

SOR 5

Business Committee

Response to the Review of Standing Orders

Wales Governance Centre



Canolfan Llywodraethiant Cymru
Wales Governance Centre

These comments are submitted by David Lambert, Marie Navarro and Manon George, members of the Wales Governance Centre of Cardiff University.

We are pleased that the operation of the Assembly's Standing Orders are being reviewed after 3 years of their operation. We consider that overall the 2007 Standing Orders promote accessible and effective parliamentary ways of working.

Also we consider that generally the Assembly is successfully holding the Assembly Government to account, however as explained below there are concerns as to whether the Assembly is fully aware of the powers which the Assembly Government are taking in UK Bills to carry out their policies. In addition we have some comments on the operation of the Assembly's review of subordinate legislation.

1.1 Holding the Government to Account

The committee would like to know if the Assembly's way of working gives you confidence that it is **accessible** and **effective** in fulfilling its role of HOLDING THE GOVERNMENT TO ACCOUNT

The ways of working of the Assembly give us confidence that it is accessible and effective in holding the Assembly Government to account. However there are areas for which the Welsh Government does not currently account to the Assembly making it impossible for the Assembly to be fully effective in carrying out its role of holding

the Government to account. The two main areas of this lack of accountability are the executive powers sought in UK Bills and the making of subordinate legislation by the Assembly Government.

UK Bills:

Following the inquiry by the then Subordinate Legislation Committee on the Scrutiny of Subordinate Legislation and Delegated Powers, recommendation 8 was made in the Committee's subsequent report¹:

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 the 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 the use of affirmative/negative procedure**
- **How the powers 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 policy objectives**
- **What consultation has been undertaken or what consultation has been proposed**

The then Counsel General replied in September 2009 that:

Response:

The publication of the Delegated Powers Memorandum is a matter for the UK Government and Parliament. The production of an equivalent document by the Welsh Assembly Government for the Committee would represent a duplication of resources.

¹ May 2009, <http://www.assemblywales.org/cr-ld7518-e.pdf>

Some of the additional information which the Committee suggests should be included in such a Memorandum, in particular, that which impinges upon negotiations between the Welsh and UK Governments, would not be appropriate for publication.

The current Counsel General supported this response in his statement on the plenary debate of the Subordinate Legislation Committee's report on 13 January 2010.

It is considered that, without information being supplied on Bills proceeding through Parliament giving executive powers to the Assembly Government (including delegated legislative powers), the Assembly cannot fully hold the Government to account. This is because it neither has the necessary information as to why the Assembly Government is seeking these powers, nor, following the passing of the legislation in Parliament, does the Assembly seem to be very aware that such powers exist.

There seems to be an unacceptable lack of transparency by the Assembly Government as to why it is seeking such powers in UK Bills and as to the nature of such powers. This was confirmed by Janet Ryder that 'historically, the [Assembly Subordinate Legislation] Committee [...] may not even have been made aware of powers about to be transferred to Welsh Ministers in UK Bills'. The Welsh Affairs Committee confirmed 'that they have no formal role in the scrutiny or consideration of Welsh clauses of UK Bills'².

We see no reason once a Bill receives its formal first reading and is published that the Assembly Government should not provide the Assembly with this information irrespective of whether the UK Government does so. Furthermore the Secretary of State for Wales' explanatory memoranda are only made available for Measure making powers in Bills.

As it is the Assembly Government who is seeking these powers and not the central UK government, it is surely for the Assembly Government to fully explain the powers it is seeking when the Bills are published³. 'Timetable and priorities are more in the hands of Whitehall and Westminster and it is the Welsh Assembly Government which steers the process in Cardiff without any National Assembly for Wales' involvement, and therefore with no effective democratic scrutiny in Wales.'⁴ These powers are 'leading to a very powerful executive in Wales which is not particularly tightly controlled by the legislature.'⁵

We do not agree with the present Counsel General's statement in the plenary debate of 13th January 2010 that the delegated powers memoranda setting out the proposals for the Assembly Government's delegated legislative powers in Bills is 'also a matter for the UK' and that the Assembly Government would not produce their own memoranda for the Assembly because it 'would also represent unnecessary duplication'. Again it is for the Assembly Government to explain to the Assembly and

² All Wales Convention report p.36, Para 3.5.12

³ This is an opportunistic process, see p 36-37 of the All Wales Convention Report.

⁴ All Wales Convention Report , p.37, Para 3.5.20.

⁵ Evidence of Professor Richard Wyn Jones, House of Commons, Welsh Affairs Committee, *Wales and Whitehall*, 11th Report of Sesssion 2009-10, HC 246, p.53, Para. 165

not for the UK Government to explain why the Assembly Government is seeking delegated powers in Bills.

Whitehall is accountable to Westminster and the Welsh Assembly Government is accountable to the Assembly as to the powers it seeks.

