Cynulliad Cenedlaethol Cymru
Y Pwyllgor ar y Rheolau Sefydlog

The National Assembly for Wales
The Committee on Standing Orders

Dydd Llun, 25 Medi 2006
Monday, 25 September 2006

Cynnwys
Contents

Cofnodir y trafodion hyn yn yr iaith y llefarwyd hwy ynddi yn y pwyllgor. Yn ogystal, cynhwysir cyfieithiad Saesneg o gyfraniadau yn y Gymraeg.

These proceedings are reported in the language in which they were spoken in the committee. In addition, an English translation of Welsh speeches is included.

Aelodau Cynulliad yn bresennol: Jenny Randerson (Cadeirydd), Lorraine Barrett, Peter Black, Jocelyn Davies, Lisa Francis, Jane Hutt, Ann Jones, Elin Jones, Val Lloyd, Gwenda Thomas.

Eraill yn bresennol: Yr Athro David Miers, Ysgol y Gyfraith, Caerdydd; Marie Navarro, Ysgol y Gyfraith, Caerdydd; Richard Owen, Prifysgol Morgannwg; Ann Sherlock, Prifysgol Cymru, Aberystwyth.

Gwasanaeth y Pwyllgor: Sian Wilkins, Clerc; Gareth Williams, Clerc; Sarah Beasley, Dirprwy Glerc.

Assembly Members in attendance: Jenny Randerson (Chair), Lorraine Barrett, Peter Black, Jocelyn Davies, Lisa Francis, Jane Hutt, Ann Jones, Elin Jones, Val Lloyd, Gwenda Thomas.

Others in attendance: Professor David Miers, Cardiff Law School; Marie Navarro, Cardiff Law School; Richard Owen, University of Glamorgan; Ann Sherlock, University of Wales, Aberystwyth.

Committee Service: Sian Wilkins, Clerk; Gareth Williams, Clerk; Sarah Beasley, Deputy Clerk.

Dechreuodd y cyfarfod am 4.03 p.m.
The meeting began at 4.03 p.m.

Cyflwyniad, Ymddiheuriadau a Dirprwyon
Introduction, Apologies and Substitutions

[1] **Jenny Randerson:** Good afternoon, everyone, and welcome to this meeting of the Committee on Standing Orders. I especially welcome members of the Shadow Commission, as well as representatives of the Welsh law schools.

[2] I remind everyone that you can speak in either Welsh or English, and that headsets are available if you want them, whether for translation or for amplification. I ask everyone to switch off their mobile phones and BlackBerrys. In the event of an emergency, the ushers will direct you to the nearest safe exit. No apologies have been received for this meeting, so we are expecting a full turnout, I believe, from both committees. To clarify, this is a meeting of the Committee on Standing Orders to which members of the Shadow Commission have been invited. You are very welcome.

4.04 p.m.

Rheolau Sefydlog ar gyfer y Cynulliad Nesaf
Standing Orders for the Future Assembly

[3] **Jenny Randerson:** The committee has invited representatives of the Welsh law schools to submit evidence on the future Assembly legislative process. We felt that it was particularly appropriate for members of the Shadow Commission to have detailed information on this, because the commission will provide the services that Members will need to support those processes.

[4] We have had a paper from each of the presenters. I draw the committee's attention to the fact that we have also received correspondence on the same issue from Oxfam Cymru, the United Nations convention on the rights of the child monitoring group and the Law Society. These have not been tabled as formal papers, but they have been circulated to committee members and are on the committee's website.

[5] In approaching the Standing Orders for legislative procedures in the Assembly from May next year, the committee starts from a position of wanting to develop open, accessible and transparent processes, which is very much how the Assembly currently does business. That principle informs our work on the new Standing Orders. We have had a great deal of work to do in a short period of time, and we believe that we have consulted as widely as possible and have built strongly on the consultation work that has been done before, including the work done by the Assembly Committee on the 'Better Governance for Wales' White Paper. It held an excellent consultation that has very much informed our work. Some of the people here today also contributed to that debate.

[6] The key recommendations of the National Assembly Advisory Group have been discussed at length over the past seven years. The principles that it recommended are enshrined in our current Standing Orders, and have been used as a starting point for many of the new Standing Orders. The committee has also visited the Scottish Parliament, where we were impressed by the rigour of its processes—for legislation and particularly for consultation. It is true to say that we have already used the Scottish Parliament's procedures in many cases as a good model for the ideas on which we are working. We have also looked in detail at the work carried out by the Consultative Steering Group on the Scottish Parliament and the principles that it outlined, which related to the fact that the Parliament should be open, responsive and should develop a participative approach.

[7] We have taken evidence from the Chair of the Legislation Committee, which formed part of the formal report that the committee produced. We have also taken evidence from the POWER commission on the general principles of openness, transparency and accountability, among many other issues.

