be aware of upcoming statutory instruments in areas of interest to them (see also below).

4.63 It is suggested that the Welsh Assembly Government considers the good practice in Whitehall mentioned by the Merits Committee, where certain departments issue a programme for rolling out legislation for implementation of delegated powers under new Acts and what consultation will take place. It would serve a similar purpose to the transposition plans in relation to implementing European Union Directives (see section on European Legislation).

### **Recommendation 3**

The Welsh Assembly Government should aim to submit to the Assembly a 6 monthly forward work programme which should include:

- departmental plans for consultations on Statutory Instruments;
- all Statutory Instruments which it aims to submit to the Committee;
- department plans to exercise Ministerial delegated powers granted as a result of new Acts of Parliament and Measures adopted within the previous 6 months.

## **The role of Scrutiny Committees in relation to subordinate legislation**

### *Background*

4.64 Standing Order 24.7 states that if any Committee, other than the Subordinate Legislation Committee, intends to report on a statutory instrument which is subject to the affirmative procedure, it must give notice to the government no later than 7 days after the instrument or draft has been laid. No such restriction applies in relation to instruments subject to the negative procedure, although Members only have 40 days after they are laid to table a motion to annul the instrument.

### *Evidence*

4.65 The responses received from the Scrutiny Committees showed that there is scope for greater liaison and exchange of information between the Scrutiny Committees and the Subordinate Legislation Committee. However, most

Scrutiny Committees stated that there would be time constraints on the amount of scrutiny of Statutory Instruments that could be undertaken without impacting on other areas of the Committees workloads. The Rural Development Sub-Committee<sup>38</sup> and the Sustainability Committee<sup>39</sup> thought it was important not to duplicate scrutiny and ensure there is a clear and well-understood differential in the roles of both committees.

4.66 Written responses from the Scrutiny Committees indicated a willingness to exchange information between committees. This would include flagging up concerns regarding forthcoming regulations which had been identified during the course of inquiries, scrutiny of Ministers or the passage of Measures and Bills.

4.67 The Equality of Opportunity Committee<sup>40</sup> stated that it had concerns regarding the extent to which equality issues are mainstreamed into current legislation, and would welcome scrutinising legislation from an equalities perspective, depending on their work programme priorities.

#### *The Committee's view*

4.68 The Committee recognises that it needs to be clear about its own remit, the extent to which it overlaps with the remit of other Committees and to communicate this clearly to the other Committees. One clear distinction would be that the Subordinate Legislation Committee will not generally consider Statutory Instruments at the consultation stages, although the Committee wishes to have the option of doing so, if necessary (see section on Draft Statutory Instruments).

4.69 It is suggested that in the first instance that any exchange of information between Committees would have to be informal and at the level of officials. As noted above, if the Welsh Assembly Government were to provide a six monthly forward work programme of subordinate legislation or notice of consultations on Statutory Instruments, this would also help the Scrutiny Committees identify areas of potential work or links with their inquiry work.

#### **Action 5**

Liaise with Scrutiny Committees, mainly at the level of officials in the first instance, paying particular attention to concerns about forthcoming Statutory Instruments which have been identified during the course of inquiries, scrutiny of ministers, and those identified by Legislation Committees during the passage of Measures and Bills.

<sup>38</sup> Rural Development Sub Committee, written submission, SLC17

<sup>39</sup> Sustainable Development Committee, written submission, SLC18

<sup>40</sup> The Equality of Opportunity Committee, written submission



## Post legislative scrutiny

### *Evidence*

4.70 The Law Society<sup>41</sup>, Countryside Council for Wales<sup>42</sup>, Arthritis Care Wales<sup>43</sup> and Public Affairs Cymru<sup>44</sup> all raised the issue of developing post-legislative scrutiny of secondary legislation in the Assembly as a key part of better regulation. The Law Society noted the Committee's annual review of the outcome of the Committee's reports on subordinate legislation as a step in the right direction.

4.71 Cardiff Law School believed the Scrutiny Committees were in the best position to undertake post-legislative scrutiny. The Countryside Council for Wales highlighted the useful role the Law Commission can play in relation to the review of legislation.

4.72 The Committee sought the views of the Law Commission (letter dated 19<sup>th</sup> January 2009). In its evidence to the Committee, the Law Commission referred the Committee to its report on post legislative scrutiny and the subsequent response issued by the UK Government. The Law Commission produced a report with recommendations for a new system of post-legislative scrutiny for Westminster in October 2006<sup>45</sup>. It acknowledged that there was no systematic practice of reviewing laws after they have been brought into force to ensure that they are working as intended, although the House of Lords' Merits Committee will occasionally recommend that the UK Government review regulations, e.g. one year on, where they have reported significant concerns on the provisions of a statutory instrument.

4.73 In its report, the Law Commission suggested a new joint Parliamentary committee, and ways in which there could be greater commitment to post-legislative scrutiny by Government departments, building on mechanisms already in place, including enhancing regulatory impact assessments for this purpose.

4.74 The UK Government has responded to the Law Commission's report and has indicated it would introduce a new systematic approach for strengthening the scrutiny of legislation three to five years after it is enacted ('Post Legislative Scrutiny – The Government's Response'<sup>46</sup>). However, in terms of post legislative scrutiny in Wales, the Law Commission was unable to offer any views as in accordance with its usual working practice the team working on it was dissolved when the project was completed, hence no expertise remained.

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<sup>41</sup> RoP, para 37-38, 4 November 2008

<sup>42</sup> RoP, para 145, 6 October 2008

<sup>43</sup> Arthritis Care Wales, written evidence, SLC5

<sup>44</sup> RoP, para 144, 6 October 2008

<sup>45</sup> <http://www.lawcom.gov.uk/docs/cp178.pdf>

<sup>46</sup> <http://www.official-documents.gov.uk/document/cm73/7320/7320.pdf>

4.75 The Law Commission stated that in order to undertake further work on post legislative scrutiny in the National Assembly for Wales it would need to form part of a specific project in the Law Commission's Eleventh Programme or as a specific ad hoc reference, which would need to be properly funded.

4.76 The Law Society suggested undertaking a post legislative scrutiny exercise, by identifying a stream of legislation and following it from the stages of Act or Measure through to the implementation of subordinate legislation flowing from these, such as:

'how the secondary legislative powers were used and whether the type of Order-making process that was allocated to it was the appropriate one, in retrospect. Rather than trying to cover the entire field, perhaps the best way of ensuring extra resources would be to identify one particular exercise as a suitable one for an inquiry and then look at that from cradle to grave, as it were, draw the lessons from it and report on them'<sup>47</sup>.

#### *The Committee's view*

4.77 The Committee believes that the witnesses have raised an important issue, which has not been given much attention to date within the Assembly, but which will become more important as the Assembly produces more primary legislation.

4.78 Consideration of post legislative scrutiny is not a current function of the Committee, other than as a "legislative matter of a general nature" under Standing Order 15.6(v). The Committee does not currently have the capacity to adopt this function. However, when the Committee starts to consider the "merits" of statutory instruments, the Committee will give consideration to any information provided by the Welsh Assembly Government in the Explanatory Memorandum on post implementation review, particularly if any issues of concern have been raised about the regulations.

### **Tailor made Assembly procedures for subordinate legislation**

#### *Background*

4.79 Subordinate legislation procedures which apply to Statutory Instruments in the Assembly (generally, the negative and affirmative procedures) are set out in the Statutory Instruments Act 1946 (as amended by Schedule 10 paragraph 3 of the Government of Wales Act 2006).

#### *Evidence*

4.80 The Assembly's Chief Legal Adviser<sup>48</sup> warned the Committee that as measures are passed the volume of subordinate legislation may increase and

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<sup>47</sup> RoP, para 41, 4 November 2008

<sup>48</sup> RoP, para 132, 29 September 2009

suggested that the committee will have to think of new ways of scrutinising Ministers legislation for example using the super affirmative procedure.

4.81 If the Committee felt that the present level of control over subordinate legislation via the standard negative or affirmative procedure needed to be adapted, the Chief Legal Adviser suggested that the Committee could consider developing tailor made procedures for Welsh legislation. The Committee could seek changes to the procedures via a Measure (which may require an Legislative Competence Order) or a change of approach to scrutiny by adapting Standing Orders e.g. to allow scrutiny of draft statutory instruments.

4.82 During the Committee's visit to Edinburgh in May 2008, the Committee was briefed on the Scottish Parliament's Subordinate Legislation Committee inquiry into the Scottish regulatory framework for subordinate legislation<sup>49</sup>. The Session 2<sup>50</sup> Committee considered the system of scrutiny and handling of subordinate legislation within the Scottish Parliament and made recommendations to improve or replace their procedures. The Scottish Parliaments Session 3<sup>51</sup> successor committee considered the new system recommended by its predecessor, but concluded that the most workable outcome both for the Scottish Parliament and the Scottish Government would be to improve procedures within the existing framework.

#### *The Committee's view*

4.83 The Committee noted the Chief Legal Adviser's suggestion, and will monitor areas where, for example, the use of the super affirmative procedure would be appropriate in proposed Measures or Bills, to ensure the commensurate level of scrutiny.

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<sup>49</sup> <http://www.scottish.parliament.uk/business/committees/subleg/inquiries/regfram/su04-001-regfram.htm>

<sup>50</sup> Second Scottish parliamentary session, 7 May 2003-2 April 2007

<sup>51</sup> Third Scottish parliamentary session, 3 May 2007 to present

## 5. European Union Legislation

### Transposition of European Union Legislation

#### *Background*

5.1 Directives are one of the three main types of European Union law – the others being regulations and decisions. Unlike regulations, which are directly applicable and binding in national law, European Union directives have to be transposed into national law via primary or secondary legislation.

5.2 Directives lay down the agreed European Union objectives which must be achieved within a time-limit, but leave it open to national authorities to decide how this should be achieved and what form it should take, as they transpose it into their domestic law. This enables national authorities to take account of domestic circumstances when implementing European Union law.

5.3 European Union law requires that European legislation should be implemented in an effective, timely and proportionate manner. The UK Government's stated policy is to transpose directives into UK law so as to achieve the objectives of the European measure, on time and in accordance with other UK policy goals, including minimising the burdens on business. Welsh Ministers will generally be responsible for implementing European Union legislation in areas of devolved competency.

5.4 The issues covered in the Statutory Instruments section of this report, apply equally to statutory instruments implementing European directives, as they do to any other type of Statutory Instrument. However, there are a few additional matters to be taken into account when the Committee scrutinises these.

5.5 The Committee was particularly interested in receiving evidence on the following matters:

- the effectiveness and transparency of the Government's transposition procedures;
- the extent to which the Government can and does tailor the implementing regulations to the needs of Wales in view of the parameters set by the European Union;
- how best to undertake effective and timely scrutiny of the implementing regulations.

#### *Evidence*

5.6 In his evidence to the Committee, the Counsel General<sup>52</sup> states that the Welsh Assembly Government works within the guidance set out in the UK government's "Transposition guide: how to implement European directive effectively", issued by the Minister for Business and Regulatory Reform in 2007 ("the Transposition Guide"), and the Memorandum of Understanding and the Concordat on Co-ordination of European Union Policy.

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<sup>52</sup> Counsel General, *written evidence*, SLC8

5.7 The Counsel General notes that “early engagement is essential and there are mechanisms in place to ensure that Assembly Government departments and Legal Services are aware of proposed and confirmed directives to ensure effective and timely implementation”<sup>53</sup>.

5.8 The Concordat on Coordination of European Union Policy Issues<sup>54</sup> sets out how Whitehall departments and the devolved administrations should work together on the negotiation and implementation of European legislation.

5.9 The Counsel General notes:

‘It is the responsibility of the lead Whitehall Department formally to notify the devolved administrations at official level of any new European Union obligation which concerns devolved matters and which it will be the responsibility of the devolved administrations to implement’<sup>55</sup>.

5.10 The “Transposition guide” states [page 8, parag 1.8]:<sup>56</sup>

For matters falling within their responsibility, it is for the devolved administrations to consider, in consultation with the Whitehall departments and other devolved administrations, if appropriate, how the obligation should be implemented and enforced within the required timescale, including whether the devolved administrations should implement separately, or opt for GB or UK legislation. Where a devolved administration opts to implement separately, it will have a responsibility to consult the lead Whitehall department, and other departments, as necessary, on its implementation proposals, to ensure that any differences of approach nonetheless produce consistency of effect and, where appropriate, of timing.

5.11 If the Assembly does not have the specific powers to make regulations to implement all of the requirements of a Directive under existing primary legislation, then it can be designated, by Order in Council, (under Section 2(2) of the European Communities Act 1972)<sup>57</sup> to bring forward regulations to implement European obligations in a given field.

5.12 The “Transposition Guide”<sup>58</sup> also explains that since November 2001, in response to a request by UK Parliament, almost all legislation laid before the UK Parliament, be it primary or secondary, that transposes any European Directive must be accompanied by a Transposition Note. Its purpose is to explain to the reader, in easy terms, how the main elements of a directive have been, or will be, transposed into UK law.

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<sup>53</sup> Counsel General, *written evidence*, SLC8

<sup>54</sup> See Part II, Section B of the Memorandum of Understanding between the UK Government and the devolved administrations at <http://www.justice.gov.uk/guidance/mou.htm>

<sup>55</sup> Counsel General, *written evidence*, SLC8

<sup>56</sup> <http://www.berr.gov.uk/files/file44371.pdf>

<sup>57</sup> [http://www.opsi.gov.uk/Acts/acts1972/ukpga\\_19720068\\_en\\_1](http://www.opsi.gov.uk/Acts/acts1972/ukpga_19720068_en_1)

<sup>58</sup> *Ibid*

5.13 In the case of Statutory Instruments, the Transposition Note is attached to the Explanatory Memorandum that is laid with the instrument, and copied to the relevant Parliamentary Committees (Joint Committee on Statutory Instruments and the Lords Merits Committee). The Explanatory Memorandum should explain in broad terms the approach to transposition highlighting any difficult areas, and include a brief scrutiny history of when it was considered by the European Union Scrutiny Committees.