We consider that the Assembly is able to require information from the Assembly Government about powers it is seeking in UK Bills by using the Assembly's Standing Orders general power in section 32(3)(b) of the Government of Wales Act 2006. Section 32(3)(b) appears to allow the Assembly to require the provision of information from WAG's ministers and their officials as part of their participation in Assembly proceedings. The Assembly is in the same position to require such information from the Assembly Government. Furthermore section 37 of GOWA 2006 allows the Assembly to require Assembly Government Ministers and their officials to produce documents in their possession (s.37(1)(b)).

Now that the Assembly has the capability of obtaining legislative powers it becomes increasingly difficult to understand why the Assembly Government does not choose to request such powers (the executive powers) by LCOs rather than in UK Bills⁶. To date, more executive powers have been given to the Welsh Government by UK Acts than by the LCOs or framework powers⁷.

In addition to a Standing Order making provision about the contents of a memorandum about the powers sought from the Assembly Government, it is recommended that the information should include a statement by the Assembly Government when a Bill is published in draft or following first reading as to why it has sought the executive powers route in a Bill rather than asking for primary legislative powers from the Assembly. This would help to ensure 'that the different legal processes are coherent, consistent and transparent'⁸.

Furthermore where direct executive powers in a Bill are sought rather than through an Assembly law (through an LCO or framework power and subsequent Measure), information should be given as to why full framework powers were not sought in the Bill enabling the Assembly to make Measures rather than taking direct executive powers in Bills. This would promote better scrutiny and transparency in the legislative process. A recent example of the Assembly Government seeking executive powers in a Bill is the Marine and Coastal Access Act 2009 in which there are limited Assembly framework legislative powers but where considerable Assembly Government executive powers were devolved consequently not allowing 'Assembly Members to propose Measures in the relevant policy area'⁹.

Subordinate legislation

⁶ WAG's explanation fort his is given at paragraph 3.5.19, p. 37, All Wales Convention.

⁷ Navarro Lambert, *Bypassing the Assembly*, AGENDA *Devolution Dividend*, Spring 2009, p.34-37.

⁸ Welsh Affairs Committee, *Review of the LCO Process*, p.32, Para. 85.

⁹ Welsh Affairs Committee, *Review of the LCO Process*, p.30, Para. 82

There are no agreed principles as to whether a power to make subordinate legislation should or should not be exercised by statutory instrument. Subordinate legislation not made by statutory instrument does not come before the Assembly for scrutiny.

Furthermore if it is considered that a power should be exercised by statutory instrument, there are no agreed principles as to whether the statutory instrument should have to be agreed by the Assembly (affirmative resolution procedure) or whether the SI once made automatically comes into force unless the Assembly votes against it (negative resolution procedure).

The Assembly has no control – other than making recommendations to the Assembly Government or to the appropriate scrutiny committee in the UK Parliament – as to whether subordinate legislative powers to be given to WAG in a Bill are to be by statutory instrument and if so whether the procedure is affirmative or negative. The problem is that important subordinate legislation may bypass the Assembly's procedures completely if the subordinate legislation is not by SI – because as noted above such non-SI subordinate legislation does not have to be laid before the Assembly – or if the legislation is by SI and is by negative procedure. In either case the Assembly will usually be denied the opportunity of debating the legislation.

We consider that the Assembly should not be denied the opportunity of debating subordinate legislation because the UK Parliament has decided that subordinate legislation is not to be made by SI and if it is to be made by SI whether it is subject to affirmative resolution procedure in the Bill. We suggest that the Assembly should make a Standing Order by which **any** subordinate legislation made by the Assembly Government (whether under UK Acts or Assembly Measures) is laid before the Assembly thereby enabling the Constitutional Affairs Committee to advise the Assembly as to whether the legislation is sufficiently important for the Assembly as a whole to be made aware of it and if necessary debated.

As regards Measures we consider that in the absence of agreed principles there is no reason for making a distinction in Assembly Measures between statutory instrument and non-SI subordinate legislation. All subordinate legislation should be by SI. This has two advantages. The subordinate legislation should have a consistent numbering and classification system as well as publication as required by the Statutory Instruments Act 1946. The SIs would be capable of being considered by the Constitutional Affairs Committee and, as necessary, by the Assembly and we suggest that a Standing Order should be made to achieve this.

Finally, we consider that a Standing Order should set out the criteria as to which subordinate legislation made under Measures should be subject to affirmative resolution procedure. Such decision should not be left to the haphazard and apparent ad hoc conclusions currently applying to such legislation.

1.2 Making Laws

The committee would like to know if the Assembly's way of working gives you confidence that it is **accessible** and **effective** in fulfilling its role of MAKING LAWS

Subject to what is said below, we consider that the Assembly's way of making laws is accessible and effective. In particular the Assembly's Standing Orders give every opportunity for consultation and the making of representations at all stages in the preparation of LCOs and Measures.