[8] So, having given that preamble, I welcome Miss Marie Navarro from Cardiff Law School, Mr Richard Owen from the University of Glamorgan, Miss Ann Sherlock from the University of Wales, Aberystwyth, and Professor David Miers from Cardiff Law School. We are very grateful for the detailed papers that you have all produced for us. The committee has had those papers for a considerable period in advance of today's meeting, so we assume that everyone has read them—I know that they will have. We will therefore go on to ask you questions based on your submissions, and I will ask you to respond to those questions. Each of you is welcome to respond to each question, but do not feel obliged to do so if you do not wish to.

[9] For the sake of simply kicking off the proceedings, I will start by asking you a broad question. What do you think are the key issues that should be reflected in Standing Orders? If you could pick out a small number of key issues that we should ensure work as a theme throughout our Standing Orders, what would they be? Who would like to start?

4.10 p.m.

[10] **Mr Owen:** I will. The key issues are: the legislation produced should be proportionate and should not produce unnecessary burdens; it should be proximate; it should be recognisable to stakeholders in that they should see it as tackling the problems that they have identified; it should be coherent and should relate properly to other policy areas; and it should be legally certain, in language that is simple, with concepts that are clear and properly defined. I would say that that was about it.

[11] **Ms Sherlock:** I would agree that those things, in very general terms, need to reflect a high level of scrutiny by the Assembly of any legislative Measures. Hopefully, it can be built in that there will be a good input from civil society in general, so that it is a transparent, open and inclusive system. It is also hoped that, in very general terms, the Assembly produces good-quality legislation that is within competence, is workable and which picks up on the factors that Richard mentioned.

[12] **Professor Miers:** For me, the key issue is proportionality within the Standing Orders—as opposed to proportionality within the legislation and the other factors to which my colleagues referred. By proportionality in the Standing Orders I mean proportionality and sensitivity to different kinds of subordinate legislation, different kinds of Measures, and different kinds of issues that the Assembly will have to deal with. My identification of that as a key issue is driven by a concern about resources. One of the messages that I would like to leave with the committee is that, regardless of how meticulous, well-thought-through and careful Standing Orders are in terms of the scrutiny that they rightly bring to proposals by way of Orders in Council, Measures and so on, the Assembly needs to have the legal and official staff—I am sure that this is well known to you—and those kinds of resources, the personnel and the time to devote to these time-consuming things, especially if you have lengthy preceding stages. You may wish to deal with pre-legislative scrutiny later in your questions. If you have procedures of that kind, they take a long time to complete satisfactorily according to the kinds of principles that you have already outlined, Chair, so proportionality within the Standing Orders is my message.

[13] **Ms Navarro:** I agree with the previous remarks. I think that it is particularly important to engage with the civic society of Wales. That is what will make the Assembly different from even the Scottish Parliament, because you can go even further and bring in more consultation. I agree with David Miers: it is a very lengthy and time-consuming process. It may be worth considering less legislation, but better legislation. The Standing Orders might provide the opportunity to bring in such new legislation.

[14] **Jenny Randerson:** Jocelyn would like to ask a follow-on question.

[15] **Jocelyn Davies:** It is easy to say that we want everything to be as open and transparent as possible, and that we want to engage with civic society, but when that happens the voluntary sector tells us, 'You are consulting us all the time about everything, and we cannot cope'. It is not just a matter of resources for us; it is also a matter of resources for those whom we consult. I am sure that we have all found that the more paper you throw at someone to read, the easier it is for something to slip through that you may not realise is important. We have certainly seen legislation with titles that can seem really dreary, but then the subject matter can become very controversial. For some of the legislation on which we have consulted, we do not get any, or very few, responses. Some people may reply and say, 'I agree with this', or there will be no responses at all, while other pieces of legislation turn out to be very controversial. There is a suggestion in one of your papers that perhaps the subject committee could decide. Of course, the Government likes not to consult, because it gets it off the hook if it is on something very controversial—[*Interruption*.] Well, all Governments are subject to that, Lorraine. That is not a party political point; it is a fact. Is there a danger in allowing the subject committee to decide, as it could miss something important? [*Interruption*.]

[16] **Jenny Randerson:** My apologies about the interruption from outside. The deputy clerk has gone to try to ensure that we are not subject to it for much longer. Carry on, Jocelyn.

[17] **Jocelyn Davies:** So, it is a matter of resources, not just for us but for those whom we are consulting. How do we decide and how do we prioritise what to consult on?

[18] **Professor Miers:** To step back, it is a question of management. From the Assembly's point of view—and I make this point two or three times in my paper and colleagues also do this—it seems to me that one of the ways in which the Assembly can save on its resource energies is by making the Government do a lot of the work for it. So, taking the point about consultation, it seems to me that you could and should require in Standing Orders that the relevant Government department has undertaken consultation for Orders in Council, Measures and statutory instruments. That may be a check list or something of that sort. However, I also have in mind here the kind of requirements, for example, that the House of Lords' Delegated Powers and Regulatory Reform Committee and the House of Commons' Regulatory Reform Committees demand of departments, namely that they have consulted the people who are affected by the proposed Orders. So, you could make exactly the same demands of Government to produce what, for you, is a well-documented, clear statement of what consultation has been undertaken and with what effect. It is not enough just to say 'We consulted'; you need 'We consulted but we accepted this or rejected the other for this reason'—perhaps because it was too expensive or some such.