5.14 The “Transposition Guide” also sets out the benefits of producing Transposition Notes [Annex 1, page 35, A1.3]<sup>59</sup>:

- a) Production of and availability of Transposition Notes should give those involved in the implementation of the directive(s) a better understanding of the wider context in which their work sits.
- b) Transposition Notes can act as a check that, in the Government’s opinion, all of the main elements of a directive have been or will be addressed.
- c) Transposition Notes will increase the transparency and clarity of implementing legislation for both those producing it and those affected by it, as well as Parliament which may not need to ask so many questions on transposition during the passage of legislation.

5.15 The Guidance also states, that they should be made available on departmental websites in a clear and accessible manner and that they could usefully accompany any draft legislation published.

5.16 The Scottish Parliament’s European and External Relations Committee (EERC) undertook an inquiry into the transposition of European Union directives which it published on 2 May 2008 (1st Report, 2008 (Session 2008), SP Paper 89)<sup>60</sup>. The Committee visited the Scottish Parliament in May 2008 and discussed the results of the inquiry with the EERC Committee. The inquiry had included the recommendation that the Scottish Government, on being notified of each obligation to implement European Union legislation, should formally notify the Scottish Parliament through the submission of a transposition plan which should include:

- any specific Scottish interests to be addressed during the transposition process;
- plans for consultation with stakeholders during the transposition process;
- plans for engagement with the Parliament during the transposition process;
- An indication of whether the Scottish Government intends to use section 57(1)<sup>61</sup> and the reasons why;

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<sup>59</sup> <http://www.berr.gov.uk/files/file44371.pdf>

<sup>60</sup> <http://www.scottish.parliament.uk/s3/committees/europe/reports-08/eur08-01.htm>

<sup>61</sup> **Section 57(1) of the Scotland Act**, which provides that “*despite the transfer to the Scottish Ministers by virtue of section 53 of functions in relation to observing and implementing obligations under Community law, any function of a Minister of the Crown in relation to any matter shall continue to be exercisable by him as regards Scotland for the purposes specified in section 2(2) of the [1972 c. 68.] European Communities Act 1972.*”

- Whether primary or secondary legislation will be used for transposition;
- The likely timetable for transposition.

5.17 The Scottish Government has committed to providing the Scottish Parliament with transposition notes when transposing European Union Directives and believes it to be “an important practice”. The Scottish Government is now developing guidance on *Handling EU obligations in Scotland*<sup>62</sup>, which takes into account the recommendations of the Committee’s inquiry. This is part of the Scottish Executive’s aim of delivering clear and consistent handling of European Union legislation across the Government, and introducing greater transparency to the process.

5.18 In particular, the Scottish Government’s draft guidance specifies that each project team should “draw up an implementation plan which can then be supplied to the Scottish Parliament and key external partners at an early stage and wherever appropriate thereafter”. An initial version of the plan should be submitted to the relevant committee no later than 8 weeks following the publication of an obligation.

5.19 In the Scottish Parliament, their European and External Relations Committee receives a regular report from Scottish Ministers providing the latest information on the progress of transposition of European Union directives.

5.20 The Law Society<sup>63</sup> commented on the need for Statutory Instruments implementing European Union Directives to be accompanied by a clear and thorough explanatory memorandum to explain how the SI gives effect to the directive and what factors in Wales were taken into account. Public Affairs Cymru<sup>64</sup> supported the idea of the Welsh Assembly Government issuing transposition notes for the implementation of European Union directives by Welsh Ministers. It thought it would increase transparency with regard to the implementation of European Union Directives. The Countryside Council for Wales also thought that it would be a step forward. They mainly referred to the recommendations of the Scottish Parliament’s EERC on this matter as a model which the Committee may wish to adopt.

5.21 The Counsel General<sup>65</sup> stated that he would examine how the Welsh Assembly Government could clarify the situation with regard to transposition notes and would consider the Committee’s recommendations on these.

5.22 Little evidence was received on the extent to which the Welsh Assembly Government can and does tailor the implementing regulations to the needs of

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<sup>62</sup> See Scottish Government’s website:  
<http://www.scotland.gov.uk/Topics/Government/International-Relations/Europe/TranspositionsInfractions/ProceduralReform>

<sup>63</sup> RoP, para 62-65, 4 November 2008

<sup>64</sup> Public Affairs Cymru, written evidence, SLC3

<sup>65</sup> RoP, para 106, 11 November 2008

Wales. Wales Environment Link<sup>66</sup> cited the example of the implementation of the Strategic Environmental Assessment Directive, expressing disappointment with the light touch approach taken by the WAG compared to what was done by the Scottish Executive. The Countryside Council for Wales felt that tailoring European Union legislation to the needs of Wales is somewhat varied.

5.23 In his written evidence, the Counsel General<sup>67</sup> explains that according to the Memorandum of Understanding, Whitehall informed the devolved administrations of any new European Union obligation which the devolved administrations have to implement. It is then for the devolved administration to consider, in consultation with the lead Whitehall department, how the obligation should be implemented, including whether Welsh Ministers should implement it separately or opt for UK legislation.

5.24 The Law Society<sup>68</sup> stressed the importance of the Welsh Assembly Government and the Assembly engaging early with the European Union law making process to ensure the interests of Wales are taken into account. The Counsel General also makes this point in his written evidence and explained to the Committee how WAG makes representations on behalf of Wales during the European Union legislative process with a view to securing amendments to suit Welsh circumstances.

5.25 Cardiff Law School<sup>69</sup> highlighted this as an area where it would be beneficial to liaise closely with the Merits Committee, because the directives the Assembly Government has to implement in Wales are also implemented in England by UK Government Ministers and are considered by the Merits Committee. They suggested that the Committee should adopt similar criteria to that adopted by the Merits Committee when assessing how European Union Directives are implemented.

This could be done at the level of co-operation between officials, to help inform their advice to the Committee.

5.26 The European and External Affairs Committee<sup>70</sup> stated that their remit is to consider and report on any matters relevant to the exercise by the First Minister, Welsh Ministers, the Counsel General or the Assembly of any of their functions relating to the European Union or external affairs. The Europe and External Affairs Committee has recently agreed a strategic approach to its work; this will include the monitoring of all European Union legislative proposals considered to have significant impact or relevance to Wales, including subsidiarity monitoring, transposition into UK law and implementation.

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<sup>66</sup> Wales Environmental Link, written evidence, SLC4

<sup>67</sup> Counsel General, *written evidence*, SLC8

<sup>68</sup> The Law Society, *written evidence*, SLC2

<sup>69</sup> Cardiff Law School, *written evidence*, SLC7

<sup>70</sup> The European and External Affairs Committee, *written evidence*, SLC12



5.27 The European and External Affairs Committee<sup>71</sup> stated there is a huge amount of legislative proposals coming forward from the European Union and to identify those considered to have significant impact or relevance on Wales the EEA Committee has recommended that the Welsh Assembly Government

- make available in a timely manner all UK Government Explanatory Memoranda on European legislative and policy proposals of relevance to Wales
- produce for the Committee a Welsh Assembly Government version of each Explanatory Memorandum, explaining its views on all new proposals that have devolved consequences and the implications they will have for Wales

5.28 The European and External Affairs Committee welcomed consideration of any formal mechanism proposed by the Subordinate Legislation Committee that would serve to link its work with that of the EEA Committee on considering European Union Directives of particular interest or concern.

5.29 The EEA Committee supported the provision of transposition notes, and noted that the provision of transposition notes along the lines proposed by the Scottish Parliament's European and External Relations Committee could provide useful information to aid the scrutiny process.

#### *The Committee's view*

5.30 The Committee acknowledges that the main opportunity for influencing European Union directives which would impact on Wales is at the early stages of negotiations in Brussels between the relevant European Union law-making institutions (European Commission, Council of Ministers and the European Parliament). Scrutiny of the relations between the Welsh Assembly Government, the UK government and these institutions, during negotiations on legislation, falls within the remit of the European and External Affairs Committee.

5.31 However, once the European Union directives are adopted into law, the Subordinate Legislation Committee has to scrutinise the regulations made for the purposes of implementing Welsh Ministers' obligations under European Union directives, when they are laid before the Assembly.

5.32 The Committee agrees with the Assembly's European and External Affairs Committee that there is scope for better exchange of information between the two Committees and felt it would be helpful to be informed of any of their reports on European Union directives. It was noted by Committee that there may be a gap of some years between early discussions on draft European Union directives and the implementing Statutory Instruments by Welsh Ministers being submitted to the Subordinate Legislation Committee.

5.33 The Committee believes that it is important to take steps to make the process of transposing European law into Welsh law more transparent. The

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<sup>71</sup> The European and External Affairs Committee, *written evidence*, SLC12

Committee notes that the UK government and Scottish Government are both committed to providing their Parliaments with clearer and better information on the implementation of European Union legislation, in the form of transposition notes when Statutory Instruments are laid, or transposition plans at an earlier stage, and believes that the Assembly and public would benefit from a similar approach being adopted by the Welsh Assembly Government.

**Action 6**

To work with the European and External Affairs Committee to consider mechanisms that would serve to link the work of the European and External Affairs Committee with the Subordinate Legislation Committee when considering European Union Directives of particular interest or concern.

**Recommendation 4**

The Counsel General should review the way in which information is made available to the Assembly on how European Directives will be implemented by Welsh Ministers, including the provision of transposition notes in Explanatory Memoranda to Statutory Instruments, to improve transparency to the public and the Assembly.

Once Directives are adopted and need to be transposed into regulations by Welsh Ministers, it would aid transparency if the Welsh Assembly Government were to produce transposition plans when implementing European Union Directives, similar to the proposal in Scotland.

## 6. UK Bills: Scrutiny of Delegated Powers

### *Background*

6.1 Standing Order 15.6 (ii) enables the Committee to scrutinise delegated powers within UK Bills.

6.2 As part of its inquiry, the Committee wished to review and consider:

- the procedures in place to make transparent the implications of UK Bills on areas of devolved competency and the powers of Welsh Ministers;
- how decisions are taken with respect to conferring delegated powers on Welsh Ministers, agreeing the applicable procedures and whether framework powers (powers to make Assembly Measures) are included within Bills;
- liaison between the Welsh Assembly Government and the UK government in relation to UK Bills;
- how to ensure effective and timely consideration of UK Bills by the Committee.

### *Evidence*

6.3 The majority of the evidence received by the Committee regarding Welsh provisions in UK Bills related to:

- the impact of UK Bills on the powers of the National Assembly for Wales and Welsh Ministers;
- concerns regarding the lack of information and transparency of the process whereby Welsh provisions appear in UK Bills;
- the liaison between the Welsh Assembly Government and UK government;
- the limited role played by the Assembly in scrutinising UK Bills;
- the effectiveness of scrutiny of these provisions in Cardiff Bay and Westminster.

6.4 These issues raised by respondents to the consultation are by no means new, and Cymru Yfory<sup>72</sup> suggests that the Assembly has not properly addressed this legislative issue since the 2001-02 Assembly Review of Procedure.

6.5 As noted in the response of Cymru Yfory, the House of Commons Welsh Affairs Committee has considered the impact of UK Bills on the Westminster legislation<sup>73</sup>. Many of the issues addressed in that Report are similar to the issues being considered by this Committee six years later, including: better access to information about the secondary legislative powers of the Assembly (post Government of Wales Act 2006, this is the equivalent of Welsh Ministers' powers); clear information accompanying Bills and proposals for

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<sup>72</sup> Cymru yfory, written evidence, SLC1

<sup>73</sup> (*The Primary Legislative Process as It Affects Wales*, Session 2002-03 4<sup>th</sup> Report, HC73, March 2003).

legislation is a crucial basis for effective consultation and scrutiny; joint working between Westminster and the Assembly<sup>74</sup>.

6.6 The House of Lords Constitution Committee's Report on Devolution: inter-institutional relations in the UK<sup>75</sup> raised similar issues. Also, the Richard Commission Summary Report of March 2004 notes in the executive summary:

'There is a fundamental problem of split accountability – policies are proposed by the Assembly Government in Wales but are scrutinised and adopted by different politicians in Westminster. Some proposals are debated in great detail in both places, others fall between the two, so that it is hard for the public and lobbying organisations to know who is responsible for what at each stage.'<sup>76</sup>

6.7 In response to the letter sent from the Committee, the Welsh Affairs Committee stated that it has contributed to Departmental Select Committees inquiries when a Bill contains provisions for Wales, but the response stated that evidence which was gathered during their inquiry into '*The Provision of cross-border public services for Wales: Further and higher education*' highlighted problems in Whitehall's understanding of the devolution settlement. The report concluded that:

"Welsh interests are not being adequately taken into account when formulating UK policy, and UK policies are overly based on English interests. We recommend that the Department for Innovation, Universities and Skills establishes processes to ensure that the territorial extent of any policy is clearly identified and communicated by officials before any developments to it are proposed and that this should be done in consultation with the Wales Office and the Welsh Assembly Government [...] there is also a need to establish better protocols and relationships to ensure that the Government's policymaking process routinely considers devolved interests at an early stage".<sup>77</sup>

### *The Committee's View*

6.8 The Committee highlights the fact that these are long-standing issues which have never been adequately addressed post devolution. The Committee feels that this is an area which requires far greater attention and systematic scrutiny than has previously been the case. The issues highlighted above are dealt with in more detail in the subsections below.