We suggest two additional Standing Orders to enable the making of the Assembly's Measures to be even more accessible and effective.

The first is as recommended in the Calman report, '*Serving Scotland Better*'. The reports considers that 'Stage 3 should routinely be split into two separate stages, held on different days'¹⁰ to allow sufficient scrutiny of the final amendments. It would be helpful if the proposed Measure were re-published with these final amendments so that Assembly Members are fully aware of its contents before voting at Stage 4.

Secondly, subordinate legislation which is subject to affirmative resolution procedure is exercising important legislative powers. Such legislation can be equal in its effect to that of primary legislation. It is suggested that such legislation should be the subject of a period of public consultation prior to its being debated in plenary.

We should add that, though not a matter for a Standing Order, better synchronisation of the consideration of Committees working on the same piece of legislation could be achieved.

1.3 Representing the people of Wales

The committee would like to know if the Assembly's way of working gives you confidence that it is **accessible** and **effective** in fulfilling its role of REPRESENTING THE PEOPLE OF WALES:

In our comments about holding the government to account we have sought to show the areas where it is difficult for the Assembly to represent the people of Wales because it cannot participate in discussing the statutory provisions initiated by WAG. This occurs where devolved powers included in UK Bills and the subordinate legislation is not subject to parliamentary control.

If the Assembly is not aware of such powers then how can the people of Wales make representations to the Assembly about such powers.

We consider it helpful if the Assembly were to arrangements with relevant scrutiny committees in Parliament to enable the Assembly to be aware of Bills proceeding through Parliament giving powers to the Assembly Government. As those powers are usually the same as powers sought by UK government departments for England any

¹⁰ All Wales Convention, Executive Summary p.26 Para.53.

evidence submitted about these powers to the UK committees and the comments of such committees would be of considerable assistance to the Assembly in giving it an effective scrutiny role of the Assembly Government legislative requests.

2.1 General Principles

The Committee welcomes your views on the GENERAL PRINCIPLES in the consultation which will form the basis for the review:

Principle 1: consideration of any matter relevant to Wales or the Assembly itself

We consider that Principle 1 is very important so that the Assembly can fully represent the people of Wales in all matters affecting Wales. In particular it would be helpful if the Assembly could consider any provision in UK Bills affecting Wales. Liaising with Westminster Committees would assist in obtaining this information.

Principle 2: allow WAG to get its business through

Principle 3: allow opposition groups, Committees, Commission, AMs to initiate and influence business

So far there have been only been limited amounts of Members' legislation. We think that giving AMs the possibility to re-enter ballots if they have initially been unsuccessful would allow AMs a better opportunity of initiating and influencing Assembly business.

Principle 4: allow public engagement

We suggest that transparency should be added as a general principle underpinning the Assembly's proceedings or at least to complement principle 4. We make suggestions as to the amendments of the Standing Orders to underline this principle in the section below.

Principle 5: suitable for any form of government

Principle 6: SOs to be as flexible and comprehensive as possible and complemented by precedents and conventions

2.3 Possible Changes to Standing Orders

The Committee welcomes your views on CHANGES you think would improve any particular provisions within Standing Orders:

We consider that our suggestions would particularly help the implementation of principles 1 and 4 and to some extent principle 2. In particular it would assist in the

proper scrutiny of the purposes of legislation which becomes even more important if Part 4 of GOWA is implemented.

Our first suggestion is that a Standing Order should be created so that Measures are always published in draft to allow maximum scrutiny and participation.

Our other suggestions were detailed above and in summary they comprise:

- change SO No 22.49 so that AMs be allowed to re-enter ballots
- a new SO to be drafted so that the Assembly could consider ANY subordinate legislation or all the subordinate legislation of a certain nature
- a new SO to be drafted to list when affirmative or negative resolution procedures are to apply
- a new SO to be drafted to require that all subordinate legislation made under Measures is to be made by SI

In order for us to engage fully with the Assembly processes (law making or inquiries) it seems to us that there should be a minimum period of consultation so that we can compile sound evidence. The extension of the deadline for this inquiry shows that the delay was too short for many of us to contribute. Therefore we suggest that a Standing Order prescribes a minimum of two months which should apply to all consultation initiated by the Assembly.

General Points:

We feel that certain matters are not strictly speaking within the remit of the Standing Orders, however we consider that the following principles might be considered to assist in better public engagement in the legislative work of the Assembly:

- LCOs could follow a simplified structure of Schedule 5 (the 2 new parts could be: Part 1- what the Assembly can do; Part 2 - what the Assembly can't do).
- Exceptions to the legislation competence of the Assembly should be expressed in general terms and not specific terms – the environment LCO should not be a precedent to followed
- Measures should seek to consolidate legislation systematically rather than amend existing Acts/Measures. Similarly Welsh subordinate legislation should seek consolidation. This would enable the Assembly to work differently and better than Westminster.