[19] Coming to the point about voluntary bodies and others who are consulted, they, too, have limited resources. I suppose that the answer for them is that, so long as the Government signals early on that it intends to consult about x and there is a sufficient timetable—and this is probably no more than standard common sense—the voluntary agencies can then determine within their own priorities whether they want to respond to a particular Order in Council or, further down the track, a Measure that is proposed, rather than to another. However, that is no different from any other form of consultative activity in that some of those affected or marginally affected will simply not have the time, energy or expertise to engage in it. However, so long as the Government, to your satisfaction, has engaged in that consultative process and given sufficient time and, if necessary, some sort of assistance to the voluntary bodies to produce a response, so that it produces an accurate draft paper and does not spring things out of a hat when they come before you, it seems that there are ways of managing the process. But, in the nature of things, it will never be perfect.

[20] **Jenny Randerson:** I notice in Marie's paper that there is a reference to open consultation as opposed to a list of consultees, and Richard refers in detail to the European Union process. How do you think that open consultation could be managed, Marie, in the light of David Miers's comments? How do you think that EU principles could be applied here?

4.20 p.m.

[21] **Ms Navarro:** You saw that we consulted and used tomorrow's ways to reach as many public bodies as possible to find out what they wanted. Many voluntary organisations have expressed a will to work with one particular body that would be the interface with the Assembly and provide papers or answers to consultations to the Assembly, and answers back from the Assembly. One of the avenues that we explore in our paper is to perhaps have a central bureau within the Assembly to deal with consultation, or something like that.

[22] **Mr Owen:** In the European Union, the consultation will be tailored to the particular exercise, so the scale of the consultation will depend on whether it is a new policy area or amending legislation. Although consultations are open in that they are available on the internet, and people can respond, they would use consultation partners to seek out those directly involved in the implementation of the policy, or affected by the policy, or organisations whose stated aims would suggest a direct interest. There are also standing consultative committees, where non-governmental organisations are represented.

[23] **Gwenda Thomas:** We are talking about civil society, and David Miers made a remark about people who perhaps lack the energy and expertise to respond to consultation. How important is it that we take specific steps to ensure that we can consult children and young people on legislation that will affect them? Should we include that in Standing Orders?

[24] **Professor Miers:** The answer to the last question, whether we should include it in Standing Orders, is 'yes', so that if any proposed Order in Council or statutory instrument is intended to have an impact, or could have an impact, on children, it seems to me that there should be some box in the long list of items about which the Assembly will need be satisfied, that deals with children. After all, there is a statutory agency that has precisely that remit.

[25] As to the more general question about how much assistance is required, that is more difficult. I can think of some straightforward things like ensuring that you make information available to representative groups, as well as to the statutory children's commissioner, whom, presumably, you would expect to produce evidence in response to any Government proposal. I would expect that there would be contact with representative organisations and that the document that sets out the proposals is clear, that the resourcing is clear and that the impact on children in education or health, or whatever it may be, is as clearly spelled out as it can be. To return to the point that Richard made, it seems to underpin or give effect to the types of principles to which the Chair referred—transparency and openness. In essence, people should know what they are dealing with so that, when they respond, they know that they are responding to something that is a likelihood, whether they are happy with it or not, and that that is what is on the agenda.

[26] **Ms Sherlock:** On the specific point regarding children, the Assembly has a good record of interacting with children and young people's groups, for example, through Funky Dragon. The Assembly will need to consciously build upon this, because my impression is that the links so far have been between the Executive of the Welsh Assembly Government and the children's groups. It is important that a parallel set of links is built between the Assembly as a legislative body and those groups.

[27] I have a more general point about what went on before, in terms of the input from different parts of civil society. The Assembly will need to monitor where the input comes from, because it is possible for the agenda to become skewed towards the interests of the groups that have the best resources and do not lack energy. I am not sure how the Assembly should deal with that, but it needs to be attended to, perhaps by the Assembly specifically inviting input from certain groups, or even commissioning its own research to balance out the skewing that might take place.

[28] **Val Lloyd:** Staying with consultation, to round it all off or to take it a stage further, do you foresee any circumstances in which it would be beneficial to have reduced consultation? I think that it is generally agreed that consultation is a positive—I take that as a given—but can you think of any situation in which reduced consultation would be beneficial?

[29] **Ms Navarro:** It could be beneficial for any emergency procedure. Also, in the event of very technical legislation, consultation might be difficult as outside bodies may not understand all the technicalities. So, I guess that there might be a contents-based reason for not carrying out extensive consultation.

[30] **Professor Miers:** To pick up the technical point to which Marie has referred, there is statutory provision for statute law appeals and consolidation. It seems to me that you do not need extensive consultation on that, but you might want to prepare a paper and make it available, so that there would be a date by which representations could be made. I hesitate slightly, because to call technical law reform technical and, therefore, non-political is a dangerous statement if you look at some of the problems of the Law Commission in the past. On the face of it, however, they are forms of legislation that do not, in the normal course of events, call for the kind of consultation that you would expect for an Order in Council that proposes substantial new powers for a Minister with regard to education or some such issue.

