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The NAW Subordinate Legislation Committee –

Inquiry into the Scrutiny of Subordinate Legislation and Delegated Powers- Public Consultation - Invitation to respond.

In its letter of 24th June, the Committee invites submissions on the procedures in place in relation to its scrutiny of subordinate legislation and of other legislation coming within its remit.

We are very impressed with the extent of the work which the Committee carries out on weekly basis given the very wide nature of its jurisdiction and the constraints under which it operates both as regards the number of Assembly Members and staff and the time available to the Committee for its consideration.

We welcome this inquiry which should result in improving the processes for the preparation of subordinate legislation and other legislation to help to ensure the effective scrutiny of enactments within the Committee's remit.

The extensive remit of the Committee

This is considerable. It covers at least 3 main areas relating to Parliamentary Bills and draft Assembly Measures, Welsh Assembly Government Statutory Instruments and other subordinate legislation and the Assembly Government's enactments which implement EU legislation.

Within these 3 main areas, the Assembly has to consider all statutory instruments required to be laid before the Assembly by reference to the 11 criteria prescribed in Standing Order 15.2 It also has discretionary powers in relation to 4 criteria relating to Bills and proposed Assembly Measures, one criteria assessing the appropriateness of enactments implementing EU legislation, 3 criteria about the merits of statutory instruments and 1 criteria about the charging provisions in statutory instruments.

This results in a total jurisdiction of 20 different areas of consideration in relation to enactments of various types.

The equivalent work in the Houses of Parliament

This considerable expanse of compulsory and discretionary work is carried out by at least 5 Committees in Parliament in relation to Bills and subordinate legislation coming before either or both Houses for consideration.

The House of Lords has the Merits of Statutory Instruments Committee and the Delegated Powers and Regulatory Reform Committee.

The House of Commons had the Regulatory Reform Committee and the Statutory Instruments Committee

There is also the Joint Committee of both Houses on Statutory Instruments.

In addition to the consideration of primary legislation made by the Committee's Parliament (i.e. the scrutiny of Measures made by the Assembly), the SLC also has to consider legislative made by another Parliament : Westminster.

The SO 15.2 criteria is similar to the jurisdiction of the Joint Committee on Statutory Instruments and the Commons Committee on Statutory Instruments. The enlarged criteria of SO 15.3 and SO 15.6 reflects the jurisdiction of the Commons Regulatory Reform Committee and the Lords Merits Committee and Delegated Powers and Regulatory Reform Committee. In relation to these 2 House of Lords Committees, a briefing paper '*Looking at the small print: Delegated Legislation*' issued this year considers that together with the work of the Joint Committee on Statutory Instruments, these Lords' committees "ensure that the small print in legislation, which affects our daily lives in many different ways, is thoroughly checked."

In this regard, the small print includes the consideration of powers in Bills giving delegated legislative powers to the executive.

The Time and Resources Available for Scrutiny in the Assembly

The Assembly's Subordinate Legislation Committee sits once a week for about an hour. It comprises a small number of dedicated AMs and expert advisers including lawyers. The equivalent Parliamentary Committees also sit each week during the time that Parliament is in session. They average up to 3 hours a week and each Committee has at least 7 members and expert advisers including lawyers.

The Extent of the Areas of Work carried out

The Assembly's Subordinate Legislative Committee has always to bear in mind that within the time constraints placed on all Assembly Committees, there are matters which the Committee must consider and other matters which they may consider. In its report for the end of the first session of the Third Assembly, the Committee notes that it has considered 180 statutory instruments and reported on 53. This is comparable work to that carried out by the Legislation Committee of the previous Assembly.

The Committee's reports on the 53 Statutory Instruments covers the consideration of 5 of the criteria which are set out in SO 15.2. In addition, other criteria within SO15.2 will have been considered. This SO 15.2 criteria mainly reflects the criteria governing the Committee under the provisions of GOWA 1998 i.e. the technical scrutiny of subordinate legislation.

In addition, the Committee has also considered a number of draft Measures which is a new area of work following from GOWA 2006.

So far the Committee's work has covered a limited area of the total competency of the Committee. Apart from the consideration of the draft Measures, the Committee does not seem to have had the time to consider the new criteria given to it under SO 15.3 and SO 15.

The Problem for the Assembly's Subordinate Legislative Committee

In its submission to the newly established Assembly's Standing Orders Committee at the time that the Assembly's current SOs were being created, the Legislation Committee clearly explained why it was seeking an expanded jurisdiction in relation to enactments.

