

## Y Pwyllgor Materion Cyfansoddiadol

### Constitutional Affairs Committee

Sulafa Halstead AM  
Head of Assembly Committee Service  
National Assembly for Wales  
4th Floor  
Tŷ Hywel  
Cardiff Bay  
CF99 1NA



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

15 July 2010

Dear Sulafa

#### Review of Standing Orders - Committees

The Constitutional Affairs Committee considered your letter of 29 June to Janet Ryder at its meeting earlier today. I am responding in Janet's absence.

#### The Business Committee's Questions

*Question 1 – Have the activities of the committee been limited in any way by Standing Orders?*

The current Standing Orders prevent the Constitutional Affairs Committee from considering any Statutory Instrument (SI) or draft statutory instrument that is required to be laid before Parliament – SO15.7(ii).

The Committee's Inquiry into the Scrutiny of Subordinate Legislation and Delegated Powers<sup>1</sup> flagged up the contradiction between Standing Order 15.7(ii) and SO 15.6(iii). The former prevents the Committee from considering SIs that are required to be laid before Parliament while the latter allows the Committee to consider draft Orders under Part 1 of the Legislative and Regulatory Reform Act 2006 (which must be laid before Parliament).

This anomaly has already been drawn to the attention of the Presiding Officer who has ruled that the specific provisions of SO 15.6(iii) should prevail. Nevertheless, it would make sense for the Standing Orders to be amended to clarify the situation.

---

<sup>1</sup> [CR-LD7518 - Subordinate Legislation Committee Report: Inquiry into the Scrutiny of Subordinate Legislation and Delegated Powers](#) – May 2009 – Annex 2

A wider issue concerning Standing Order 15.7(ii) is that it effectively prevents the Committee from considering Statutory Instruments that are made jointly with the UK Government. The rationale for this seems to be that it could give rise to a situation where the Constitutional Affairs Committee took a different view of a Statutory Instrument to a Parliamentary Committee. However, in practical terms, it means that there is very little scrutiny, and no Committee scrutiny, of this type of SI. The Committee can see no justification for this and would, therefore, wish to see standing orders amended to allow the Committee to consider SIs that are required to be laid before Parliament.

The Committee also felt that the rationale for Standing Order 15.7(i) is not entirely clear. This standing order prevents the Committee from considering draft Legislative Competence Orders. While the Committee accepts that it would normally be a duplication of effort for LCOs to be considered by both a Legislation Committee and the Constitutional Affairs Committee, there may be occasions when the CA Committee can add value. It may be considered somewhat inflexible, therefore, for there to be a blanket prohibition in standing orders.

The Committee is not convinced that there is a need to change this particular standing order but I'd be grateful if you could draw the issue to the attention of the Business Committee so that they can give the matter appropriate consideration.

*Question 2 - Have the functions/responsibilities assigned to the committee been sufficiently flexible to allow Members to do the things they felt needed to be done?*

### Draft SIs

There is nothing that specifically prevents the Committee from considering draft Statutory Instruments but neither are they specifically included in the Committee's remit (other than ones that are required to be laid before the Assembly for some reason). The Committee's Inquiry last year<sup>2</sup> identified this as an issue and suggested that Standing Orders should be amended to ensure that there is no ambiguity in respect of this function.

However, merely allowing the Committee to consider draft SIs, without a complementary requirement for Welsh Ministers to inform the Committee of them, may be somewhat fruitless. The Committee would, therefore, wish to see consideration given to changes to standing orders to require the Welsh Government to inform the Committee of consultations on draft SIs at an appropriate time.

---

<sup>2</sup> Ibid – Action 2

### Draft Westminster Bills

There is also nothing that explicitly prevents the Committee from considering draft Westminster Bills but, again, it is not specifically included in the Committee's remit and there is no requirement for the Welsh Government to draw the Committee's attention to draft Bills that may have implications for the powers of the Assembly or Welsh Ministers. This issue was also identified as an area for possible Standing Orders changes as part of last year's inquiry<sup>3</sup>.