[31] Another point on consultation is that one might also consider the mode of consultation. A way of managing consultation and keeping it within a short timescale is to just have written consultation rather than oral. You may well take the view that for some forms of legislative proposal—again, Orders in Council and Measures procedures—you might want the full order, as it were. However, for some general statutory instruments, as an Assembly and a scrutiny body, you might be satisfied with some form of written consultation. After all, that is what happens with Ministers under the regulatory reform procedures: you simply write to the Minister and say whom you have consulted. It is a slightly arm’s-length relationship, but it is possible to have less.

[32] **Jenny Randerson:** I would just like to make it absolutely clear that members of the Shadow Commission are welcome to ask questions as well. Lisa is next.

[33] **Lisa Francis:** I wanted to ask about subordinate legislation, because there are no statutory provisions in the new Government of Wales Act—I will refer to it as that—relating to the procedure for making subordinate legislation under enabling powers in Measures. Given that, I wondered how you envisaged the operation of a subordinate legislation committee. Could you expand on how you think that that might work? The Government of Wales Act 2006 states that subordinate legislation made under Acts will be made by Assembly Government Ministers. I think that that is quite constraining and I wondered how each of you would envisage that a subordinate legislation committee might work. I know that that could mean a very long answer, but I would appreciate it if you give an answer in the most succinct way that you can.

[34] **Ms Sherlock:** I am happy to kick off. In my view, there are a number of issues. There is the issue that when the Assembly is making an Assembly Measure, it will have to determine what the subordinate legislation process will be. That is a matter for the Assembly. My paper thinks in terms of a general legislation committee that would deal with subordinate and other legislation. In a sense, my thinking was that there are certain things that need to be looked at in relation to any kind of instrument that the Assembly makes.

4.30 p.m.

[35] I would see the technical, competence, and slightly less politicised issues being looked at by a legislation committee, whatever kind of instrument is being dealt with. When an Assembly Measure is being made, I think that that legislation committee would have an input into reporting on what it sees as the ideal procedure. In a sense, ultimately, it is choosing between a high level, a medium level, and a very low level of scrutiny. I think that those are the basic choices.

[36] In a sense, once the Assembly Measure is made, whichever committee looks at the subordinate legislation has its remit determined for it, just as when UK legislation has created powers, they come to the Assembly with the procedures stipulated. I do not know whether that answers your question.

[37] **Jenny Randerson:** Does anyone else want to come in on that? Lorraine?

[38] **Lorraine Barrett:** Thank you, Chair. I have one small point on the issue of consultation. I thought of it when Gwenda asked about consulting with children and young people. Do you think that there is a danger in the form of consultation and how we reach as many appropriate people as possible, given that we assume that everyone has a computer? When we think of consulting by way of IT, we think that, as long as it is on the website, people should know that we are out there consulting. Thinking of young people—particularly those who are disengaged, if you like—not all of them would be engaged with Funky Dragon, which is a great way of communicating with young people. Have you had any thoughts on how we consult? Are we in danger of thinking that because it is on a website, people out there would know? You mentioned the written form; do we still need to make that sort of contact?

[39] **Ms Sherlock:** I think that, possibly, there is a danger, but I am not sure whether it relates specifically to children. I think that other age groups might be more likely to miss things if they were only on a website. I know that my mother tends to say, ‘They have just told me to do ‘www’’, and she is very frustrated because she cannot do so. So, I think that there are other groups. There is a danger. I think that disengaged children are hard to reach and I think that various children’s organisations are trying to reach them. Perhaps there are more efforts being made to reach certain groups of children, but you may lose some of the adult population if it is simply on a website.

[40] **Professor Miers:** I suppose that the commissioner for older persons has a role to play here. Television carries Welsh Assembly Government messages about health, for example. I suppose that that is a way of reaching a population that is not as computer-literate as everyone else.

[41] **Ms Navarro:** I have a slightly more general point on the subject, which is electronic information versus paper information in general. I have read in some report that there is a danger in keeping only electronic copies of things, or publishing things only on the internet or electronically, because there is a higher danger of virus attacks. So, it is always good to think—in the publication scheme, perhaps—of something that is not only electronic, for various reasons.

[42] **Jenny Randerson:** That raises an issue of which I am very conscious, having visited various Canadian Parliaments; while admiring our electronic approach, they were slightly dismayed that we do not keep a paper master copy. They pointed out that an electronic version can be changed without you knowing that it has been changed, whereas you cannot change the paper master copy without knowing that it has been changed. That is an issue that we need to take to heart.

[43] Shall we move on? Jocelyn, do you want to take on a new topic, or carry on with that one?

[44] **Jocelyn Davies:** It was about the initiation of Orders in Council, if that is okay.

[45] **Jenny Randerson:** Yes; go on.