In paragraph 7 of its report of May 2007 on the '*Technical Scrutiny of Legislation by the National Assembly the Legislation Committee*' the Committee considered that 'without the restriction of section 58 [of GOWA 1998 which sets out specific jurisdiction of the scrutiny of subordinate legislation by the Assembly] the Committee would be able to advise the Assembly on all legislative matters **THAT WOULD NOT BE MORE APPROPRIATELY OR MORE CONVENIENTLY DEALT WITH BY ANOTHER COMMITTEE.**'

Consequently, the Committee recommended the extent of the jurisdiction which it now possesses in SOs 15.2 to 15.6. **No other Committee had this explicit jurisdiction and if the Subordinate Legislative Committee did not have such jurisdiction, such matters would not come within the purview of any branch of the Assembly.**

This demonstrates in our opinion the importance of the present inquiry being undertaken by the Committee. The three aspects of the inquiry namely the scrutiny of the merits of subordinate legislation, the implementation of EU legislation and the scrutiny of devolved powers in UK Bills are fundamental to the operation of the Assembly's new work under GOWA 2006.

These are new areas of Assembly work for which scrutiny procedures need to be strengthened.

Consideration of the three questions raised by the inquiry:

1- Scrutiny of statutory instruments on the grounds set out in Standing Orders 15.3 (Merits):

This work is carried out by the Merits Committee of the House of Lords. It appears that there are no equivalent in the House of Commons as the Commons Statutory Instrument Select Committee only looks at the technical aspects of the legislation.

The Subordinate Legislation Committee asks in its invitation to respond to 'what can the Committee learn from the House of Lords Merits Committee':

Since its establishment a few years ago, the Merits Committee, by concentrating on the equivalent of 15.3 matters has acquired considerable expertise. This it does by sitting weekly during the parliamentary session for up to three hours with 11 members and advisers.

The Merits Committee identifies SIs which raise questions in relation to criteria similar to that in the Assembly's SO 15. 3 (ii), 15.3 (iv), 15.3 (v), and 15.6 (v). Following any such identification, a memorandum is requested from the relevant Government Department and written and oral evidence is then taken. The Committee:

- a. publishes its correspondence with Government Departments,
- b. has close contacts through its official with all Government Departments,

- c. holds seminars to explain its work,
- d. ensures that in making their proposals for subordinate legislation that Departments have sought expert views, that the stakeholders have been consulted and are content with the proposals,
- e. makes suggestions as to how legislation can be more effective and checks to see whether its recommendations have been carried out,
- f. requires plans for secondary legislation arising from new legislation and a list of planned Instruments with basic information outlining the proposed content and impact of such Instruments.
- g. issues guidance as to the need for detailed and clear explanatory memorandum to ensure that the Committee works efficiently.

The Merits Committee's approach to matters giving rise to issues of public policy is wide ranging. An example is its latest report of July this year (the 27th Report) which comments adversely on the considerable number of Instruments relating to the National Curriculum which all come into force in schools at the beginning of September and are likely to prove difficult to implement in such a short time.

We consider that such accumulating expertise should be used by the Assembly Subordinate Legislation Committee.

2- Particular considerations relating to statutory instruments implementing European directives:

This again is part of the work of the Merits Committee and here there is considerable opportunity for the Subordinate Legislation Committee to work with the Merits Committee. This is because the Merits Committee is looking at the same directives which will be implemented both in England and in Wales.

The Merits Committee regularly considers subordinate legislation which implements EU legislation, taking particular account of:

- i) whether such legislation goes beyond the strict requirements of the relevant EU Directive (termed gold plating);
- ii) whether new legislation is necessary or will amendments to existing subordinate legislation suffice;
- iii) whether what is being done in other member states in implementing the directives is less onerous and complex than their implementation in England;
- iv) whether there is timely consultation at the time when proposed EU directives are being considered.

In view of the expertise possessed by this Committee in looking at the same Directives as come within the consideration of the Assembly Subordinate Legislation Committee it is considered that there should be continuing liaison between the two Committees enabling the SLC to adapt the conclusions of the Merits Committee to suit the particular requirements of the Assembly's jurisdiction.

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

This is work carried out by the Delegated Powers and Regulatory Reform Committee in the House of Lords in relation to executive powers. There seems to be no equivalent in the House of Commons.