*Question 3 - Are there additional functions that the Committee would want to undertake? For example scrutiny of particular role holders in Wales, such as commissioners, ombudsmen, watchdogs or UK-wide bodies with responsibilities affecting Wales.*

*Question 4 - Should greater emphasis be given to particular functions/responsibilities? For example post legislative scrutiny, scrutiny of UK or EU Bills/legislation.*

### Westminster Bills that grant Powers to the Assembly

The Committee is allowed (SO 15.6) to consider Westminster Bills where they grant powers to the Welsh Ministers. In practical terms it has proved difficult to scrutinise Welsh provisions in these Bills. This may be because the timing and process for considering Bills in Westminster can make it practically very difficult to consider them at a time when there is an opportunity to influence their content.

A further issue is that the current standing orders seem to prevent the Committee from being able to consider Bills that grant powers to the Assembly, rather than just those that grant powers to Ministers.

On both these issues, the Committee is firmly of the view that there is a real scrutiny gap that needs to be addressed and that standing orders should enable reasonable scrutiny of Bills at an appropriate point. The Committee was not necessarily convinced that this task should fall to the Constitutional Affairs Committee; scrutiny Committees, with their more in-depth knowledge of the policy area concerned may be better placed to do so.

In either event, a requirement for Welsh Ministers to inform Committees, when they become aware that Westminster Bills and draft Westminster Bills have implications for the powers of Welsh Ministers or the Assembly, should also be

---

<sup>3</sup> Ibid – Action 10

considered so that Committees have meaningful opportunities to consider Bills and draft Bills.

### Legislative Consent (Sewel) Motions

Provisions in Westminster Bills can sometimes cut across areas that fall within the legislative competence of the National Assembly. In such cases the convention is that the consent of the Assembly for Westminster to legislate must be obtained in advance and standing order 26 already provides a mechanism for this. However, while it provides for Legislative Consent Memoranda (LCM) to be debated in the National Assembly, there is little or no opportunity for Committee scrutiny.

While there may also be practical or timing issues here as well, the Committee identified the way these motions are scrutinised as an issue last year and agreed<sup>4</sup> that the Business Committee should consider how LCMs could be subject to scrutiny in Committee prior to plenary debate. It should be noted that the standing orders of the Scottish Parliament require Committee consideration of LCMs prior to consideration by the Parliament as a whole. There does not seem, therefore, to be any reason in principle why similar provisions could not be made for Committee scrutiny in the National Assembly.

### Other Issues

The Business Committee's approach suggests, as far as possible, having fewer Committees specified in Standing Orders to allow more flexibility around the size and number of Committees while powers and functions of Committees would still be defined in Standing Orders

The Constitutional Affairs Committee has the following main roles defined in Standing Orders:

- It is required to consider individual Statutory Instruments and report on any technical or legal issues that arise.
- It may consider individual Statutory Instruments and report on any broader (merits) issues that arise.
- It may consider wider legislative issues concerned with subordinate legislation, including Assembly Measures, and Westminster legislation.
- It may consider any legislative matter of a general nature within or relating to the competence of the Assembly or Welsh Ministers (the Constitutional Affairs role).

---

<sup>4</sup> Ibid – Recommendation 5

The demand led nature of the Committee's work on subordinate legislation, as well as the need for a degree of expertise among staff supporting the function, suggests that there will be a continuing need for a single Committee to scrutinise subordinate legislation. For this reason the remit of such a Committee, and the requirement to establish it, should be clearly set out in Standing Orders.

The Committee also considered whether the other functions of the Committee, as currently constituted, should continue to be the responsibility of a Committee specified in the Standing Orders or whether the more flexible approach outlined by the Business Committee might have advantages. The Committee was firmly of the view that there is a continuing need for these functions and that the Constitutional Affairs Committee should continue to carry them out. The Committee was also firmly of the view that a requirement to establish the Committee, and its functions, should continue to be clearly set out in the Assembly's standing orders

Finally, the Committee considered the relationship between the consideration of Legislative Competence Orders and Assembly Measures. Committee Members felt that to avoid duplication of effort, scrutiny of LCOs and Measures should, wherever possible, be carried out by the same Legislative Committees. I appreciate that this issue may be somewhat outside the scope of your letter and I also understand that Chairs of Legislation Committees have yet to be consulted about the review. Nevertheless, I'd be grateful if you could draw this issue to the attention of the Business Committee for their information.

Yours sincerely

**Dai Lloyd AM**

Temporary Chair, Constitutional Affairs Committee