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<sup>74</sup> <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmwelaf/79/7903.htm>

<sup>75</sup> <http://www.publications.parliament.uk/pa/ld200203/ldselect/ldconst/28/2801.htm>

<sup>76</sup> <http://www.richardcommission.gov.uk/content/finalreport/summary-e.pdf>

<sup>77</sup> (Welsh Affairs Committee, First Report of Session 2008-09, HC 57, *Cross-border provision of public services for Wales: Further and higher education*, paragraphs 105 and 107)

## Devolving powers to the National Assembly for Wales and Welsh Ministers

### *Background*

6.9 Powers can be devolved to Wales following the Government of Wales Act 2006 in varying ways.

- Legislative functions can be conferred on the National Assembly by a Legislative Competence Order – an order in council made by the Her Majesty in Council with the approval of the UK Parliament on application by the Assembly, under section 93 of the Government of Wales Act 2006. Such an order adds specific ‘matters’ to the 20 ‘fields’ set out in Schedule 5 to the 2006 Act.
- Legislative functions can also be conferred on the Assembly by UK Acts of Parliament, which directly add matters to Schedule 5 to the 2006 Act.
- Executive functions can be transferred to the Assembly Government or the Welsh Ministers by an order in council made under section 58 of the 2006 Act.
- Executive functions can also be conferred or transferred by Act of the UK Parliament.
- The designation of Welsh Ministers to make regulations implementing Community obligations under section 2(2) of the European Communities Act 1972 (see paragraph 5.11)

6.10 Devolution Guidance Notes are prepared by the Ministry of Justice to assist Whitehall civil servants in dealing with aspects of devolution.<sup>78</sup> The Devolution Guidance Notes deal with issues such as Common Arrangements; handling correspondence; the role of the Secretary of State for Wales; and the attendance of UK Ministers and Officials at Devolved Legislatures. Devolution Guidance Notes 9 deals with *Post-devolution primary legislation affecting Wales*.<sup>79</sup>

6.11 The Guidance advises that when primary legislation is prepared by Whitehall Departments, consideration should be given to what arrangements may be required for Wales. It states that by the time the UK Government’s Legislative Programme Committee considers whether the Bill should be introduced, that agreement has been reached with the Welsh Ministers, where it is required, and that “in instances where the agreement of the National Assembly for Wales is required, that the Welsh Ministers have agreed to promote the relevant motion in the Assembly”<sup>80</sup>.

6.12 The Guidance also advises that Whitehall Departments should approach the Welsh Assembly Government to gain the consent of the National Assembly for Wales to legislate when appropriate. It will be for the Welsh

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<sup>78</sup> See the Ministry of Justice, Devolution Guidance Notes webpage <http://www.justice.gov.uk/guidance/devolutionguidancenotes.htm>

<sup>79</sup> Ministry of Justice, DGN 9, *Post-devolution primary legislation affecting Wales*, 2007.

<sup>80</sup> <http://www.justice.gov.uk/docs/dgn09.pdf>

Assembly Government to indicate the view of the National Assembly for Wales when appropriate and to take whatever steps are required to ascertain that view. Whitehall Departments should also liaise closely with the Wales Office. Whether the consent of the National Assembly for Wales on the one hand, or the Welsh Assembly Government on the other, is needed depends on the nature of the provision in question, which is explained in the Guidance<sup>81</sup>.

6.13 Scrutiny Committees currently undertake scrutiny of significant Bills, looking at their implications for Wales generally, any proposed framework powers and provisions delegating powers to Welsh Ministers. However, this does not mean that each Bill with Welsh provisions is considered by an Assembly Committee.

6.14 The Welsh Assembly Government informs the Subordinate Legislation Committee of any proposals to transfer executive functions via Transfer of Functions Order under section 58 of the Government of Wales Act 2006. However, as these Orders are laid before Parliament, the Subordinate Legislation Committee is not permitted to consider them (SO 15.7).

#### *Evidence*

6.15 Cymru Yfory notes that the Assembly need only approve the first way of acquiring new powers as listed above – the acquisition of legislative competence via Legislative Competence Orders. It suggests that there is a need for the Assembly to play a stronger role in determining the powers (whether legislative or executive) that are devolved to Wales and “to act as a ‘gatekeeper’ for all devolved functions”, in accordance with the constitutional principle of the supremacy of the legislature over the executive:

‘Powers conferred through Acts of Parliament at Westminster are wholly outside the scrutiny of the Assembly as matters stand, and indeed Devolution Guidance Note 9 specifically asserts...that the consent of the Assembly is not required before framework powers are devolved to it by an Act of Parliament....Though scrutiny committees may decide to look in detail at the implications of certain Bills, the Assembly has no formal role in these matters, important though they are. Neither does the Assembly subject the Assembly Government to any substantial scrutiny of the powers it acquires (or chooses to acquire)...The upshot is that the process gives all power to the Assembly Government and leaves the Assembly with at best a marginal role in the acquisition of devolved powers.’<sup>82</sup>

6.16 Cymru Yfory is critical of the current situation, stating it “is prone to lead to increasing confusion about what functions are devolved, and to make it harder for the general public to understand what functions are devolved or to which institution. It aggravates the problems of transparency.”

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<sup>81</sup> <http://www.justice.gov.uk/docs/dgn09.pdf>

<sup>82</sup> Cymru Yfory, *written evidence*, SLC1

6.17 It also notes:

‘An active role for the Assembly in looking at Westminster as well as National Assembly legislation would help greatly in improving the present system, and the Subordinate Legislation Committee is the organ of the Assembly best placed to undertake this role...Such a [gatekeeper] role will require involvement from the Assembly in plenary, but more detailed consideration of these matters would be an appropriate task for what is presently the Subordinate Legislation Committee to take on’<sup>83</sup>.

6.18 The Secretary of State for Wales did not acknowledge any role played by Assembly Committees in the scrutiny of UK Bills. He notes:

“It is for Parliament to scrutinise Welsh provisions, including framework powers in Bills, and if necessary bring forward amendments in the same manner as for other provisions in primary legislation.”<sup>84</sup>

6.19 The Counsel General gave his view on whether there should be a system where the Assembly expresses a view as to whether it is appropriate for Ministers to receive powers to make delegated legislation. He thought that Committees should mainly check the Statutory Instruments stemming as a result of the delegated powers. However, he noted that Assembly Committees can scrutinise Bills in order to express a view as to “whether they feel that it is appropriate to devolve that power, and, secondly, whether that power has been devolved broadly enough”<sup>85</sup>. His view was that it is mainly a matter for the Houses of Parliament to examine whether delegation of powers to Welsh Ministers in Bills would be appropriate:

‘Where an Act of Parliament delegates powers to Welsh Ministers before the Act becomes law...it is open to the House of Commons or the House of Lords to examine whether the delegation of those powers to make statutory instruments, for example, would be appropriate. That is a matter for them because at that stage it is still in the hands of Parliament as to whether Welsh Ministers receive that power. Once that power is received by Welsh Ministers, the way in which they seek to exercise that power is ultimately – via the praying against procedure, to use the parliamentary shorthand—a matter for scrutiny by the Assembly if the Assembly feels that the legislation should not be made. ... So, it would be possible for Parliament to examine whether the legislative powers being delegated to Welsh Ministers are sufficient. It would also be open for any Assembly committee to examine the proposed delegation of powers to express a view as to whether those powers are sufficiently broad.’<sup>86</sup>

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<sup>83</sup> Cymru Yfory, *written evidence*, SLC1

<sup>84</sup> Secretary of State, *written evidence*, SLC9

<sup>85</sup> RoP, para 70, 11 November 2008

<sup>86</sup> RoP, para 66, 11 November 2008

6.20 The Law Society stated in its oral evidence:

‘This committee has the ability to set the tone and standard of how the whole question of the delegation of powers is investigated, and perhaps to raise the awareness of the subject committees, when they scrutinise legislation, of this important aspect, namely of how much will be retained by the Assembly and how much will be passed down to the Assembly Government, albeit subject to the appropriate subordinate legislation procedures.<sup>87</sup>’

6.21 The Scrutiny Committees who responded were willing to exchange information on their scrutiny work of UK Bills and were open to suggestions as to how they might work with any new scrutiny procedures the Subordinate Legislation Committee might suggest for itself.

6.22 Standing Order 26 sets out when the Assembly’s assent is required with respect to UK Parliament Bills, through the consideration of a Legislative Consent Memorandum.

‘26.4 When a legislative consent memorandum is laid, the government must at the same time table a motion (‘a legislative consent motion’), which must seek the Assembly’s agreement to the inclusion of a relevant provisions in a relevant Bill.’

6.23 The Committee heard evidence referring to the difference between Standing Order 26 and the Sewel Convention<sup>88</sup> in Scotland, which sets out when a Legislative Consent Memorandum is required by the Scottish Parliament.

6.24 Whereas the National Assembly is only required to consent where a Bill contains provisions which are within the legislative competence of the Assembly or has a negative impact on its competence, the Scottish Parliament’s Sewel Convention requires a Legislative Consent Memorandum where the legislative competence or the executive competence of the Scottish Ministers is altered.

6.25 During the oral evidence session, the Counsel General stated that the Assembly already has a Sewel Convention in Wales, “more or less”<sup>89</sup>, under Standing Order 26. He also explained that it was not appropriate for the Welsh Assembly Government to consult the Assembly on the executive powers it seeks:

‘It is not possible to bring Bills to the Assembly every time there is a change in Westminster regarding which powers would come to Assembly Ministers. This is something for the Assembly Government and the Ministers to deal with; they are accountable to their committees

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<sup>87</sup> RoP, para 34, 4 November 2008

<sup>88</sup> <http://www.parliament.uk/commons/lib/research/briefings/snpc-02084.pdf>

<sup>89</sup> RoP, para 23, 11 November 2008



as regards how they have dealt with Bills<sup>90</sup> .... The Westminster Parliament does not pass Acts where the Assembly has powers in that policy area without the Assembly's permission.<sup>91</sup>

6.26 Evidence from The Law Society touches on a related issue - the need to build a coherent picture from the legislative jigsaw. The evidence states:

'the Assembly must think about moving from having this kind of committee, which is based on a Westminster model and was set up to be the guardian of the process of delegating powers to Ministers, to developing a committee that has a remit for looking at how the legislative process—the body of legislation as it affects Wales—is developing as a whole. Whether it is this committee or another body that does that is another matter, but there is a job to be done in trying to come to a view about the coherence of what is developing, because, realistically, you will never move entirely away from Westminster legislating for Wales.'<sup>92</sup>

#### *The Committee's view*

6.27 The Committee notes that presently, the National Assembly for Wales has no formal part to play in the process of conferring either legislative competence on the Assembly through UK Bills, nor in the delegation of powers from the UK Parliament to Welsh Ministers in UK Bills (other than under Standing Order 26).

6.28 The Committee agrees that there are weaknesses in the present system due to the UK's complex constitutional settlement, and that there is insufficient scrutiny of the devolution of power to Welsh Ministers by the UK Parliament. However, steps can be taken to ensure that the Assembly undertakes a more proactive approach to scrutiny of these matters than is presently the case.

6.29 As a result of the inquiry, the Committee has commenced scrutiny of UK Bills introduced in Westminster in the 2008-09 Parliamentary Session, starting with the Business Rates Supplements Bill and the Apprenticeships, Skills, Children and Learning Bill.

6.30 The purpose of the Committee's scrutiny of Bills would be firstly, to identify powers which relate to Wales and whether any of the powers conferred on the Secretary of State should be conferred on Welsh Ministers (whether necessary, or too broad, too narrow etc) and, secondly, where powers have been conferred on Welsh Ministers, consider whether the procedures suggested for making subordinate legislation are appropriate

6.31 This could result in recommendations to Welsh Ministers to request amendments to Bills by the UK Government. It would also enhance

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<sup>90</sup> RoP, para 21, 11 November 2008

<sup>91</sup> RoP, para 21-23, 11 November 2008

<sup>92</sup> RoP, para 57, 4 November 2008

transparency, by reporting to the Assembly what powers are to be conferred on Welsh Ministers, and help understanding of how this fits with any related areas of competency sought through Legislative Competence Orders.

6.32 As regards to where the legislature's Legislative Consent is required, the Committee notes that the difference between the Scottish Parliament's system and the Assembly's procedures as laid out in Standing Order 26, stems from the incremental way that the Assembly gains its legislative powers. This may make it increasingly difficult to identify the areas where Standing Order 26 should apply or not. From an outside perspective, the fact that the Assembly is required to give its consent when Westminster legislates or delegates powers to Welsh Minister in some areas but not others may well appear inconsistent and illogical, especially when compared with the Scottish system.

6.33 The Committee is concerned that the current procedure in place for the Assembly to consider Legislative Consent Motions under Standing Order 26 does not allow adequate opportunity for scrutiny within the Assembly. Currently they are submitted directly for consideration in Plenary with no opportunity for any Committee to undertake more detailed scrutiny. Although Legislative Consent Memoranda will not necessarily fall within the remit of the Subordinate Legislation Committee, the Committee strongly feels that they should be remitted to either a Scrutiny Committee or Legislative Committee to report on it prior to the Plenary vote on the Legislative Consent Motion.

#### **Action 7**

The Committee agrees that it should undertake systematic scrutiny of the delegation of powers from Westminster to Welsh Ministers in Bills, to address this current scrutiny gap.

#### **Recommendation 5**

That the Business Committee give consideration as to how Legislative Consent Memoranda under Standing Order 26 could be subject to scrutiny prior to debate in Plenary.

## **UK Legislative Work Programme**

### *Background*

6.34 The UK government's Annual Legislative Work Programme is announced at the beginning of each Parliamentary Session and is commonly referred to as the "Queen's Speech".

6.35 The Secretary of State for Wales makes an annual Legislative Statement to the Assembly in Plenary Session, following the Queen's Speech. The

Secretary of State has a statutory duty under section 33 of the Government of Wales Act 2006 to consult the National Assembly on the UK Government's legislative programme.

'As soon as is reasonably practicable after the beginning of each session of Parliament, the Secretary of State for Wales must undertake with the Assembly such consultation about the UK Government's legislative programme for the session as appears to the Secretary of State to be appropriate.'<sup>93</sup>

6.36 Devolution Guidance Note 9 states that this "provides an opportunity for the Assembly to consider the content of individual Bills, in addition to the UK Government's choice of priorities."<sup>94</sup>

6.37 The UK government has also started publishing the draft legislative programme since July 2007, but to date, the Assembly has not been formally consulted on it.