For each Bill, the Delegated Powers and Regulatory Reform Committee needs to have a memorandum from the relevant Government Department which:

- a. identifies all of the provisions in the Bill giving delegated legislative powers,
 - b. describes the purpose of such power,
 - c. explains why the powers are needed,
 - d. explains what parliamentary control, if any, would be applicable to the exercise of powers and why the particular control has been chosen, or why none has been specified.
- Evidence is then taken from government officials and /or Ministers on the memorandum.

It does not seem that the Subordinate Legislation Committee in the Assembly currently has arrangements in place to access any of this evidence. Without such evidence it would not seem possible for the Committee to carry out this most important aspect of its work i.e. whether the provisions in Bills inappropriately delegate subordinate legislation powers or whether such power is subject to an inappropriate degree of legislative scrutiny. This is a matter which is given clear consideration in the paper submitted to the Committee by Cymru Yfory/ Tomorrow's Wales in its submission to the Committee. We would only add that collaboration with the Lords' Committee would seem to be essential if the Assembly Committee is to have the information necessary to carry out its work.

As an example of the importance of this work which can fundamentally affect the powers of the Assembly to scrutinise WAG's legislation, 5 UK Acts enacted in July 2008 gave subordinate legislative powers to the Welsh Ministers. It does not appear that the Committee had the time available to scrutinise these Bills.

There is no evidence that any other part of the Assembly gave consideration to these Bills.

The new Acts include separate provisions applying to Wales in the Sale of Student Loans Act and the Regulatory Enforcement and Sanctions Act. There is also the Health and Social Care Act and the Housing and Regeneration Act and the Criminal Justice and immigration Act (Part 8).

The Acts make some of the Welsh Ministers' subordinate legislative powers subject to affirmative or negative procedure before the Assembly, but is such procedure sufficient and what of provisions where there are no procedures at all?

Possible Ways Forward for the Subordinate Legislative Committee

1- Establishing direct links with Westminster:

Apart from the links between Assembly Committees and the Welsh Affairs Select Committee, Assembly Committees do not seem to have established machinery enabling them to liaise directly either with Central Government Departments or with Parliamentary Committees. In this respect, matters appear to be no further forward than when the internal review carried out by the Assembly in 2003 on its workings identified this as a major problem and which was again underlined in the Richard Commission report.

The wide ranging work of the relevant Parliamentary Committees is something into which the Committee could link, as regards subordinate legislative powers in Bills, in subordinate legislation made for England for which there are parallel instruments being made for Wales and as regards the proposed implementation of EU directives. At least the Committee should have arrangements whereby it is sent papers and evidence from these Parliamentary Committees.

Without such liaison the Committee could not hope to cover the whole of its important remit. It seems to be particularly important in considering subordinate legislative powers in Bills, where it is only through working with a Parliamentary based Committee, that the Assembly can hope to have the possibility of exercising some direct influence on the Government Department which is promoting the Bill.

Liaising in this way will considerably increase the workload of the Committee. Extra staff would seem to be required to analyse the evidence as it arrives from the Parliamentary Committees. Each Committee sits once a week and produces very large amounts of information. Additionally, in order to perform the same assessments as the Parliamentary Committees, it will be necessary to establish the practice of regularly calling for papers and for evidence from Assembly Government officials and ministers.

David Lambert also recalls that at an early stage of the Assembly in about 2000 when he was its legal adviser the Clerk and Officials of the Commons Regulatory Reform Committee offered to share all their analysis which they carry out on a weekly basis for their Committee (which reports to the House of Commons on draft legislative reform orders under the Legislative and Regulatory Reform Act 2006). They also offered to work with Assembly officials on a regular basis and to share their expertise.

This helps to demonstrate the willingness of Parliamentary Committees to collaborate with Assembly Committees. This seems to be necessary given the constraints under which the Committee has to work taking into account its very wide remit. Liaison would be a way for the Committee to satisfactorily fulfil the requirements of its important jurisdiction.

We think that Scotland is a less relevant model in this regard because the two House of Lords Committees operate and will continue to operate to a very large extent by reference to UK legislation which is common to both England and Wales and whose subordinate legislative powers give rise potentially to the same questions arising in relation to SIs made by central government in relation to England and by WAG in relation to Wales.