[46] **Jocelyn Davies:** I see that there is a suggestion in your paper that our Standing Orders should provide for outside bodies to initiate. I think that that is an excellent idea. I can imagine that local government and other outside organisations would have many ideas. It is easy to say that Standing Orders should provide for it—another thing that is easier said than done. Would we not have to have some sort of orderly process for an outside body to initiate the process for an Order in Council? Do you have any ideas as to how it might happen?

[47] **Ms Navarro:** Do you mean how it would be drafted?

[48] **Jocelyn Davies:** Yes; what the process might be, rather than that we should have one. We are considering setting up a way of receiving petitions, but this would not be a petition, if it is from an outside organisation, which has a good idea and thinks that it is something that we should take forward. If it comes from local government, for example, it is likely to have cross-party support. How would we do that? Would it be via one of the subject committees?

[49] **Ms Navarro:** No. I think that there should be somewhere in the Assembly—a venue or a recipient—for interacting with civic society in particular, whether it is a committee or a bureau.

[50] **Jocelyn Davies:** A special committee for interacting with civic society?

[51] **Ms Navarro:** It could be, yes. I could come back to you with more structured thoughts on that. We were thinking of a bureau, maybe, or a service.

[52] **Jenny Randerson:** I believe that your paper looks at these suggestions in the light of the Scottish system for private Bills. Having been to Scotland, the comments that we got were that their private Bill procedure is massively heavy on resources and time. Professor Miers talked about resources; we have to bear that in mind, given that we only have 60 Members. The amount of time in Scotland devoted to private Bills is extremely high. Therefore, have you looked at the implications for us as Assembly Members, as opposed to simply the implications for the commission as a whole?

[53] **Ms Navarro:** I have also been to the Scottish Parliament, two or three weeks ago. In fact, while discussing the issue of private measures with them a little further, I discovered that they are not under the Transport and Works Act 1992, so they are under the old private measures problem. That is why the issue that is raised in Scotland would not necessarily apply to the Assembly, because all of the transport and works Orders are out of this procedure already. That is why we offer to you in our submission a hybrid procedure, which takes the good sides of transport and works Order procedures and the Scottish model.

[54] **Mr Owen:** I will return to the question of how local authorities might initiate legislation before this Assembly. They could have the standing, perhaps, to develop their own initiative opinions, which might have to be considered by the Assembly. These could just be consultative opinions, but the Assembly would be required to consider them and introduce draft proposals in that way.

[55] **Ms Navarro:** Another point that I find fascinating is that, in the box relating to the consultation and other private measure sections, you will notice that the organisations that we consulted expressed no will to introduce such legislation. What they are keen to do—and it is them saying it, not me—is to work with Assembly Members and Assembly committees rather than introduce their own legislation. They realise that drafting legislation is something huge and they might not necessarily be able to do it. They are quite willing to engage and to participate with AMs and committees and therefore follow these procedures rather than other private measures.

4.40 p.m.

[56] **Professor Miers:** I will follow up on the point about local government. Whatever criteria the Assembly determines that it needs to apply, in terms of levels of scrutiny on Government Measures, must apply equally to local government Measures. In the case of proposals coming from the Assembly Government, they come with its officials' or legal advisers' input and, going back to my earlier points, will, you hope, meet the criteria to your satisfaction. The same would have to be true of local government proposals, would it not? So, the question for local government would become: does it have sufficient legal expertise and so on to produce proposals for instruments that will meet whatever your criteria are? Some of those will be statutory, as much as the points in the 2006 Act, which will have to be taken account of, as well as the things to which Richard and Ann have referred. That would be a substantial burden for local government and would, in turn, raise the question of whether the Assembly should regard itself as having some obligation to assist. That question is not easily answered.

[57] **Peter Black:** Under the present arrangements, local authorities can sponsor their own Bills through the House of Commons and the House of Lords. They call on expertise to do so, by employing parliamentary draftsmen, so one assumes that they have the capacity to do that with the National Assembly just as they will with the Houses of Parliament. I am interested because, in terms of the primary lawmaking powers of the Assembly, before we can pass anything we have to ask permission of the Westminster Government to have the powers passed down to us. In the event of private legislation coming from local authorities or some other body, how would you envisage that process tying into that need to request permission? Would they have to petition the Assembly Government first to seek the powers before they put the legislation through or would it be easier for them to go to the House of Commons, as they do now?

[58] **Ms Navarro:** That is a very good question and it will depend on the extent of the Orders in Council. If we get very broad Orders in Council and they are already in Wales, such as the example that we always use with David, namely the protection and welfare of children, then once the Order in Council is passed, you could have several Measures made under that. So, it depends on whether or not it is a pioneer policy.

[59] **Jenny Randerson:** Does anyone want to come in on that?

[60] **Peter Black:** It also means that, in order for local authorities or other bodies to seek that private legislation, we have to be moving faster than them in terms of the authority that we seek.

[61] **Professor Miers:** That would be right.