### *Evidence*

6.38 The Counsel General in his oral evidence to the Committee explained that the Secretary of State is responsible for representing the interests of Wales with respect to the preparation of the draft legislative programme. The Welsh Assembly Government is consulted when it is published, in the same way that the Welsh Assembly Government only consults the UK government when the Welsh Assembly Government draft programme is published. The Counsel General noted: "when the programme is published, that is the time for the administration to make its representations in terms of what framework powers would be appropriate for Wales".<sup>95</sup>

6.39 The Counsel General<sup>96</sup> stated that the Secretary of State consults first with the Welsh Assembly Government, in meeting with Welsh Ministers, and secondly, with the Assembly itself by way of the annual debate. He believed that the section 33 debate was important for the Assembly as an institution "to offer views on the legislative programme once it is known"<sup>97</sup>.

6.40 It is clear from the evidence submitted that the Welsh Assembly Government should be consulted from an early stage in the development of Bills, in accordance with Devolution Guidance Note 9.

6.41 The evidence presented by the Counsel General<sup>98</sup> and Secretary of State<sup>99</sup> explains that discussions between officials and Ministerial exchanges

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<sup>93</sup> [http://www.opsi.gov.uk/acts/acts2006/ukpga\\_20060032\\_en\\_3#pt1-pb10-11g33](http://www.opsi.gov.uk/acts/acts2006/ukpga_20060032_en_3#pt1-pb10-11g33)

<sup>94</sup> <http://www.justice.gov.uk/docs/dgn09.pdf>

<sup>95</sup> RoP, para 29, 11 November 2008

<sup>96</sup> RoP, para 39, 11 November 2008

<sup>97</sup> RoP, para 41, 11 November 2008

<sup>98</sup> Counsel general, *written evidence*, SLC8

<sup>99</sup> Secretary of State, *written evidence*, SLC9

take place in relation to individual bills before, during and after publication of the draft programme.

6.42 The Secretary of State explained that, as set out in Paragraph 4 of Devolution Guidance Note, they expect the Welsh Assembly Government to be consulted from an early stage in the development of legislative proposals.

‘Following publication of the UK draft legislative work programme, the Wales Office continues to work with colleagues in the Welsh Assembly Government in facilitating discussions on Bills of interest. In terms of formal contacts, I write to the First Minister to invite bids for “Wales only” Bills.’<sup>100</sup>

6.43 In terms of taking account of the views of the public in Wales, the Secretary of State<sup>101</sup> explained that following a consultation on UK legislation, a summary of responses which have been sent directly to him from Wales are fed into the summary of the Leader of the House of Commons which is then published. The evidence also stated that the National Assembly is free to provide comments either directly to the Leader of the House of Commons or to him on the draft legislative programme. The Committee also noted that Wales Office officials work with UK government departments and Welsh Assembly Government officials to ensure that Welsh interests and views are taken into account as the Bills develop.

6.44 Some respondents felt that the legislative programme (and the draft version) is not sufficiently detailed to enable stakeholders to identify the potential implications for Wales, compared to some instances, where the implications for England are fleshed out in more detail, an example of this quoted in evidence was the Marine and Coastal Access Bill as detailed in this year’s legislative programme.

6.45 The Secretary of State explained that ‘it is often difficult to give detailed information until the relevant Bill is published, particularly at the time of the publication of the draft programme as many proposals are still in development or under discussion.’<sup>102</sup>

#### *The Committee’s view*

6.46 The Committee notes that the UK Legislative Work Programme and the consultation on the draft work programme is the Assembly’s opportunity for engaging in scrutiny of UK Bills and is an opportunity for both the Subordinate Legislation Committee and the scrutiny committees to begin the scrutiny of Welsh provisions in UK Bills. However, to make an impact on the content of UK Bills, scrutiny needs to be undertaken at an early stage and often extensive information is not available at this stage.

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<sup>100</sup> Secretary of State, *written evidence*, SLC22

<sup>101</sup> Secretary of State, *written evidence*, SLC22

<sup>102</sup> Secretary of State, *written evidence*, SLC22

6.47 The Committee has already commenced Scrutiny of UK Bills. At its meeting on the 13<sup>th</sup> January 2009<sup>103</sup> the Committee considered the UK Legislative Work Programme. The Committee has already taken evidence from the Welsh Assembly Government on the Business Rate Supplements Bill and found this a useful and valuable process which raised issues on the delegation of powers to Welsh Ministers in UK Bills.

6.48 The Committee believes that closer attention needs to be paid to scrutinising the Welsh Assembly Government on the issues of whether further powers could have been delegated to Welsh Ministers but either have not been or were not requested. This is an area which the Committee intends to pursue further in relation to future Bills. The Committees first report on a UK Bill is due to be published soon and will be available on the National Assembly for Wales website.

### **Recommendation 6**

The Welsh Assembly Government or the Wales Office should provide a detailed legislative statement to accompany the UK Government draft and annual legislative work programme. This should detail what powers the Welsh Assembly Government wish to seek via the UK government's legislative work programme.

## **Liaison between the Welsh Assembly Government and the UK Government in relation to UK Bills**

### *Background*

6.49 As mentioned, Devolution Guidance Note 9 deals with *Post-devolution primary legislation affecting Wales*. It sets out guidance for Whitehall Departments on arrangements for managing UK Bills affecting the responsibilities of either the National Assembly for Wales or the Welsh Assembly Government. It states that the UK Government Cabinet Committee on the Legislative Programme "expects devolution issues to be resolved by the time a Bill is brought before the Committee prior to its introduction into Parliament."<sup>104</sup>

6.50 Also:

"The UK Government has agreed with the Welsh Assembly Government that they will normally consult each other from an early

<sup>103</sup> <http://www.assemblywales.org/bus-home/bus-committees/bus-committees-third1/bus-committees-third-sleg-home/bus-committees-third-sleg-agendas-2.htm?act=dis&id=110861&ds=1/2009>

<sup>104</sup> Ministry of Justice, DGN 9, *Post-devolution primary legislation affecting Wales*, 2007. <http://www.justice.gov.uk/docs/dgn09.pdf>

stage on the development of relevant legislative proposals, in confidence where necessary.<sup>105</sup> “

6.51 In July 2008, new guidance, Devolution Guidance Note 16 *Orders in Council under section 95 of the Government of Wales Act 2006*<sup>106</sup>, was published having been developed by the Wales Office and the Welsh Assembly Government, on handling proposals for Assembly Legislative Competence Orders.

### *Evidence*

6.52 Much of the evidence received regarding the liaison between the Welsh Assembly Government and the UK Government in relation to UK Bills noted concern at the procedures by which Welsh provisions appear in UK Bills. Public Affairs Cymru referred to it as a “mystery”<sup>107</sup>.

6.53 Some respondents have suggested that it appears the Welsh Assembly Government is not always consulted by UK Government departments at an early stage in the development of legislation which may affect Wales and in particular where competence has been devolved. Cymru Yfory made the following comment in its response to the Committee’s consultation:

‘It is well known that the formal obligations for the UK Government departments to consult the Assembly Government during the process of framing and drafting legislation are often honoured with consultation that is late, sketchy, or both.’<sup>108</sup>

6.54 As some of the evidence submitted cited the Planning Bill, and Draft Marine Bill, as examples of where problems have occurred, the Committee reviewed the legislative and scrutiny history of the Planning Bill and Draft Marine Bill to establish what issues became apparent from the evidence. A summary of the case study can be found in annex 7.

6.55 In relation to the Planning Bill, the Sustainability Committee’s Report<sup>109</sup> urged the review of procedures for liaison between the Welsh Assembly Government and UK government departments due to their concern at the position of the Welsh Assembly Government within the UK legislative process.

6.56 The Response from the Enterprise and Learning Committee<sup>110</sup> to this Committee’s consultation is worth noting and is critical of the procedure being followed to introduce Welsh provisions into the Draft Apprenticeships Bill, following their recent scrutiny of that draft Bill:

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<sup>105</sup> <http://www.justice.gov.uk/docs/dgn09.pdf>

<sup>106</sup> Ministry of Justice. DGN 16, *Orders in Council under section 95 of the Government of Wales Act 2006*, July 2008. <http://www.justice.gov.uk/docs/dgn16.pdf>

<sup>107</sup> Public Affairs Cymru, *written evidence*, SLC3

<sup>108</sup> Cymru Yfory, *written evidence*, SLC1

<sup>109</sup> <http://www.assemblywales.org/cr-ld6950-e.pdf>

<sup>110</sup> Enterprise and Learning Committee, *written evidence*, SLC13

'The Bill as drafted was for England only. The written memorandum provided by the Deputy Minister for Skills informed us that it was intended that the provisions of the Bill would be subsumed in the fourth session of the Learning and Skills Bill at which stage it would be possible that references and amendments to Wales might be included. This procedure concerned us greatly. We were of the opinion that this legislative approach was unsatisfactory and did not reflect well on the UK Government or the Welsh Assembly Government or indeed the current constitutional settlement.

6.57 Given the obfuscation of normal procedure, a much amended Bill will need to be considered at some future date. The Committee was concerned that a precedent for the introduction of Welsh clauses to Bills might be developing, given our Legislature's recent experience of the Planning Bill, where Welsh provisions amended the Bill at a stage too late to allow for Assembly scrutiny in Wales.

6.58 In his first letter to the Committee, the Secretary of State for Wales<sup>111</sup> explained the procedure for including Welsh provisions in Bills and the role of the Wales Office in facilitating discussions between UK Departments and Welsh Assembly Government officials. In his second letter to the Committee, the Secretary of State for Wales<sup>112</sup> explained that responsibility for monitoring the compliance with Devolution Guidance Note 9 lay with the Wales Office's team for Legislation and Programme Management of UK Bills. It also provides general guidance and presentations for UK departments on the handling of Bills which affect the responsibilities of the Welsh Ministers.

6.59 In his written evidence, the Counsel General<sup>113</sup> explained that while they aim to consult on any proposal concerning new powers for Welsh Ministers, the timescale for the production of Bills means that this is not always possible. The Counsel General used the draft Marine Bill as an example of how liaison between the UK government and the Welsh Assembly Government progressed:

'...during the course of the Bill, it has become clear that there are issues that affect Wales that need to be included in the Bill that were not thought of at the beginning of the process. That is normal, and it shows that the system can be flexible. It is certainly not the case when a Bill is published that, somehow, no notice is taken of Welsh Assembly Government Ministers—far from it. Ministers are fully able to engage with colleagues at Westminster; Ministers are fully able to suggest the insertion of clauses in Bills, and those clauses are inserted... The time to make representations with regard to including Welsh clauses is once the Bill is published, and that is done as quickly as possible. It is certainly not the case that, right at the end of the Bill

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<sup>111</sup> Secretary of State, *written evidence*, SLC9

<sup>112</sup> Secretary of State, *written evidence*, SLC22

<sup>113</sup> Counsel General, *written evidence*, SLC8

process, there is a flurry of suggestions on the part of the Assembly Government'.<sup>114</sup>

6.60 Countryside Council for Wales<sup>115</sup> were concerned with the lack of opportunity for stakeholder consultation on the content of clauses conferring powers on Welsh Ministers or the scope of framework powers.

*The Committee's view*

6.61 The Committee is concerned with the number of issues raised presented that suggests that the Welsh Assembly Government is not always consulted at the early stages of preparations for Bills and believes that it should be done well before the introduction of Bills into Parliament as set out in Devolution Guidance Note 9. The Committee believes that the Wales Office has a key role to play in ensuring effective relations between the Welsh Assembly Government and across Whitehall departments.

6.62 The Committee wishes to bring to the attention of the Welsh Assembly Government again the difficulties faced by Assembly Committees scrutinising Bills if amendments introducing new Welsh provisions are introduced during the passage of a Bill rather than at the point of introduction of the Bill but accepts that this is to some extent an inevitable product of the scrutiny and amendment of Bills as they progress through Westminster procedures.

**Action 8**

In adopting the role of systematic scrutiny of all UK Bills, the Committee would be well placed to monitor relations between UK government departments and the Welsh Assembly Government across the departments, with a view to highlighting areas of good practice and areas where better relations need to be established between departments.

**Recommendation 7**

The Committee recommends closer liaison between the UK Government and Welsh Assembly Government to ensure it is fully informed and consulted early in the process of developing proposals for Bills, on the UK Government's draft and annual legislative work programme. The Committee believes the Wales Office should play a more active role in ensuring protocol is followed in accordance with Devolution Guidance Note 9.

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<sup>114</sup> RoP, para 71, 11 November 2008

<sup>115</sup> Countryside Council for Wales, *written evidence*, SLC6



## Information on Welsh provisions in UK Bills and scrutiny of UK Bills

### *Background*

6.63 When the UK Government publishes a Bill, it is accompanied by three supporting documents:

- i. Explanatory Notes (these are revised when the Bills is introduced in the second House, to reflect changes made in the first House);
- ii. Regulatory Impact Assessments;
- iii. the Delegated Powers Memorandum prepared for the House of Lords Delegated Powers and Regulatory Reform Committee, which is now published by the UK Government at the same time as a bill is published, regardless of the House to which it is first introduced (the Memorandum may also be revised if the Bill is significantly amended in the first House).