Also, as the Subordinate Legislation Committee's report (SLC(3)-15-08) –*Visit to the Scottish Parliament* shows at paragraph 18, that under the 'Sewel Convention', Westminster will not agree to Bills which could either change the law on a Scottish devolved matter or alter the executive competence of Scottish Ministers without first obtaining the consent of the Scottish Parliament. This means (paragraph 20 of the Committee's report) that the Subordinate Legislation Committee of the Scottish Parliament (SSLC) does not correspond directly with the UK government or Westminster. Comments by the SSLC on proposed legislation in UK Bills are Matters for consideration by the Scottish Ministers who need the consent of the Scottish Parliament to such legislation. There is no such convention in Wales and so machinery is necessary, in our opinion, to establish a way by which the Assembly's Subordinate Legislation Committee can work with the two Lords Committees.

The potential work involved in analysing the aspects of the matters in SO 15.3(ii) (political or legal importance or public policy issues) is especially considerable.

The matters within the remits of these Parliamentary Committees are not being performed on a regular basis, or at all, by other Assembly Committees.

Without the Subordinate Legislation Committee, in some way, exercising this jurisdiction, it cannot be said that the small print in legislation, which affects our daily lives in many different ways, is thoroughly checked.

2- Issuing Guidance to WAG:

The reports of the Merits Committee and the Delegated Powers and Regulatory Reform Committee (together with the equivalent House of Commons Committees) emphasise that their work is considerably assisted by issuing and updating guidance to government departments and meeting officials from such departments on a regular basis.

Examples of such guidance are available at:

- Delegated Powers and Regulatory Reform Committee - *Guidance for Departments on the role and requirements of the Committee* - October 2007

<http://www.parliament.uk/documents/upload/GuidDeptsOct07.pdf>

- 29th Report of Session 2005–06 *The Management of Secondary Legislation*

<http://www.publications.parliament.uk/pa/ld200506/ldselect/ldmerit/149/149i.pdf>

The Scottish Subordinate Legislation Committee report (SL-S3-08-R12)- *Inquiry into the Regulatory Framework in Scotland* also sets out matters which the committee considers can be “the beginning of a dialogue between the [Scottish] Parliament and the Scottish Government to find a set of procedures which meet Parliament’s scrutiny requirements while allowing the Government to exercise appropriately the powers delegated to it.” (Paragraph 126). This report shows matters which could be adopted by the Assembly’s Subordinate Legislation Committee and incorporated in guidance issued to WAG.

Using appropriate recommendations from the SSLC report together with relevant aspects of the guidance currently in force from the House of Lords’ Merits Committee and the Delegated Powers and Regulatory Reform Committee as well as regularly consulting with these Committees in our opinion, would form the basis of helpful cooperation between WAG’s Ministers and the Assembly acting through its Subordinate Legislation Committee.

The principles which the Merits Committee has established and guidance which it has issued to UK Departments is very clear and seeks to ensure that there is prior proper consultation with the business community and others likely to be affected by the implementation of directives that the implementation has not gone beyond the strict implementation of the Directive and as to whether it is possible to amend UK legislation rather than making new law to implement the Directive. These are certainly lessons and precedents which the Committee should consider using in exercising this aspect of its jurisdiction. Cooperation in this respect with the Merits Committee would seem to be vital.

A particular example paragraph 121 of the Merits Committee 29th Report draws attention to the need for clarity in explanatory memoranda, the need to engage in ‘grass roots’ consultation, inappropriate implementation of EU directives, insufficient progress in the

consolidation of successive instruments. This then leads to a number of recommendations which the Committee hopes that Government Departments will adopt.

Equally important is the guidance for departments issued in October 2007 on the role and requirements of the Delegated Powers and Regulatory Reform Committee. In this report we would draw particular attention to the need for drafting clear explanatory memoranda explaining the delegated legislation provisions in Bills, why such provisions are considered necessary, how to explain ‘Henry the VIIITh’ powers and also how Government Departments should respond to Committee’s recommendations.

With regard to the SSLC report – SL-S3-08-R12, attention is drawn to the need for the Scottish Government to provide a forward programme of subordinate legislation and for the need to consolidate instruments as far as possible.

We would strongly recommend that the Assembly Subordinate Legislation Committee urgently considers the production of guidance to Welsh Ministers on the criteria the Committee would wish to use in exercising its jurisdiction including the nature of its assessment of proposed powers of delegation to Welsh Ministers in Bills and other aspects of its non-technical remit.

Conclusion:

We understand that if the Committee is to carry out its full range of powers and to liaise with relevant Parliamentary Committees, considerable burden will be imposed on it. Assistance could be provided if further experienced staff are appointed to advise the Committee. While there is a statutory limit on the number of AMs, 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.

1st September 2008
MN & DL