[62] **Jane Hutt:** Just one reflection from Government— [*Inaudible.*]. It has been a very interesting discussion in terms of the balance between what the Executive does, as Ann mentioned, and what the legislature will want to do. How that pans out will be very interesting. It is horses for courses—there will be very different circumstances and contexts. However, this Government is, and follow-on Governments will be, committed to extensive pre-legislative scrutiny in order to present to the Assembly a robust draft Order in Council. That will be the challenge in terms of how Standing Orders reflect the Assembly's will to engage—again, perhaps, going over much ground that will have been undertaken by the Executive. Getting that balance right will be quite a challenge, which, presumably, you recognise, given the points that you have made. Do any of you want to expand on that?

[63] **Jenny Randerson:** Ann first and then David.

[64] **Ms Sherlock:** I do not know whether this is a direct response, but it is a comment. In terms of my own written evidence, which when I reread it seemed extremely negative about pre-legislative scrutiny—and I have written 'Why not?' in the margin in many places—I think the reason why I was extremely cautious was that, while in principle I think that it is excellent and, as a matter of principle, I would go for it every time, I was not sure how it would operate in practice. As a result, I think that I come across as very negative on it. So, for the record, I am not very negative on it.

[65] One of the things that was in my mind was that, although at the moment we are talking about six or seven big things being done per year, eventually, presumably, it will increase quite a way above that. I was trying to think in terms of Standing Orders that are suitable for six or seven big items per year, but also think in terms of Standing Orders that might be suitable if a vast amount of legislation were going through. In particular, as Marie mentioned, if the Orders in Council add broad matters to Schedule 5, then there is authority to do quite a lot and it is not a case of one Order in Council, one Measure; it might be lots of different Assembly Measures. As a result, the legislative output could increase substantially. Given that we do not know exactly what the practical implications are, I wondered about the practical problems of building in a rigid requirement for pre-legislative scrutiny. On the other hand, what David suggested with regard to the Assembly presenting a memorandum outlining what has taken place may be an answer to that.

[66] **Professor Miers:** I speak from experience here, having been a special adviser to a joint committee in 2003-04 in Westminster, which was a pre-legislative scrutiny committee. If I may, Chair, I would like to spend two or three minutes on this, because there are a number of important points that need to be pulled out. You first have to ask yourself why pre-legislative scrutiny exists in Westminster at all. The answer is that the committee stage has no consultative powers. So, you have pre-legislative scrutiny as a way of engaging with the public and, in particular, with those groups most closely affected by the proposed legislation. That is point one. The second point that is worth making is that you need to be careful about pre-legislative scrutiny if it takes place before you have, let us say, an Assembly Plenary debate or a Second Reading debate in the Assembly. The reason for that is that what happens is that pre-legislative scrutiny will substitute for, or be seen as an opportunity for, a general debate about the policy being proposed. That is not the purpose of pre-legislative scrutiny at Westminster. I am not suggesting that you have to follow Westminster, but one needs to think about the analogy.

[67] I have always understood—and this is the way that Westminster understands it—that the purpose of pre-legislative scrutiny is to see whether the Bill as drafted gives effect to the policy, which, effectively, is a policy that is already agreed. There may be some doubts around the margins about the policy and how far it goes, but if you look at the reports that have been produced by Westminster on pre-legislative scrutiny, they all make the point that its function is to look at implementation. If we translate all of that to Wales and look at the activity of the Government, if the Government has conducted wide consultation before it gets to the Assembly, when it comes to the Assembly it can say, ‘We have consulted all of the affected groups; we have taken account of this, that and the other and our proposal is as follows’. Let us say that you have an Order in Council procedure under your Standing Orders, you then have a Plenary and you have that proposal committed to a committee stage, which looks at technical matters and its legal competence—I think that we are all agreed on that; I do not think that there is any dispute about all of those things—the question is: if you introduce some kind of public scrutiny at that point, what would its purpose be? You could say that, by this time, some views have changed and the policy has been sharpened up—it is much clearer what the Government proposes to do. I will expand on that—please stop me, Chair, if I go on too much. On the assumption that you have asked the Government to produce, as part of the explanatory memorandum for the Order, a list of the proposed Measures, or the Measures that it is now contemplating if this Order in Council goes through and what it will propose over the next two or three years, I assume that that kind of thing would have been canvassed at an early stage, but it will become much firmer by the time that the Minister stands up here and puts her reputation down.

4.50 p.m.

[68] It may well be that you feel that you then want, through subject or policy scrutiny, some kind of pre-legislative scrutiny event, which involves a further round of consultation with the affected groups. However, again, to make the point—and forgive me if this is repetitious—it needs to be clear that that consultation is not about the policy as a whole. It is for Plenary to say, ‘We do not like this policy’. For committees, the question then is, ‘Okay, given the policy, does this Order in Council, and do the Measures that are proposed under it for the next two or three years’ worth of implementation, give effect to that policy—or not, as the case may be?’. That seems to be a valuable undertaking, but it is time-consuming and resource-consuming.