6.64 If members of the public wish to understand the contents of a Bill, they are most likely to turn to these explanatory documents rather than reading the Bill itself.<sup>116</sup>

6.65 Information on “Framework powers” or Measure making powers proposed in UK Bills is dealt with in a particular way, apart from the above accompanying documents. In a recent letter to Hywel Francis MP, the Secretary of State for Wales, the Rt. Hon. Paul Murphy MP said:

‘For framework powers, the UK Government must continue to provide as much information as possible to aid scrutiny. We need to apply vigorously the procedures we have put in place. I will issue a Written Ministerial Statement immediately after the Queen's Speech drawing any Bills with framework powers to Members' attention. When a Bill containing a framework power is introduced, another written statement will be made informing Members. An Explanatory Memorandum will accompany every framework power. As soon as possible after introduction of a Bill containing a framework power a briefing session led by a Wales Office Minister and an Assembly Government Minister will be held in the relevant House, open to all Members. In the Commons, where there is a demand, at least one Welsh MP will be on every Committee scrutinising a Bill with a framework power. Subject to demand, and agreement by the usual channels, time for debate on a framework power will be guaranteed. I believe that these arrangements coupled with the usual opportunities to scrutinise a Bill during its passage through Parliament, including public evidence sessions in the Commons, allow for effective scrutiny.’<sup>117</sup>

6.66 In short, the Government has ensured that Welsh Labour MPs are appointed to Public Bill Committees that are considering clauses that confer

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<sup>116</sup> See the Modernisation Committee's Report on “The Legislative Process”, HC1097 (First Report, 7 September 2006, session 2005-06)  
<http://www.publications.parliament.uk/pa/cm200506/cmselect/cmmodern/1097/109706.htm>

<sup>117</sup> Op.Cit., Letter from Secretary of State for Wales to WASC Chair, 21 July 2008.

Measure-making powers on the Assembly. It is conceivable that they will also focus on clauses that confer secondary legislation powers on Welsh Ministers. However, no opposition Welsh MPs have been placed on the relevant committees, for whatever reason and the practice does not take account of secondary legislation powers for Welsh Ministers conferred in other Acts.

6.67 Of recent Bills which are at or have completed the Committee stage in the House of Commons, the Apprenticeships, Skills, Children and Learning Bill, the Business Rate Supplements Bill, which include Welsh provisions, did not include any Welsh MPs. In his response to the Committee Elfyn Llwyd MP noted concerns 'that Welsh interests are not fully represented in Public Bill Committee'<sup>118</sup>.

### *Evidence*

6.68 Several respondents stated that the information provided on the implications of UK Bills for Wales is inadequate. In his evidence to the Committee, the Secretary of State for Wales noted that when seeking legislative powers for the Assembly in UK Bills the Welsh Assembly Government produces an Explanatory Memorandum, agreed with the Wales Office, setting out the existing executive and legislative provisions which is then published on the Wales Office website.

6.69 The Explanatory Memorandum produced by the Welsh Assembly Government however, does not appear to be published on neither its website under its section on UK Bills, nor on the UK Parliament's website. Currently, this is the extent of information held on the Welsh Assembly Governments website about Welsh provisions in UK Bills, which is both brief and has not been updated to reflect the 2008-09 legislative programme and only identifies three bills (as at March 2009). For further information, the public is directed to the UK Parliament's website.

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<sup>118</sup> Elfyn Llwyd, *written evidence*, SLC 23

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### Legislation

#### UK Parliamentary Bills

Bills and Acts that contain Measure powers

### Bills and Acts that contain Measure powers

There are currently three Bills before Parliament that contain Measure powers for the National Assembly for Wales.

These are:

- Education and Skills Bill
- Local Transport Bill
- Planning Bill

There are many stages that a Bill has to pass through in both Houses of Parliament before it becomes law. The official record of the debates on these Bills as they are scrutinised by both Houses of Parliament is produced by Hansard. Read about these stages in Factsheet L1 - Parliamentary Stages of a Government Bill.

View: [Factsheet L1 - Parliamentary Stages of a Government Bill on the UK Parliament website.](#)

Once a Bill has been scrutinised and approved by both Houses of Parliament it is then formally approved by HM The Queen – this is called Royal Assent. The Bill then becomes an Act.

There have already been successful amendments to Schedule 5 by Acts of Parliament. The Brief Guide to Legislative Competence lists the specific Matters currently listed Schedule 5 of the Government of Wales Act 2006 and the legislation which inserted them. The full text of those Acts of Parliament can be accessed on the Office for Public Service Information (OPSI) website.

### Related Links

**Schedule 5 to the Government of Wales Act 2006**  
Schedule 5 to the Act alphabetically lists 20 devolved areas, within which the National Assembly for Wales can seek legislative competence to pass Assembly Measures over certain topics.

**A Brief Guide to the Legislative Competence of the Assembly**  
The Guide to Legislative Competence provides a detailed introduction to the National Assembly's legislative competence.

**Office of Public Sector Information**  
The Office of Public Sector Information publishes Acts of Parliament and Statutory Instruments.

**Progress of UK Parliamentary Bills**  
Follow the progress of United Kingdom (UK) Parliamentary Bills on the UK Parliament website.

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6.70 As mentioned above, whereas Welsh Ministers produce an Explanatory Memorandum on proposed framework powers in Bills, there is no similar process to identify where Bills confer new functions on Welsh Ministers and how they plan to make use of their new powers. Elfyn Llwyd MP stated:

‘A Wales Office or Welsh Assembly explanatory memorandum, written in co-ordination with the lead Department in Westminster, could give a fuller indication of expected changes and their effects, perhaps including any suggestions made by the relevant Welsh Assembly Government minister as to how these powers will be utilised once created or transferred’.<sup>120</sup>

6.71 The Secretary of State explains that further information on the powers delegated to Welsh Ministers in Bills are included in the Explanatory Notes:

‘Where appropriate a table is drawn in the explanatory notes to each Bill setting out where there is substantial devolved executive or legislative competence. We are encouraging the use of such tables in order to improve understanding of how individual Bills will impact on Wales. How powers devolved to Welsh Ministers might be used is a matter for Welsh Ministers.’<sup>121</sup>

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<http://new.wales.gov.uk/legislation/ukparliamentary/contain/?jsessionid=6nMhJ2TVVNTsQyijMn1NRShQ0fb1h2WNwyWGQGx7J2xnLdJTIFjXT!1614610361?lang=en> (accessed 10.03.09)

<sup>120</sup> Elfyn Llwyd, *written evidence*, SLC23

<sup>121</sup> Secretary of State, *written evidence*, SLC22

6.72 On this point, the Counsel General noted:

‘It is ultimately a matter for the UK Government as to what information it provides when Bills are published...we should remember that, when Bills are published, they are not published in their full form. Bills are worked on over time, and consultation takes place with Government Ministers here to look at what needs to be included in the Bill from a Welsh perspective. So, it should not be seen as unusual that a Bill is published without a full transcript of what it would eventually look like. If that were the case, the accusation would be made, fairly, that consultation was a sham. So, because Bills are published without the full transcript being available, proper consultation can take place, and negotiation and discussion can take place between Ministers here and Ministers in London in order to ensure that what is seen as appropriate for Wales is included in the Bill. That is the normal process that is always followed’.<sup>122</sup>

6.73 The Law Society commented that the usefulness tended to vary and that there was ‘significant departmental variation’<sup>123</sup>. The Law Society cited the Planning Bill as an example of where it was difficult to identify the extent of the remit of the proposed Infrastructure Planning Commission in relation to the current powers of Welsh Ministers, and the clause which was ‘the key to protecting the devolution settlement’.

‘It is not mentioned in the explanatory memorandum, and the latest one dates from the introduction of the Bill from the House of Commons to the House of Lords, by which time the Minister had already flagged this point up in her written statement to the Assembly, but it still does not appear in the Westminster explanatory memorandum. That is a classic example of the devolution significance of provisions in Westminster Bills not being adequately flagged up.’<sup>124</sup>

6.74 The Sustainability Committee's Report on the Planning Bill, of 5 February 2008, also expressed disappointment that, “due to the lack of detail on the face of the Bill on a number of provisions, it was unable to consider and input fully to the parliamentary process on the impact on Wales of all aspects of the Bill.”<sup>125</sup>

6.75 Countryside Council for Wales<sup>126</sup> highlighted the point that information on the implications of UK Bills on areas of devolved competencies and the powers of Welsh Ministers are available from a range of sources (e.g. Members Research Service, Committee briefing, Cabinet Statements), however there is no standard procedure for the provision of such information.

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<sup>122</sup> RoP, para 72, 11 November 2008

<sup>123</sup> RoP, para 44, 4 November 2008

<sup>124</sup> RoP, para 46, 4 November 2008

<sup>125</sup> <http://www.assemblywales.org/cr-ld6950-e.pdf>

<sup>126</sup> Countryside Council for Wales, *written evidence*, SLC6

6.76 Some respondents expressed concern that scrutiny of Bills in Westminster tended to neglect the implications for Wales. While the Secretary of State has suggested that at least one Welsh MP will be on every Committee scrutinising a Bill with a framework power, there may be other Bills which do not contain framework powers but nonetheless devolve significant functions to Welsh Ministers.

6.77 During its visit to London, the Committee noted the model adopted by the Lords' Delegated Powers and Regulatory Reform Committee in its scrutiny of Bills. It considers the Delegated Powers Memorandum from the relevant government department in addition to the explanatory notes on the Bill. This memorandum:

- identifies all of the provisions for delegated legislation;
- describes their purpose;
- explains why the matter is proposed to be delegated; and
- explains which procedure will apply to the exercise of each power – affirmative, negative or none – and why it is thought appropriate.

6.78 It was suggested that it may be useful for the Delegated Powers Committee to be informed of the views of the Assembly's Subordinate Legislation Committee, although in practice the timing of reports would be challenging due to the different timescales employed by the House of Lords and the Subordinate Legislation Committee. It was suggested that there may be scope for closer co-operation with the Delegated Powers Committee, mainly at an official level, to help the Subordinate Legislation Committee in its consideration of the delegated powers in Bills.

6.79 The Welsh Affairs Committee stated that in the course of their work on Legislative Competence Orders it has found that informal joint meetings with Assembly Committees have been extremely productive and that the exchange of information involved has enhanced their inquiries. The Committee felt that pursuing this means of dialogue with the Welsh Affairs Committee would enhance the scrutiny of UK Bills and ensure the Committee had relevant information available.

6.80 Some of the evidence submitted noted the Planning Bill, and Draft Marine Bill, as useful examples of where problems have occurred in terms of scrutinising UK legislation. As part of the inquiry the Committee reviewed the Planning Bill and Draft Marine Bill to establish what issues were apparent (as mentioned – annex 7). The issues highlighted by external stakeholders were similar to the issues identified when the Committee reviewed the Bill. These issues included:

- Lack of WAG involvement at an early stage of legislation;
- Insufficient information on the face of the Bill;
- Insufficient time to scrutinise the draft Bill within the Assembly and a mismatch of timeframes for scrutiny between the Assembly and UK Parliament (in particular on amendments to the Bills);

- A lack of stakeholder consultation and input in Wales;
- No evidence that Assembly recommendations were given particular consideration;
- There is a potential for long delays in implementation as there has been relatively little consideration of implementation in Wales.

6.81 The Report of the Joint Committee on the Draft Marine Bill<sup>127</sup> (July 2008) flagged concern that there is a potential for a legislative vacuum between Westminster and the Assembly where changes are made to the UK legislative framework, due to the difference in ways in which Executive powers can be implemented by Welsh Ministers and the Secretary of State.

6.82 The Countryside Council for Wales<sup>128</sup> and Public Affairs Cymru<sup>129</sup> were concerned with the lack of opportunity for public consultation on the content of clauses conferring powers on Welsh Ministers or the scope of framework powers.

#### *The Committee's view*

6.83 While the Committee notes that the Wales Office and Welsh Assembly Government do provide information on Welsh provisions in UK Bills in a range of ways, it is concerned at the lack of coherence in presenting the information to the Assembly and external stakeholders. The Committee believes that good governance involves transparency of processes and access to information which allows the public easily and quickly understand the implications of Welsh provisions in Bills and how they are intended to be used.

6.84 The Committee welcomes the efforts made by the Wales Office to encourage the use of tables in explanatory notes to improve understanding of how individual Bills will impact on Wales.

6.85 However, the Committee is concerned at the lack of information available on the Welsh Assembly Government's website on the implications of the UK Government's legislative work programmes and Bills for the legislative powers of the Assembly and Welsh Ministers. The Committee believes that it is the role of the Welsh Assembly Government to explain how powers devolved to Welsh Ministers might be used, similar to the way that any requests for framework powers and the intention behind them are explained to Parliament in a supplementary Explanatory Memorandum. There is a real gap in proper supplementary information about these provisions which needs to be addressed.

6.86 The Committee noted the concerns of stakeholders at the lack of opportunity to input into scrutiny of Welsh provisions in UK Bills, and agrees to give it further consideration as its work on scrutiny of Bills develops.

<sup>127</sup> <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtmarine/159/15902.htm>

<sup>128</sup> Countryside Council for Wales, *written evidence*, SLC6

<sup>129</sup> Public Affairs Cymru, *written evidence*, SLC3

### **Action 9**

Seek to establish a closer working relationship between the Subordinate Legislation Committee and Westminster Committees, to ensure that Committees are aware of the implications for Wales of UK Bills and to assist with notification of amendments made during the passage of a Bill. The Committee would like to pursue this dialogue on how to ensure this happens with the Welsh Affairs Committee and others in Westminster.

### **Recommendation 8**

The Committee requests that the Welsh Assembly Government provides it with the Delegated Powers Memorandum as soon as this is available.

To improve the level of information publicly available about Welsh provisions in UK Bills and to help the Committee effectively scrutinise these provisions, the Welsh Assembly Government should submit the equivalent of a delegated powers memorandum to the Committee on any delegation of legislative powers to Welsh Ministers included in each Bill to supplement that provided by the UK Government. These should be submitted to the Committee as soon as possible after the Bill is introduced in Parliament.

The Memorandum should include the following information:

- Impact of the Bill in Wales
- What powers are contained in the Bill allowing Welsh Ministers to make subordinate legislation
- Explanation of enabling powers
- Explanation for use of affirmative/negative procedure
- How the powers contained in the Bill impact/change powers currently held by Welsh Ministers
- How the Government intends to implement the powers in the Bill
- How the Government has worked with UK Ministers to ensure that proposed delegated powers are adequate to achieve the outcomes of the Bill and Welsh Assembly Government's policy objectives
- What consultation has been undertaken or what consultation has been proposed

### **Recommendation 9**

The Welsh Assembly Government should improve the information on Welsh provisions in Bills included on its website; for example, the explanatory memorandum on Welsh provisions in UK Bills as recommended above should be included on the Welsh Assembly Government's website, this will enhance transparency and ease access to information.

