

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

Consultation Responses
SLC 2 - Law Society Wales



Cymdeithas y Cyfreithwyr
The Law Society

Dr D Lloyd AM
Chair
Subordinate Legislation Committee
Legislation Office
National Assembly for Wales
Cardiff Bay
CF99 1NA

1 September 2008

Dear Dr Lloyd,

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

This is the Law Society Wales response to the Subordinate Legislation Committee's call for evidence to inform their inquiry.

The Law Society plays an active role in law reform, the effective operation of legal institutions and access to justice in England and Wales. We are pleased to comment on this progressive review of the work of the Subordinate Legislation Committee ('the Committee').

The Law Society Wales Committee has monitored the progress of devolution in Wales and its impact on the profession as well as monitoring the programme of legislation of the National Assembly for Wales. Our aims in the Third Term of the National Assembly include seeking improvements in the way the law is made and in its accessibility, from preliminary and consultation stages to publication and implementation of a new law¹.

Overview

This inquiry is welcomed for the breadth of its investigation and its aims of better regulation and enhanced scrutiny. This is a timely moment for the consideration of the

¹ Law Society Wales Manifesto May 2007

Committee's new roles particularly the responsibility of scrutinising new executive powers in UK legislation which is a task that is not shared by any committee at Westminster.

We want to see enhanced opportunities for engagement with the law-making process; more Guides to law-making to cover all legislation not just the new powers under the Government of Wales Act 2006 ("GOWA"); and the inclusion of flowcharts showing the relevant committees and support staff would improve our ability to respond.

The importance of the separation of the roles for 'technical' and 'merits' scrutiny and the understanding of the difference between them is fundamental. We do not propose to rehearse the nature of these two roles in this response but it is important that we have confidence that all Assembly Members not just those sitting on the Committee understand these important new legislative scrutiny responsibilities. It is as important that all those whose work may impact on legislation within both the National Assembly and the Welsh Assembly Government ("WAG") understand how both primary and subordinate legislation is made and scrutinised. Further, it is vital that the Committee's workload is organised appropriately. In future we would expect your legal advisers to undertake much of the technical scrutiny for report leaving the Committee sufficient time for the vital new function of merits scrutiny of primary and secondary legislation.

Many of the questions relate to the detail of the internal processes of the National Assembly, WAG, Whitehall and Westminster and the interaction of the respective departments and committees. As we sit outside these relationships we do not intend to comment on the current arrangements but to highlight areas where efficient interaction is to be encouraged.

Communication between the National Assembly and WAG with regard to all legislation is central to the developing law-making roles of both the National Assembly and the Welsh Ministers. However, in order for the Committee to perform its function communications must improve. We would suggest that a legislative co-ordinator be appointed by WAG to act as a point of contact to provide information on new legislation at a Wales, UK and EU level and who would formally advise the Committee of proposed relevant legislation of all kinds with the understanding that information would be shared within a constructive timeframe. This would improve communication between the Committee and WAG. Such a role should improve the Committee's ability to respond to new UK Bills and to plan its work to enable real engagement with stakeholders. However, improving the engagement of stakeholders at the point of scrutiny does not avoid the need for WAG to improve its approach to consultation on proposed legislation (see below).

Statutory Instruments made by the Welsh Ministers

Access to subordinate legislation 'made in Wales' is patchy² and at a draft level is almost impenetrable. At a UK level subordinate legislation is made by Ministers and

² Following lobbying by the Law Society Wales Committee from 1 January 2006 subordinate legislation has been posted on the website of WAG. A feasibility study into the addition of all subordinate legislation from 1999 to 2006 has yet to be concluded.

consequently maintained and consulted upon within Whitehall departments e.g. the Department for Health has its legislation available on its website this includes Statutory Instruments back to 2000, Health and Regulatory Impact Assessments, Directions from the Secretary of State and links to relevant Acts and Bills. In addition all Letters and Circulars appear on their website. There is no corresponding readily accessible service from WAG. Also, consultation on the WAG website combines both policy and legislative consultation: these should be separated to make clear what type of consultation is taking place.

By way of example: the WAG website displays 11 items for consultation under its Environment and Countryside section, only 1 item states that it is a 'consultation on legislative proposals' whereas 6 items relate to new legislation and the remaining 5 items are policy consultations³.

Statutory Instruments implementing European Union directives

It is important for Wales to establish its position at the European Union law-making level. It is influence at the point of the making of the directives which will deliver effective legislation at a Wales level when the regulations come to be made. Active engagement will highlight possible problems to transposition so that these can be avoided. The Law Society has an office in Brussels through which we are able to monitor law-making and lobby on issues at an early stage. The new post established by the National Assembly in Brussels should provide a conduit for a greater appreciation of European law-making and a route to influence decisions.

It is imperative that these SIs are 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.

UK Bills

There are many factors affecting the Committee's ability to undertake its scrutiny of powers in UK Bills however we focus here on the need for robust Explanatory Memoranda to accompany proposed legislation.

When the Society considered the NHS Redress Measure we were concerned to note that the Explanatory Memorandum contained such little supporting information, particularly as there were no draft regulations available.

The question "What should be included in the delegated powers memorandum?" has been considered at Westminster and the following recommendation was reported:

"The memorandum should identify every provision for delegated legislation in the bill;

³<http://new.wales.gov.uk/consultations/currentconsultation/envandcouncurrcons/?lang=en> viewed on 22 August 2008

and:

- 1 Explain its purpose;
- 2 Describe why the power has been left to delegated legislation rather than included in the Bill;
- 3 Explain the choice of parliamentary scrutiny procedure for each power (affirmative, negative or none at all)⁴

We are concerned that WAG continues to seek executive powers in UK Bills. It was expected that framework powers in UK Bills would produce powers to make Assembly Measures only so that all new executive powers would be subject to scrutiny by the National Assembly. This has not been the case.

Nomenclature and Subject Categories

A further way in which to improve access to scrutiny of subordinate legislation would be for the National Assembly and WAG to record legislation and proposed legislation under common headings. It is proposed that the headings should follow those set out in GOWA for Fields within Schedule 5 (these correspond with Subjects within Schedule 7 and so would survive a move to full law making powers under GOWA). The Committee might adopt these strict headings so that consultations are recorded under subject headings and are accessible through the website in this way a search of the website or in the Committee's section for a 'key word' would show all relevant current matters and show a clear archive.

Better Regulation includes post-legislative scrutiny. We are pleased to note that the Committee agreed at its last meeting (15 July 2008) to adopt an annual review of the reports made on legislation and to request that the Counsel General reports on action taken by the Welsh Ministers in response.

Summary of Proposals

The Law Society wants to see:

- The Committee clearly separate its scrutiny functions to embrace its new 'merits' scrutiny function with sufficient time and resources
- Improved access for stakeholders to proposed legislation through adopting the descriptions of the 'Fields' in the Government of Wales Act 2006 to categorise legislation
- Enhanced Explanatory Memoranda to proposed legislation: the Committee should consider guidelines for minimum requirements to inform the scrutiny process

⁴Para 11 House of Lords Delegated Powers & Regulatory Reform Committee Guidance for Departments October 2007

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- Improved communication with WAG: transparent lines of communication should be established, the appointment of a legislative co-ordinator at WAG would facilitate this

We should be pleased to provide further evidence to the Committee if requested.

Yours sincerely,

E Kay Powell

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