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

The Countryside Council for Wales welcomes the opportunity to respond to the Subordinate Legislation Committee's inquiry into the scrutiny of subordinate legislation and delegated powers.

General comments

Information on Welsh legislation should be available in an accessible format, with explanatory notes and Regulatory Impact Assessments that provide clarity on the scope of the legislation and implications in terms of funding, existing legislation and non-statutory Government strategies, and impact on stakeholders. This would be in line with the UK Government's approach to develop greater public engagement in the legislative process, as set out in Chapter Four of *Preparing Britain for the future: The UK Government's Draft legislative programme 2008/09*.

The Assembly's subordinate legislation committee currently sits once every two weeks and for short sessions relative to other committees. Consideration should be given to extending the scrutiny time available for subordinate legislation, in order to allow for more detailed consideration of the issues identified in this inquiry, and scope for further engagement with external stakeholders, such as written and/ or oral evidence on Statutory Instruments. Several of the issues identified within this response indicate this as a necessity.

The Report of the Richard Commission on the Powers and Electoral Arrangements of the National Assembly for Wales (Spring 2004) includes some useful issues and recommendations relating to scrutiny, the relationship between Wales and Whitehall, the relationship between Wales and Westminster, and primary legislation affecting Wales, that could be considered as part of this inquiry.

Responses to specific questions in the consultation

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**

In reference to Standing Order 15.3(i), information on financial implications of Statutory Instruments set out in accompanying Regulatory Impact Assessments should be taken into account in the scrutiny process. Section 76 of the Government of Wales Act 2006 (GOWA 2006) provides that Welsh Ministers must make a Code of Practice on Regulatory Impact Assessments (RIA) when making Welsh subordinate legislation. The WAG is currently consulting on the Code for [Regulatory Impact Assessment for Subordinate Legislation](#). Any information on the financial implications of legislation affecting Wales could also help inform the review of the Barnett Formula.

The issue of post-legislative scrutiny is of relevance to Standing Order 15.3 (iii) (Cases whereby Statutory instruments are inappropriate in view of changed circumstances), and does not appear to be part of the Subordinate Legislation committee’s current remit. Consideration of existing legislation of relevance to a particular statutory instrument could also form part of the scrutiny process, including issues of implementation and resourcing. This could help inform other legislative processes established under the Government of Wales Act 2006, such as proposals for Legislative Competence Orders and Measures, including potential for consolidating existing Acts of Parliament. Also of relevance to post –legislative scrutiny is the fact that Statute Law (Repeals) Bill was introduced to Parliament in February 2008. This will remove a number of pieces of obsolete legislation from the statute book.

Scrutiny of regulations in respect of political or legal importance or policy objectives

On the 20th March 2008, the UK Government accepted the Law Commission’s report on post legislative scrutiny. In 1992, the Rippon Commission (Making the Law: the Report of the Hansard Society Commission on the Legislative Process, November 1992) concluded that post legislative review of Acts of Parliament was inadequate; an issue considered by the Lords Select Committee on the Constitution’s report on Parliament and the legislative process 2004¹. The Government’s response [Post legislative Scrutiny – the Government’s approach](#), proposed that laws should be reviewed three years after being passed, by the relevant Government department and then by Parliament, with one aim being to improve policy-making legislation. Whilst the terms of reference for the Beecham Review: [Beyond Boundaries](#) did not cover the issue, the review report identified the need for improvement in policy implementation in Wales as well as in service delivery (Chapter 2: The citizen model - The new context for public service delivery, paragraph 2.2.).

The committee could request that policy objectives and legal implications are outlined within statutory instruments, the accompanying explanatory memorandums or Regulatory Impact Assessments. The Law Commission also has a role to play in that it is charged with keeping the law under review and is interested in whether or not legislation accurately gives effect to the underlying policy aims. It should be noted however that the Law Commission does not currently review all Acts of parliament as standard procedure, and primarily responds to

requests from Government to review the effectiveness of legislation, sometimes as a direct result of a Westminster Committee or other inquiry having identified a need. Evidence from the Law Commission could support the Subordinate Legislation Committee in scrutinising legislation, as set out in Standing Order 15.3 (ii). External stakeholders could also provide advice to the committee through written or oral evidence. Stakeholder views of statutory instruments that have been subject to consultation should also be made available to the committee.

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**

Consultations on statutory instruments implementing European Directives tend to be on broad principles rather than detailed drafting. The extent to which implementing regulations are tailored to the needs of Wales in view of the parameters set by European Union varies. There are examples where implementation has differed in England and Wales on the basis of policy differences or as a result of issues raised through stakeholder consultation. Examples include implementation of CAP reform, and the Nitrates Directive.