## Consideration of Draft Bills

### *Background*

6.87 The UK Government publishes a number of Bills each parliamentary session in draft form, before they are introduced in Parliament as formal Bills. This enables consultation and pre-legislative scrutiny before a Bill is issued formally. Scrutiny Committees may consider draft Bills. However, as Standing Order 15 is currently drafted, the Subordinate Legislation Committee may only consider “the appropriateness of provisions in proposed Assembly Measures and in Bills for Acts of the United Kingdom Parliament”.

### *Evidence*

6.88 Some respondents noted that the best opportunity to influence the content of Welsh provisions in Bills is at the draft Bill stage. Wales Environment Link urged the Committee to consider “how the opportunity harnessed by the publication of draft Bills can be effectively harnessed by the Assembly”<sup>130</sup>.

6.89 The Chief Legal Adviser refers to this issue in his written evidence to the Committee<sup>131</sup>. The Subordinate Legislation Committee’s Standing Orders only refer to the consideration of the appropriateness of delegated powers in Bills, and not draft Bills.

6.90 The Scrutiny Committees responded that they that would be interested in considering draft Bills. The Children and Young Peoples Committee<sup>132</sup> considered that the scrutiny of draft Bills, as opposed to Bills, has the advantage of potentially affording greater scope to influence legislation.

### *The Committee’s view*

6.91 The Committee agrees with the view that scrutiny at the stage of draft Bills would allow greater potential for influencing legislation. This would require a change to Standing Order 15.6. This is something the Committee will look to pursue at its review stage when it would then wish to make adjustments to standing orders to afford the Committee the opportunity to consider draft Bills with significant Welsh provisions when published in draft form.

#### **Action 10**

The Committee should have the option to consider draft Bills with significant Welsh provisions (and considers that Standing Orders should be amended to reflect this).

<sup>130</sup> Wales Environment Link, *written evidence*, SLC4

<sup>131</sup> SLC(3)-20-08 : Paper 3 : Evidence to Inquiry 29 September 2008

<sup>132</sup> Children and Young People Committee, *written evidence*, SLC11



## 7. Taking the work forward: the implications of the Committee's conclusions for its future approach to scrutiny

### *Background*

7.1 The Chief Legal Adviser clearly sets out the challenge to the Committee as it seeks to develop its role:

“The challenge...is to strike the right balance between effectiveness of scrutiny by the legislature and flexibility of law-making by Ministers....the search for a perfect solution to the problem of how best to scrutinise subordinate legislation is doomed to fail. The best that can be achieved is a compromise which delivers a good level of scrutiny without undermining the speed and flexibility which are the reason why the power to make subordinate legislation was delegated in the first place. The solution must also be realistic having regard to the resources available. Even achieving a workable compromise is likely to involve careful prioritisation, concentrating the time of the Committee on the kind of work which is likely to be of the greatest practical benefit.”<sup>133</sup>

7.2 Cymru Yfory<sup>134</sup> noted that the Committee's remit encompasses the work of at least five Committees in the UK Parliament currently undertakes. It is also worth highlighting Cardiff Law School's comment:

“No other Committee has this explicit jurisdiction [as set out in SO 15.2 – 15.6], and if the Subordinate Legislative [sic] Committee did not have such jurisdiction, such matters would not come within the purview of any branch of the Assembly...these are new areas of assembly work for which scrutiny procedures need to be strengthened.”<sup>135</sup>

7.3 Most respondents to the consultation acknowledged that the Committee's limited resources would determine to what extent it could take on these new roles, both in terms of Members' time and staff support. Cardiff Law School noted “expert staff who are able to clearly analyse and comment upon each aspect of the Committee's work, would help to leave the Committee with the core important decisions and recommendations which it has to make on a weekly basis.”<sup>136</sup>

7.4 Public Affairs Cymru was critical of the Committee's early morning meeting time, commenting that it “does not accord the Committee the opportunity to engage meaningfully and urgent consideration should be given to changing its time”<sup>137</sup>. The implication is that the 8.15am slot gives it the appearance of being a Committee of marginal interest.

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<sup>133</sup> SLC(3) 20-08 (p3), *written evidence*, 29<sup>th</sup> September 2009

<sup>134</sup> RoP, para 34, 6 October 2008

<sup>135</sup> Cardiff Law School, *written evidence*, SLC7

<sup>136</sup> Cardiff Law School, *written evidence*, SLC7

<sup>137</sup> Public Affairs Cymru, *written evidence*, SLC3

7.5 Tomorrow's Wales noted that the Committees name is no longer appropriate;

'A further change would be to re-name the committee, to emphasise the breadth of its role. In reality it is already a 'Legislation Committee' rather than a 'Subordinate Legislation Committee'.

### *The Committee's View*

7.6 If the Committee were to undertake all the work within its remit, it could consider:

- Statutory Instruments (both from a technical and merits view point;)
- Proposed Measures – provisions delegating powers to Welsh Ministers;
- UK Bills – provisions delegating powers to Welsh Ministers;
- Legislative and Regulatory Reform Act Orders – the consequences for legislation subject to the consideration of the Assembly;
- Any other subordinate legislation laid before the Assembly;
- Commencement orders;
- Any legislative matter of a general nature within or relating to the competence of the Assembly or Welsh Ministers.

7.7 The Committee acknowledges that its remit is wide. However, it is also important to recognise that the majority of Welsh legislation is subordinate legislation, and that now, post the Government of Wales Act 2006, the Committee is the only Committee which formally scrutinises subordinate legislation. The Committee therefore believes that it is essential to ensure an adequate level of scrutiny of subordinate legislation.

7.8 The Committee agrees that smart working will be required for it to undertake effective scrutiny of all these different types of items within its present time slot and with the resources currently available to it.

7.9 The Committee has therefore agreed to test its new ways of working over the next six to nine months. It will enable the Committee to test its capacity to undertake this new kind of work with the current level of support available to the Committee and what the Committee could potentially aim for if it had more resources. It will also help it determine its work priorities and where it would have the greatest impact and bring the greatest benefits.

7.10 The Committee has regularly discussed the issue of changing the meeting time of the Committee so that it meets during the mainstream Assembly Business timetable (i.e. after 9am on Tuesday or Wednesday mornings and Thursdays). However, the timing of the meeting is not the Committee's key concern, it is the one hour allocated to the Committee. This has already proven to be insufficient for the Committee to undertake its work in an effective and timely manner. It is likely to prove even more challenging as the Committee undertakes its wider work remit. The Chair has started a

dialogue with the Business Committee to explore the options for alternative meeting times.

7.11 The Committee agrees with Tomorrow's Wales and believes the title 'Subordinate Legislation Committee' no longer reflects the enhanced remit of the work the committee undertakes.

#### **Action 11**

The Committee will implement initial changes over a 6 month period on an incremental basis and will undertake a review in 6 to nine months. This review will consider the impact of the changes and new ways of working introduced and possible future changes, which could be made if more resources were made available to the Committee.

#### **Recommendation 10**

The Committee recommends consideration should be given, by Business Committee to changing the name of the Committee. A suggested appropriate title is 'Delegated Powers and Subordinate Legislation Committee'.

#### **Workload for the next six to nine months**

7.12 For the initial six months after publication the Committee intends to:

- i. Adopt an incremental approach to the scrutiny of the "merits" of Statutory Instruments, by focusing primarily on the merits of statutory instruments which are subject to the affirmative procedure. This should help inform the plenary debate on the motion to approve the Statutory Instruments, by providing all Assembly Members with the Committee's view of the "merits" of the Statutory Instrument, where appropriate.
- ii. Continue to scrutinise the appropriateness of the delegated powers provisions in proposed Measures according to the significance of the provisions;
- iii. Scrutinise the delegated powers provisions of selected Bills; consider each Bill on the basis of briefings provided by the Welsh Assembly Government, and the Committee's legal advisers; where possible, consider evidence from external stakeholders; and test how best to give effect to any specific recommendations the Committee may make in relation to individual Bills.

## **Work which the Committee may consider undertaking in future with additional resources**

7.13 Following the review, if the Committee wishes to give fuller consideration to all aspects of its remit, the Committee will require additional resources in terms of officer support to the Committee.

7.14 During the course of the inquiry, the Committee identified a few other areas of work which would ensure more effective and timely scrutiny of statutory instruments and UK Bills. If the Committee were to gain additional resources and more Committee time, then the Committee could undertake the following additional work:

i. Add to the categories of Statutory Instruments which the Committee would receive merits advice on, to include:

- any statutory instruments stemming from either new Measures, Acts of Parliaments or EU directives which have been identified as areas of concern by the Assembly during the passage of the legislation, and therefore merit closer scrutiny;
- consider any significant draft Statutory Instruments during the WAG consultation phase, in particular those which are implementing a significant new or change of policy.

7.15 With a fully resourced Committee, Members could receive advice under Standing Order 15.3 on all statutory instruments, whether negative or affirmative.

ii. In relation to UK Bills, the Committee could:

- consider the Welsh delegated powers provisions of all UK Bills;
- consider the draft legislative work programme when issued in Spring / Summer, as well as “Queen’s Speech” the UK government’s Legislative Work Programme on an annual basis;
- consider the draft Bills with the most significant Welsh provisions when published in draft form (which would require a corresponding change of standing orders).

7.16 As mentioned above, some of these new areas of work would require changes to Standing Orders. For ease of reference, a full list of standing order implications are at annex two.

## **STANDING ORDER 15 - Subordinate Legislation Committee**

- 15.1 There is to be a Subordinate Legislation Committee.
- 15.2 Subject to Standing Order 15.7, the Committee must consider all statutory instruments or draft statutory instruments required by any enactment to be laid before the Assembly and report on whether the Assembly should pay special attention to the instrument or draft on any of the following grounds:
- (i) that there appears to be doubt as to whether it is *intra vires*;
  - (ii) that it appears to make unusual or unexpected use of the powers conferred by the enactment under which it is made or to be made;
  - (iii) that the enactment which gives the power to make it contains specific provisions excluding it from challenge in the courts;
  - (iv) that it appears to have retrospective effect where the authorising enactment does not give express authority for this;
  - (v) that for any particular reason its form or meaning needs further explanation;
  - (vi) that its drafting appears to be defective or it fails to fulfil statutory requirements;
  - (vii) that there appear to be inconsistencies between the meaning of its English and Welsh texts;
  - (viii) that it uses gender specific language;
  - (ix) that it is not made or to be made in both English and Welsh;
  - (x) that there appears to have been unjustifiable delay in publishing it or laying it before the Assembly; or
  - (xi) that there appears to have been unjustifiable delay in sending notification under section 4(1) of the Statutory Instruments Act 1946 (as modified).
- 15.3 Subject to Standing Order 15.7, the Committee may consider and report on whether the Assembly should pay special attention to any statutory instrument or draft statutory instrument required by any

enactment to be laid before the Assembly on any of the following grounds:

- (i) that it imposes a charge on the Welsh Consolidated Fund or contains provisions requiring payments to be made to that Fund or any part of the government or to any local or public authority in consideration of any licence or consent or of any services to be rendered, or prescribes the amount of any such charge or payment;
- (ii) that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly;
- (iii) that it is inappropriate in view of the changed circumstances since the enactment under which it is made or is to be made was itself passed or made;
- (iv) that it inappropriately implements European Union legislation; or
- (v) that it imperfectly achieves its policy objectives.

15.4 The Committee must make any report under Standing Order 15.2 or 15.3 in respect of any statutory instrument or draft statutory instrument no later than 20 days after the instrument or draft has been laid.

15.5 In calculating for the purposes of Standing Order 15.4 any period of days, no account is to be taken of any time during which the Assembly is dissolved or is in recess for more than 4 days.

15.6 Subject to 15.7, the Committee may also consider and report on:

- (i) any other subordinate legislation laid before the Assembly;
- (ii) the appropriateness of provisions in proposed Assembly Measures and in Bills for Acts of the United Kingdom Parliament that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister or the Counsel General;
- (iii) consequences for legislation subject to the consideration of the Assembly of draft orders under Part 1 of the Legislative and Regulatory Reform Act 2006;
- (iv) the exercise of commencement powers by the Welsh Ministers; or
- (v) any legislative matter of a general nature within or relating to the competence of the Assembly or Welsh Ministers.

15.7 The Committee may not consider:

- (i) any draft legislative competence order; or
- (ii) any statutory instrument or draft statutory instrument that is required to be laid before Parliament.

## Annex 2

### **Standing Order Implications**

The Committee's actions and recommendations have resulted in a requirement to amend Standing Orders. These are summarised here for ease of reference.

#### *Scrutiny of SIs*

The Committee wished to explore the option of considering draft statutory instruments before they are laid. Scrutinising draft statutory instruments would require an amendment to Standing Orders to ensure this is possible. The standing order which would need to be amended would be Standing Order 15. It could be done by adding to the list of optional work which the Committee may undertake under SO.15.6.

#### *Legislative Consent Memoranda*

The committee would like to recommend that Business Committee give consideration as to how Legislative Consent Memoranda under Standing Order 26 could be subject to scrutiny by one of the Assembly Committees prior to debate in Plenary.

#### *Draft Bills*

The Committee wishes to have the option to consider draft Bills, which would require a change of Standing Order 26. The Committee would need to consider under what circumstances would the Committee wish to consider draft Bills e.g. limited only to Bills with significant delegation of powers.

#### *Legislative and Regulatory Reform Orders*

The Committee may consider these draft Orders under the Legislative and Regulatory Reform Act 2006 (LRRRA) which impact on legislation which is subject to the consideration of the Assembly (SO 15.6 (iii)). However, there is an apparent contradiction within Standing Orders, as Standing Order 15.7 precludes the Committee from considering any statutory instruments which have to be laid before Parliament, as all LRRRA Orders have to. The Committee wish to request that the Business Committee removes this contradiction in Standing Orders. This would allow the Committee the option to consider them in future.