[69] I will make one other point, to link with post-legislative scrutiny, to which I inadvertently referred earlier. It seems that there is a huge benefit for the Assembly, and, indeed, for the Government, if that kind of scrutiny function is carried out in the sort of way that I suggested—I can expand more on that if you wish. What you could generate, as it were, is another checklist—you would generate another set of outcomes, if you like, so that two, three, four or five years down the track, the Assembly could come back and say, 'Well, Ministers, you said that you would do this'. After all, one must bear in mind that an Order in Council gives power, but the power may not be exercised as a Measure within five years; indeed, by the time that it comes to be exercised, it may be exercised by a party of a different political complexion. However, as part of its scrutiny of the Executive functions—not its scrutiny of legislation—the Assembly might want to come back and say, 'In 2007, when you were putting forward this Order in Council, you said that you would do the following things—where are they?'. Therefore, a lot of input at this stage could be enormously valuable further down the line in terms of that kind of scrutiny of the Executive.

[70] I am sorry, that was a rather long answer, but there is a lot packed into this legislative scrutiny notion.

[71] **Jenny Randerson:** That was very helpful. Does anyone else wish to comment on that?

[72] **Elin Jones:** I have a question on subordinate legislation. We have been used to that here in the past few years, and some of us may be reluctant to allow some of it to go. Therefore, I am interested in the negative procedure. In your paper, Marie Navarro, you have outlined a process for the negative procedure, and I believe that it is along the lines of the Scottish model, although I am not too sure. Are there any comments on the negative procedure, and is any consensus coming from our experts on it?

[73] **Jenny Randerson:** Thank you, Elin. Who would like to start with that?

[74] **Elin Jones:** It may be too open-ended a question.

[75] **Professor Miers:** I am content with what Marie and David have said in their paper. You need to ensure that instruments do not go either way. Therefore, you need some procedures to ensure that, at the very least, they will come to your attention and you will have motions for annulment. I do not have anything more to add.

[76] **Ms Navarro:** A procedure must be provided anyway, because Acts of Parliament require subordinate legislation to be subject to negative procedures. So, what we say is that, as far as we are aware, you can use them as well within Assembly Measures, and impose that as well.

[77] **Ms Sherlock:** I suppose that another general point is that the reason why the negative procedure is there is to speed things up. While it may be a wrench, and I can understand why, for the Assembly to lose control over making these Measures, if the wave of legislation is large enough, then there has to be some give in the system, and the negative procedure is a way of accommodating time and resources.

[78] **Jocelyn Davies:** I just make the point that some things that are done by statutory instrument are very technical and non-controversial. At other times, they can be very controversial and no-one could say, 'Oh yes, you would definitely do that by statutory instrument, while this would need primary legislation'. It does not seem that anyone has ever said what should be secondary legislation and what should be primary legislation, and you would never guess or be able to tell which should be which. The point that Elin is making is that we have been used to saying, 'We want a debate on that, and we would like to table an amendment and so on'. We will not be able to do that all the time in the future. However, you say here that the Assembly should

[79] 'be given the power to recommend certain changes being made to an instrument, before the instrument will achieve Parliamentary approval'.

[80] So, there is a suggestion there that we should be able to table amendments.

[81] **Ms Navarro:** Especially in the framework Orders. In our submission we say that there are different types of subordinate legislation and we agree that anything to do with any seeds or potatoes from Egypt might not need a lot of—

[82] **Jocelyn Davies:** No.

[83] **Ms Navarro:** We then moved on to framework legislation. Something that was stressed by the Scottish Parliament representatives, when I discussed with them how they organised themselves and how they managed their accountability function as well as the legislative one, was that that was what the Assembly should focus on, as well as keeping some control of it, as far as you can—I know that it is a question of 'can'. There is a new trend in legislation these days in Westminster and Scotland, whereby more and more framework powers are devised and given to the Executive. That is something new—before, executive functions were quite narrow in application. We all know now that framework powers are on the up; these particular types of subordinate legislation should, in our opinion, be subject to at least affirmative procedures.

[84] **Jocelyn Davies:** Yes, but the idea of framework powers is justified, because of the level of scrutiny in the Assembly, is it not? So, if we do not have that level of scrutiny, you cannot justify primary powers.

[85] **Ms Navarro:** I totally agree.

[86] **Jenny Randerson:** We have discussed consultation at some length. Of course, thorough consultation slows down the legislative process and Governments are often anxious to get things on the statute books, quite reasonably. In fact, we are all often impatient about how long it takes for certain laws to get through the process. If we were to go for a robust system of consultation, how long do you think that it would take, from the moment an idea was first floated for an Order in Council—because we have an additional stage, in that we have a two-stage process, which does not exist in Scotland—through to getting it enacted? There might be some parallels here with the European situation.

[87] **Mr Owen:** The consultation obviously needs to vary according to the Measure, so that could affect the length of time. The European Commission has found that a six-week consultative period is inadequate and has suggested that no less than eight weeks be spent on consultation.

5.00 p.m.

[88] **Jenny Randerson:** So, the whole process would take at least a year, would you say? I am only throwing that into the pool as a possibility for you to argue with.

[89] **Ms Navarro:** I would guess at least a year.

[90] **Professor Miers:** When you say 'floated an idea', Chair, this is the Government floating an idea, is it?

[91] **Jenny Randerson:** The Government puts forward a proposed Order in Council for consultation, right through to the point where it can actually say, 'The Assembly has now enacted this legislation'.