In reference to Standing Order 15.3 (vi) on appropriate implementation of EU legislation, provision of the following information/ analysis to the Subordinate Legislation Committee would support effective scrutiny:

- (i) Analysis of Statutory Instruments in reference to EU policy objectives,
- (ii) Differences in implementation across the UK, and
- (iii) Information gathered from the stakeholder consultation process

Clearly additional briefing material and analysis would have capacity implications for the Assembly's Parliamentary Service.

As previously stated, requests for written and/ or oral submissions to the Committee from external stakeholders on implementing regulations for EU Directives could inform the scrutiny process.

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 competence 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**

In July 2007, for the first time, the UK Government published its Draft Legislative Programme, ahead of the 2007-08 Parliamentary session, with the aim of modernising and opening up the legislative process with increased public involvement, as set out in the Green Paper '[The Governance of Britain](#)', also published in July 2007. The Select Committee on the Modernisation of the House of Commons endorsed this approach in its report, [Scrutiny of the Draft Legislative Programme 1](#), in January 2008. The UK's draft legislative programme 2008-09, the Green Paper [Preparing Britain for the Future – the Draft Legislative Programme 2008-09](#), was published for public consultation in May 2008. The document contained a list

of draft legislative proposals, and related non-legislative action, including details on legislative proposals and an indication as to whether Bills would apply to Wales.

Recommendations from the [Select Committee on Modernisation of the House of Commons](#)² also led to several reforms to the parliamentary process, including:

- More frequent publication of bills in draft, enabling pre-legislative scrutiny both inside and outside Parliament;
- Publication of the draft legislative programme
- Introduction of published Explanatory Notes on bills and Acts
- Oral evidence-taking as a standard part of public bill committee work on programmed Government bills starting in the Commons
- Written evidence taking procedures in public bill committees

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.

Information on the implications of UK Bills on areas of devolved competence and the powers of Welsh Ministers are available from a range of other sources including research papers provided by the Members Research Service, Cabinet Statements and Committee Briefing papers. However, such information is usually provided subject to request or at the discretion of individual Government departments rather than as standard procedure.

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.

As in the case of the previous Legislation Committee of the second Assembly/ third Assembly, a list of draft legislative proposals should be laid in front of the Assembly and considered by the Subordinate Legislation committee and subject committees. Where other subject committees consider legislation, information should be provided to the subordinate legislation committee to avoid duplication and to ensure cross-referencing where appropriate.

References

Preparing Britain for the future: The UK Government's Draft Legislative Programme 2008/09: <http://www.official-documents.gov.uk/document/cm73/7372/7372.pdf>

Standing Orders of the National Assembly for Wales: <http://www.assemblywales.org/bus-docs-third-standingorders.pdf>

The House of Lords Merits Committee Terms of Reference
http://www.parliament.uk/parliamentary_committees/merits.cfm

² The Select Committee on Modernisation of the House of Commons:
http://www.parliament.uk/parliamentary_committees/select_committee_on_modernisation_of_the_house_of_commons.cfm

The Richard Commission: Commission on the Powers and Electoral Arrangements of the National Assembly for Wales (Spring 2004):

<http://www.richardcommission.gov.uk/content/finalreport/report-e.pdf>

House of Commons Select Committee on Modernisation of the House of Commons, Scrutiny of the Draft Legislative Programme: [Government Response to the Committee's First Report First Special Report of Session 2007–08](#) (4 June 2008)

The Government's response is available at:

<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmmodern/597/597.pdf>

The Green Paper [The Governance of Britain](#) (July 2007): <http://www.official-documents.gov.uk/document/cm71/7170/7170.pdf>

Welsh Assembly Government Consultation on Regulatory Impact Assessment Code for Subordinate Legislation:

<http://new.wales.gov.uk/consultations/currentconsultation/improveps/regimpactcode/?lang=en>

Making the Law: the Report of the Hansard Society Commission on the Legislative Process, November 1992)

House of Lords Select Committee on the Constitution, 14th Report of Session 2003-04:

<http://www.publications.parliament.uk/pa/ld200304/ldselect/ldconst/173/173.pdf>

Post –legislative scrutiny – The Government's response (March 2008): <http://www.official-documents.gov.uk/document/cm73/7320/7320.pdf>

Beyond Boundaries – Citizen-centred local services for Wales:

<http://new.wales.gov.uk/dpsp/strategy/boundaries/beyondboundariese.pdf?lang=en>

Annex 1: Inquiry into the scrutiny of subordinate legislation and delegated powers

Terms of Reference

The Committee has agreed the following terms of reference for the inquiry:

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

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;
- Particular considerations relating to statutory instruments implementing European directives;
- Scrutiny of Bills of the UK Parliament which have an impact on Wales.

The inquiry 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.

Annex 2: 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.