#### *Name change*

The Committee wishes to change the name of the Committee to incorporate the enhanced remit it now has. This would require a change to Standing Order 15.1 and any other consequential amendments.





***Y Pwyllgor Is-ddeddfwriaeth***  
**Subordinate Legislation Committee**

Cynulliad National  
Cenedlaethol Assembly for  
Cymru Wales  
Bae Caerdydd / Cardiff Bay  
Caerdydd / Cardiff CF99 1NA

Dear Colleague

24 June 2008

**Public Consultation – Invitation to respond**

**Subordinate Legislation Committee – Inquiry into the scrutiny of subordinate legislation and delegated powers**

The Subordinate Legislation Committee of the National Assembly for Wales has launched an inquiry into the scrutiny of subordinate legislation and other legislation which falls within its remit. I am writing to invite you to submit evidence to the Committee by the 2 September 2008.

The remit of the Committee is set out in Standing Orders (SO), the Assembly's procedural rules in SO15. The Committee is required to undertake "technical" scrutiny of statutory instruments under SO15.2. The Committee may also undertake additional scrutiny activities:

- Under SO 15.3, the Committee may report on statutory instruments (SIs) on other grounds, for example, that it is of political or legal importance (SO 15.3 (ii)); that it inappropriately implements European Union legislation (SO 15.3(iv)) or that it imperfectly achieves its policy objectives (SO 15.3(v)).
- Under SO 15.6, the Committee may consider various matters including the appropriateness of provisions in Assembly Measures or Bills of the UK Parliament that grant powers to make subordinate legislation to the Welsh Ministers, First Minister or the Counsel General - Standing Order 15.6(ii) - and the consequences for legislation subject to the consideration of the Assembly under Part 1 of the Legislative and Regulatory Reform Act 2006 - Standing Order 15.6(iii).

The Inquiry will review the procedures in place in relation to the scrutiny of subordinate legislation and other legislation falling within the remit of the Committee. It will focus in particular on how it should approach the following areas of its work and the implications for the Committee's working practices:

- scrutiny of statutory instruments on the grounds set out in Standing Order 15.3;
- particular considerations relating to statutory instruments implementing European directives;

- scrutiny of Bills of the UK Parliament which have an impact on Wales.

We are interested in understanding current procedures in relation to the preparation and making of subordinate legislation by the Welsh Assembly Government and the conferral of delegated powers on Welsh Ministers in UK Bills with a view to making recommendations which should result in:

- better regulation – improved processes for the preparation of subordinate legislation and other legislation within the Committee’s remit with a view to improving the transparency of procedures and the engagement of those affected by them;
- enhanced scrutiny – the results of the inquiry will provide the basis for the Committee’s approach to its enhanced scrutiny remit to ensure effective and timely scrutiny of regulations and other legislation within its remit which goes beyond technical scrutiny.

**In particular the Committee would like to receive evidence on the following:**

1. Scrutiny of Statutory instruments on the grounds set out in Standing Order 15.3:

- the effectiveness of the Welsh Assembly Government’s consultation with stakeholders in respect of statutory instruments;
- how the Welsh Assembly Government works with the UK government when drafting statutory instruments;
- how the Committee can undertake effective and timely scrutiny of regulations in respect of their political or legal importance or policy objectives;
- what the Committee can learn from the House of Lords Merits Committee, whose reporting remit is similar to that of SO15.3.

2. Additional considerations relating to statutory instruments implementing European Union directives:

- the effectiveness and transparency of the Welsh Assembly Government’s transposition procedures;
- the extent to which the Welsh Assembly Government can and does tailor the implementing regulations to the needs of Wales in view of the parameters set by European directives.

3. Scrutiny of Bills of the UK Parliament which have an impact on Wales:

- the procedures in place to make transparent the implications of UK Bills on areas of devolved competency and the powers of Welsh Ministers;
- how decisions are taken with respect to conferring delegated powers on Welsh Ministers, agreeing the applicable procedures or conferring framework powers (powers to make Assembly Measures) within Bills;
- liaison between the Welsh Assembly Government and the UK government in relation to UK Bills;

- how to ensure effective and timely consideration of UK Bills by the Committee.

Further information on the Subordinate Legislation Committee can be found on the Assembly website:

<http://www.assemblywales.org/bus-home/bus-committees/bus-committees-third1/bus-committees-third-sleg-home.htm>

#### **How to respond to the consultation:**

If you would like to respond to the consultation, please keep the following in mind:

- We would appreciate concise responses. Please reference your response using the title applied above.
- The National Assembly normally makes responses to public consultation available for public scrutiny, for example through the Assembly's website, and they may also be seen and discussed at Committee meetings. **If you do not want your response or name published it is important that you specify this at the end of your submission.**
- Please indicate whether you are responding on behalf of an organisation, or as an individual.
- Please indicate whether or not you would be prepared to give oral evidence to the Committee.

To submit evidence please send, preferably by email or on disk, otherwise in hard copy to Olga Lewis, Deputy Committee Clerk, Subordinate Legislation Committee, National Assembly for Wales, Cardiff Bay CF99 1NA. The email address is [legislationoffice@wales.gsi.gov.uk](mailto:legislationoffice@wales.gsi.gov.uk). Please entitle the email *Consultation SLC*.

**Submissions should be sent to arrive by 2 September 2008. All submissions will be acknowledged. It may not be possible to take into account responses received after this date.**

The Committee will consider responses to the written consultation during the Autumn term 2008.

If you have any queries regarding the consultation, the Committee's work or about the Assembly's legislative process etc, please do not hesitate to contact the Clerk, Anna Daniel (tel: 029 2089 8144), or Olga Lewis, the Deputy Clerk (tel.: 029 2089 8154).



**Dr Dai Lloyd AM**  
**Chair**

Swyddfa Ddeddfwriaeth Gwasanaeth Seneddol y Cynulliad / APS Legislation Office  
Ffôn / Tel 02920 89 8154  
E-mail [Legislation.comm@wales.gsi.gov.uk](mailto:Legislation.comm@wales.gsi.gov.uk)

Croesewir gohebiaeth yn y Gymraeg a'r Saesneg  
We welcome correspondence in both English and Welsh

## Annex 4

### List of further consultation requests

Letter to Scrutiny Committee Chairs

[http://www.assemblywales.org/slc-inq-ltr-081211\\_dl\\_to\\_committee\\_chairs\\_-\\_inquiry.pdf](http://www.assemblywales.org/slc-inq-ltr-081211_dl_to_committee_chairs_-_inquiry.pdf)

Letter to Harriet Harman MP

[http://www.assemblywales.org/slc-inq-ltr-20.01.09\\_jr\\_to\\_hh\\_re\\_inqry\\_.pdf](http://www.assemblywales.org/slc-inq-ltr-20.01.09_jr_to_hh_re_inqry_.pdf)

Letter to Welsh Affairs Committee

[http://www.assemblywales.org/slc-inq-ltr-081216\\_jr\\_to\\_wac\\_re\\_inqry\\_dec\\_08\\_.pdf](http://www.assemblywales.org/slc-inq-ltr-081216_jr_to_wac_re_inqry_dec_08_.pdf)

Letter to Law Commission

[http://www.assemblywales.org/slc-inq-ltr-081211\\_dl\\_to\\_law\\_commission.pdf](http://www.assemblywales.org/slc-inq-ltr-081211_dl_to_law_commission.pdf)

Letter to Wales Office

[http://www.assemblywales.org/slc-inq-ltr-081211\\_dl\\_to\\_sos\\_re\\_inqry\\_2\\_dec\\_08\\_1.pdf](http://www.assemblywales.org/slc-inq-ltr-081211_dl_to_sos_re_inqry_2_dec_08_1.pdf)

Letter to Elwyn Llwyd MP

[http://www.assemblywales.org/slc-inq-ltr-081216\\_jr\\_to\\_el\\_re\\_inqry\\_dec\\_08\\_.pdf](http://www.assemblywales.org/slc-inq-ltr-081216_jr_to_el_re_inqry_dec_08_.pdf)

Letter to Roger Williams MP

[http://www.assemblywales.org/slc-inq-ltr-20.01.09\\_jr\\_to\\_rw\\_re\\_inqry\\_.pdf](http://www.assemblywales.org/slc-inq-ltr-20.01.09_jr_to_rw_re_inqry_.pdf)

Letter to Cheryl Gillan MP

[http://www.assemblywales.org/slc-inq-ltr-20.01.09\\_jr\\_to\\_cg\\_re\\_inqry\\_.pdf](http://www.assemblywales.org/slc-inq-ltr-20.01.09_jr_to_cg_re_inqry_.pdf)

## Annex 5

### **List of consultation responses**

<http://www.assemblywales.org/bus-home/bus-committees/bus-committees-third1/bus-committees-third-sleg-home/bus-committees-third-sleg-cons-response.htm>

SLC 1	Tomorrow's Wales
SLC 2	Law Society Wales
SLC 3	Public Affairs Cymru
SLC 4	Wales Environment Link
SLC 5	Arthritis Care in Wales
SLC 6	The Countyside Council for Wales
SLC 7	Cardiff Law School
SLC 8	Carwyn Jones AM
SLC 9	Secretary of State for Wales
SLC 10	Communities and Culture Committee
SLC 11	Children and Young People
SLC12	European and External Affairs
SLC 13	Enterprise and Learning
SLC 14	Equal Opportunity
SLC 15	Health Well Being and Local Government
SLC 16	Petitions Committee
SLC 17	Rural Development Sub-Committee
SLC 18	Sustainable Development Committee
SLC 19	Harriet Harman MP, Leader of the House of Commons
SLC 20	Dr Hywel Francis MP, Chair Welsh Affairs Committee
SLC 21	William Arnold, Chief Executive, Law Commission
SLC 22	The Right Hon. Paul Murphy, Secretary of State, Wales Office
SLC 23	Elfyn Llwyd MP, Plaid Cymru

Annex 6  
**Oral Evidence Sessions**

Date of Meeting	Attendee	Organisation
29 <sup>th</sup> September 2008	Keith Bush, Chief Legal Adviser and Director of Legal Services	National Assembly for Wales
	Mr David Lambert, Distinguished Research Fellow	Cardiff Law School, Cardiff University
	Marie Navarro, Research Associate	Cardiff Law School, Cardiff University
6 <sup>th</sup> October 2008	Keith Davies, Head of Environment Policy	Countryside Council for Wales
	Llinos Price, Senior Policy Officer	Countryside Council for Wales
	Daran Hill, Chair	Public Affairs Cymru
	Darren Hughes, Vice Chair	Public Affairs Cymru
	Anne Meikle, Policy and Advocacy Manager	WWF Cymru (Wales Environment Link)
	Helen Miller, Policy and Campaigns Manager	Arthritis Care Cymru
	Annie Smith	RSPB Cymru (Wales Environment Link)
	Alan Trench, Constitutional Advisor	Tomorrow's Wales
4 <sup>th</sup> November 2008	Kay Powell, Policy Advisor	Law Society
	Huw Williams	Geldards LLP
11 <sup>th</sup> November 2008	Carwyn Jones, Counsel General and Leader of the House	Assembly Member, Labour
	Kate Cassidy, Head Constitutional Affairs and Legislation Management	Welsh Assembly Government

## Members' Research Service

### Gwasanaeth Ymchwil yr Aelodau

## Summary of Bill Case Study

Annex 7

### Members' Research Service Case Study into the Planning Bill and Draft Marine Bill

As the Committee Inquiry progressed, it became evident that several of the issues that were coming to the fore were experienced at various stages of legislative scrutiny of the Planning Bill and draft Marine Bill, and in October 2008 the committee asked the Members' Research Service to undertake a case study into the legislative scrutiny of these particular Bills.

The main findings of the case study are highlighted below:

#### 1. Planning Bill

The stated purpose of the Planning Bill was to streamline and improve the planning regime, including an independent Infrastructure Planning Commission (IPC) to consider applications for "nationally significant" infrastructure projects in the fields of energy, transport, water, waste water and waste. It also introduced a Community Infrastructure Levy and further measures to improve the Town and Country Planning System in England.

#### Issues from evidence

**Insufficient information on the face of the Bill prevented the opportunity to fully consider and input into how the Bill might affect Wales.**

The UK Government's Planning Bill received its First Reading in the House of Commons on 27 November 2007. The Secretary of State announced in his statement to the National Assembly for Wales on 28 November 2007 that the Bill would include new framework powers relating to local development plans and the Wales Spatial Plan. However these did not appear on the face of the Bill.

The Bill introduced a Community Infrastructure Levy and a number of changes to the Town and Country Planning regime in England. Some of these changes applied in Wales but Welsh Ministers would be able to decide when they should commence. For the remaining changes, the Welsh Assembly Government said that they would be introduced at the Parliamentary Committee stage of the Bill but would not be implemented in Wales until consultation had taken place. It was unclear which of the changes to streamline the planning system being made in England the Minister intended to introduce in Wales, and the likely timescale of this.

**There was a lack of Welsh Assembly Government involvement at an early stage of legislation, and the timescale of the Bill, and full schedule of Members and Ministers, meant that it was difficult to ensure adequate opportunity to discuss and develop proposals.**

The Assembly's Sustainability Committee invited the Minister for Environment, Sustainability and Housing to an evidence session on the UK Planning Bill to allow Members to seek clarification on the implications for Wales. As the Bill was also being considered in Westminster on the same day, the UK Minister and Bill Team were unavailable to attend the evidence session. In order to meet deadlines in scrutiny of the Bill at Westminster, the Committee's consideration of the Bill was limited to one evidence session, which took place on 24 January 2008. Amendments to the Bill to include Framework Powers were also tabled on 24 January 2008, and a copy of the amendment was sent to the Sustainability Committee following its meeting on that date.

The Committee reported on the Bill on 5 February 2008. In relation to the development of the legislation, the Committee highlighted the following:

- The Committee welcomed the Minister's commitment to provide Members with regular updates on any substantive amendments to the Bill. However, the Committee was disappointed that, due to the lack of detail on the face of the Bill on a number of provisions, it was unable to consider and input fully to the parliamentary process on the impact on Wales of all aspects of the Bill. **The Committee recommended that 'the Welsh Assembly Government is fully involved in the development of the detail of the Community Infrastructure Levy, before the Bill is amended or regulations introduced'.** (Recommendation 4)
- The Committee expressed general concern as to the position of the Welsh Assembly Government within the UK legislative process. The Committee was particularly concerned that the Welsh Assembly Government is not included in the early development stage of UK legislation and so its influence is limited. **The Committee recommended that 'the Welsh Assembly Government urges UK Government departments to review their procedures to ensure that the Welsh Assembly Government plays a role in the early development of all UK-wide legislation'.** (Recommendation 5)



**Introducing changes affecting Wales late in the legislative process (at the Committee stage) provided inadequate opportunity for scrutiny. In particular, amendments made to the Bill in May 2008 meant that there was little opportunity for the Assembly (or UK Parliament for that matter) to comment on the amendments.**

Following the Assembly's Sustainability Committee scrutiny of the Planning Bill, further amendments were tabled including a large collection of Government amendments, new clauses and new schedules in late May 2008. Amendments made to the Bill at this time meant that there was little opportunity for the Assembly (or UK Parliament) to comment on the amendments. Consideration of the Bill by the House of Commons was completed on 25 June 2008.

The Bill commenced its passage through the House of Lords on 26 June 2008 and an updated explanatory memorandum on the framework powers was issued on its introduction to reflect the amendments made to the Bill following its Third Reading in the House of Commons.

In its evidence to the subordinate legislation inquiry, Public Affairs Cymru stated that "despite many enquiries from Assembly Members, the content of the relevant clauses of the Bill were not laid until Committee stage in the House of Commons. This curtailed significantly the amount of time available for the Assembly in any form – including the Subordinate Legislation Committee – to scrutinise these aspects."<sup>138</sup>

The Enterprise and Learning Committee *Interim Response to the Innovation, Universities, Science & Skills Select Committee on the Draft Apprenticeship Bill* stated:

We place on record our concerns that a precedent for the introduction of Welsh clauses to Bills may be developing, given our Legislature's recent experience of the Planning Bill, where Welsh provisions amended the Bill at a stage too late to allow for parliamentary scrutiny in Wales.<sup>139</sup>

**There is a lack of consultation and stakeholder input into UK Bills containing Welsh provisions.**

In its evidence to the subordinate legislation inquiry, the Countryside Council for Wales stated:

With regard to UK Bills containing Welsh provisions, either to confer powers on Welsh Ministers or broad framework powers, there is currently no process for stakeholder/public consultation on the content of clauses or on scope for legislative competence. On certain UK Bills containing Welsh provisions, Assembly committee scrutiny has

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<sup>138</sup> [SLC\(3\) 21-08 \(p2\)](#)

<sup>139</sup> Enterprise and Learning Committee, [CR-LD7261 - Enterprise and Learning Committee: Interim Response to the Innovation, Universities, Science & Skills Select Committee on the Draft Apprenticeships Bill](#), 10 October 2008

been limited, and rarely includes stakeholder engagement. Examples include the Marine Bill, and Planning Bill, where detailed scrutiny has taken place in Westminster committees.<sup>140</sup>

## 2. Draft Marine Bill

The draft Marine Bill was published, on 3 April 2008, for public consultation. Its aim was to create a new marine planning and management framework that balances the need for wildlife protection with the requirements of industry around our coasts. It was proposed that the Bill would apply to England, Wales, Scotland and Northern Ireland, although discussions were ongoing regarding the extent to which each Devolved Administration would be involved in each of the areas of the Bill.

### Issues from evidence

**There was insufficient pre-legislative scrutiny, and the draft Bill contained insufficient information on how powers conferred should be implemented.**

At a National Assembly for Wales Sustainability Committee meeting of 4 June 2008, the Minister for Environment, Sustainability and Housing's paper stated:

Some clauses of the Bill were not ready for inclusion in the published draft. There also remain a number of drafting issues to be addressed and other areas where the Welsh Assembly Government and Defra are still working to balance the complex interplay of devolved and non-devolved responsibilities, such as how marine plans are agreed. The published Bill is a draft and changes are expected to be needed.

Changes that need to be made as a result of consultation responses and pre-legislative scrutiny will be made before the Bill is introduced to Parliament.<sup>141</sup>

Following the meeting, the Sustainability Committee's report stated:

The Committee welcomes the recognition given in the Draft Bill of the need for Wales to establish its own procedures and mechanisms for marine management in devolved areas. We are concerned, however, that this throws up a number of grey areas in terms of implementation and potential confusion over ultimate responsibilities.<sup>142</sup>

In its evidence to the subordinate legislation inquiry, Wales Environment Link stated:

Little information is available yet about how the powers given to Welsh Ministers in the Marine Bill will be implemented. In contrast, a large amount of information is available about the structures that the UK Government will put in place to deliver its new powers. This has made it difficult for stakeholders in Wales to fully assess the implications of the new legislation, and - crucially in respect of the draft Bill - how the legislation itself may need to be redrafted.

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<sup>140</sup> [SLC\(3\) 21-08 \(p4\)](#)

<sup>141</sup> Sustainability Committee, [SC\(3\)-12-08 \(p2\)](#), 4 June 2008

<sup>142</sup> National Assembly for Wales Sustainability Committee, [Report on the Committee's scrutiny of the Draft Marine Bill: implications for Wales](#), June 2008

and

Potential shortfalls in the draft provisions for Wales, a key concern for stakeholders such as ourselves, are not challenged or championed effectively by any group - i.e. there is inadequate pre-legislative scrutiny for Wales. Wales therefore risks missing the opportunity that the draft Bill stage offers to ensure that the legislation is as complete and robust as it should be; once the legislation is published in full, securing amendments is likely to be more difficult.<sup>143</sup>

**Regulatory Impact Assessments for Welsh provisions within UK Bills for broad framework powers might not provide adequate assessment given that detailed Welsh Measures and plans for implementation will not have been developed.**

In its evidence to the subordinate legislation inquiry, the Countryside Council for Wales stated:

All UK Bills are subject to Regulatory Impact Assessments, including those with Welsh provisions. There are instances where separate RIAs have been undertaken on the Welsh provisions for UK Bills such as the draft Marine Bill. It should be noted that RIAs for Welsh provisions within UK Bills for broad framework powers might not provide adequate assessment given that detailed Welsh Measures and plans for implementation will not have been developed, thus the extent of resource implications may not be entirely clear.<sup>144</sup>

**There was a low level of understanding among members of the Westminster Joint Committee that scrutinised the draft Bill of its importance for Wales.**

The draft Bill was subject to pre-legislative scrutiny by the UK Parliament which involved discussion by a Joint Committee made up from members of both the House of Lords and House of Commons. The Joint Committee published its Report and recommendations on 30 July 2008.

In its evidence to the subordinate legislation inquiry, Wales Environment Link stated:

There appeared to be a low level of understanding among members of the Westminster Joint Committee that scrutinised the draft Bill of its importance for Wales. For example, committee member Mr Charles Walker MP said in the penultimate oral evidence session "... am I right in thinking that this Bill applies to the whole of the UK or will it be down to the Welsh Assembly and the Scottish Parliament to bring forward their own recommendations?". This may be due to differences between the devolution settlements for Wales, Scotland and Northern Ireland, and a failure by some to fully understand that unlike in the other two countries, the primary marine legislation for Wales will come directly from the UK Marine Bill. This perhaps explains why the

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<sup>143</sup> [SLC\(3\) 21-08 \(p4\)](#)

<sup>144</sup> [SLC\(3\) 21-08 \(p3\)](#)

majority of the Committee's 96 recommendations focused on the UK Government, with few referring specifically to WAG.<sup>145</sup>

**There was insufficient time given to scrutinise the draft Bill within the Assembly and a mismatch of timeframes for scrutiny between the Assembly and UK Parliament, and no evidence that Assembly recommendations were given particular consideration by the Westminster Joint Committee.**

In its evidence to the subordinate legislation inquiry, Wales Environment Link stated:

The draft Bill was not given high priority for scrutiny within the Senedd with the Sustainability Committee using only about forty minutes of a scheduled hour long evidence session to question the Minister about it. Evidence was not invited from the public. Prior to the setting of a date for the session, concern was expressed that the timescale for the Sustainability Committee's to report and the Minister to respond would extend beyond the window of opportunity for amendments to be made to the draft Bill. In the event, the Committee provided recommendations directly to the Joint Committee inquiry at Westminster as written evidence, but there is no evidence that these recommendations were given particular consideration (possibly in part due, again, to a mismatch in timeframes).<sup>146</sup>

**No process for stakeholder/ public consultation in Wales on the content of clauses or on scope for legislative competence.**

As noted in the section on the Planning Bill, the Countryside Council for Wales stated:

With regard to UK Bills containing Welsh provisions, either to confer powers on Welsh Ministers or broad framework powers, there is currently no process for stakeholder/ public consultation on the content of clauses or on scope for legislative competence. On certain UK Bills containing Welsh provisions, Assembly committee scrutiny has been limited, and rarely includes stakeholder engagement. Examples include the Marine Bill, and Planning Bill, where detailed scrutiny has taken place in Westminster committees.<sup>147</sup>

In its evidence to the subordinate legislation inquiry, Wales Environment Link stated:

WEL would have liked to see input from a range of witnesses, to enable Committee members to gain an understanding of stakeholders' concerns, and question the Minister in relation to these. The Committee may then have been in a stronger position both to make recommendations directly to Westminster as to how the UK legislation should be strengthened in relation to Wales, and to encourage the Minister to secure amendments to the draft Bill through negotiations with UK Government.<sup>148</sup>

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<sup>145</sup> [SLC\(3\) 21-08 \(p4\)](#)

<sup>146</sup> [SLC\(3\) 21-08 \(p4\)](#)

<sup>147</sup> [SLC\(3\) 21-08 \(p4\)](#)

<sup>148</sup> [SLC\(3\) 21-08 \(p4\)](#)

In its evidence to the inquiry, Public Affairs Cymru stated:

Welsh provisions within the Climate Change and Marine and Coastal Access Bills were not subject to public consultation. Once details are agreed between the Welsh Assembly Government and Whitehall, information is provided in Ministerial statements and briefings from the Members Research Service on an ad hoc basis, and is also provided for subject committee discussions upon request. Committee scrutiny also tends to be limited to sessions with WAG officials and Ministers, with no oral or written evidence from external stakeholders.<sup>149</sup>

**There is a risk of potential long delays in implementation as there has been relatively little consideration of implementation in Wales.**

In its evidence to the inquiry, Wales Environment Link stated:

As there has been relatively little consideration of implementation specifically in Wales - either by the Assembly or by stakeholders there could be considerable delay before the appropriate structures are identified and, perhaps more crucially, the necessary resources are identified and secured.<sup>150</sup>

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<sup>149</sup> [SLC\(3\) 21-08 \(p2\)](#)

<sup>150</sup> [SLC\(3\) 21-08 \(p4\)](#)

## Annex 8

<b>Glossary of Terms</b>	
Acts of Parliament	An Act of Parliament creates a new law or changes an existing law. An Act is a Bill approved by both the House of Commons and the House of Lords and formally agreed to by the reigning monarch (known as Royal Assent). Once implemented, an Act is law and applies to the UK as a whole or to specific areas of the country.
Affirmative Procedure	Affirmative procedure means that an instrument/draft instrument must be approved by the Assembly, following consideration by the Subordinate Legislation Committee.
Counsel General	The Chief Legal adviser to the Welsh Assembly Government
Devolution Guidance Note 9	Guidance for UK Government officials published by the Ministry of Justice
European and External Affairs Committee	The Committee's remit is set out in Standing Order 18.1. The Committee may consider and report on any matters relevant to the exercise by the First Minister, Welsh Ministers, the Counsel General or the Assembly of any of their functions relating to the European Union or external affairs
European Union Directives	A directive is a legislative act of the European Union which requires member states to achieve a particular result without dictating the means of achieving that result.
European Union Regulations	A regulation is a legislative act of the European Union which becomes immediately enforceable as law in all member states simultaneously. Directives need to be transposed into national law.
HMSO	Her Majesty's Stationery Office (HMSO) continues to exist and fulfill its core activities including responsibility for the publication of legislation and the management of Crown copyright
Legal Advisers	Legal Advisers to the Committee will consider beforehand all instruments and draft instruments to be considered by the Committee; and prepare advice to the Committee identifying matters arising under Standing Order 15.2
LRRRA Legislative and Regulatory Reform Act 2006	An Act to enable provision to be made for the purpose of removing or reducing burdens resulting from legislation and promoting regulatory principles; to make provision about the exercise of regulatory functions; to make provision about the interpretation of legislation relating to the European Communities and the European Economic Area; to make provision relating to section 2(2) of the European Communities Act 1972; and for connected purposes.
Negative Procedure	Negative procedure usually means that the instrument can be made and come into force but can be annulled by a resolution of the Assembly. Negative instruments are considered by the Subordinate Legislation Committee. Any member may lodge a motion to annul an instrument and the motion is debated by the Assembly.

OPSI	Office of Public Sector Information (OPSI) is at the heart of information policy, setting standards, delivering access and encouraging the re-use of public sector information
Secretary of State for Wales	The Secretary of State is a Member of the UK Government and is responsible for steering through Parliament legislation which concerns only Wales.
Standing Order 15	15.1 states there is to be a Subordinate Legislation Committee. The Committee's remit is set out in Standing Orders 15.2 to 15.7
Wales Office	Wales Office supports the Secretary of State for Wales in ensuring the smooth working of the devolution settlement in Wales. It is Wales' voice in the UK Government.
Welsh Affairs Committee	The Welsh Affairs Committee is one of the departmentally-related select committees of the House of Commons appointed under Standing Order No 152. Its terms of reference are to examine matters within the responsibility of the Secretary of State for Wales (including relations with the National Assembly for Wales).