[92] **Professor Miers:** Sorry, through to what?

[93] **Jenny Randerson:** To the point of delivery. The end.

[94] **Professor Miers:** To the point of delivery of the Order in Council, or the proposal?

[95] **Jenny Randerson:** No, of the actual Measure.

[96] **Professor Miers:** The Measure? Heavens. I think that I would start by differentiating between the Order in Council and the Measure.

[97] As I said earlier, the Measure, or Measures, made by the Assembly under the Order in Council power could be quite quickly made once the Order has been made in Parliament, but that could be some years later—that is in the nature of the power-conferring Order. In terms of the Order in Council itself, it seems to me that that will take some months from the initial stage. If you walk through it, and start with the Welsh Assembly Government saying, 'Right, we are going to consult on x policy', that might take two months for consultation and for it to be reconsidered. The Government can speak for itself on this, of course. However, then it would formulate its proposals, produce an explanatory memorandum that meets all of the Assembly's requirements, and then find a slot in the Assembly's business timetable, through negotiation with the business managers, and so on. Once it is in the Assembly, there is, presumably, a Plenary stage, and then a committee stage, which will look at technical competence. As we have all, I think, suggested, the committee stage could also have some kind of subject-matter scrutiny, even if it is not as extensive as I have suggested, or even if it is not as extensive as the whole policy, but the implementation of the policy. If that involves further consultation rounds, you have to call in the Government first to give its point of view, then you call in the affected groups, and then you call the Government back. That is going to take some time, too, and then you have to agree your report. It is going to take months, it seems to me. Obviously, it depends on how much is in the Order in Council, but I assume that they will be substantial—if not in volume then at least in the powers that they can give to the Assembly, and that is why they will attract political attention. The whole point of the procedure is to give the Assembly powers that it does not currently have—powers equivalent to Acts of Parliament. So, I can readily see how this could be quite a long, drawn-out process.

[98] **Peter Black:** I want to come back to the enabling legislation. Marie made the point that a lot of it is happening in Scotland and in Parliament. We are concentrating largely on subordinate legislation, and we most probably give it far more scrutiny in the Assembly than they do in Parliament or in Scotland. Given that we will be moving more towards their method of doing things, what good practice is there in Scotland and in the Houses of Parliament in terms of keeping a grip on that enabling legislation and the subordinate legislation that comes from it?

[99] **Ms Navarro:** Are you referring to the super-affirmative procedure that we mentioned?

[100] **Peter Black:** We are saying that a lot of primary legislation now, effectively, has clauses that enable Ministers to bring in all the detail. Clearly, when that detail comes here, it gets fairly substantive scrutiny—basically, because we have nothing else to do apart from talk about motions. However, in terms of a primary-law-making body, we will have a lot more to do, and we therefore need to learn from Scotland and Westminster how to keep tabs on the subordinate legislation that follows from those enabling clauses, and how they can scrutinise that effectively.

[101] **Professor Miers:** As has been said, the answer as regards the scrutiny of the power conferring into that Act is the House of Lords' Delegated Powers and Regulatory Reform Committee, which has well articulated criteria and has been doing this for years now, looking at the inappropriate or appropriate delegation of powers to Ministers. So, there is a clear model there in the DPRR committee—though I confess that I am not sufficiently acquainted with this in Scotland—for how to deal with the inappropriate delegation of powers to Ministers.

[102] On how Westminster scrutinises how the instruments under those powers are made, of course it may be that the parent Act requires the affirmative-resolution procedure, in which case, there is that kind of control. Even if it is only negative, to pick up a point that was made earlier, it is worth noting that, notwithstanding that the House of Lords Select Committee on the Merits of Statutory Instruments is looking at negative-procedure instruments, it still picks up some 64 instruments, looking at the 2004-05 report. So, it is possible to conduct the scrutiny of negative instruments and refer them, in the case of the House of Lords, to the House. Here, the legislation committee, having a merits function and using similar criteria to those at Westminster, could do the same kind of job, given the resources. It would give you the kind of control that you are looking for, as it could refer an inappropriate instrument to the Assembly, or say that things have changed in five years—which is one of the criteria used—and say that it now wants to make an instrument under an Assembly Measure, even from some years back.

[103] **Jenny Randerson:** Ann Sherlock, do you have a comment?

[104] **Ms Sherlock:** I do not have a lot to add. I think that we are back to the question of resources. My paper argued in favour of the highest level of scrutiny for subordinate legislation, sending the technical legal issues to a legislation-type committee and referring policy issues to the relevant committee. I suppose that, at that stage, it would be open to the committee to say, 'Well, there are not enough issues for us to discuss here; we do not need to discuss this', but it would at least alert them to the existence of the Measure, whether it was negative or affirmative, because very substantial powers will be given.

[105] The UK-made legislation arrives at the Assembly with a procedure, but the Assembly can work out its own procedures for the Assembly Measures, so there is a little more scope there for raising the level of scrutiny. Again, it is a different situation. One of the things that I raised in my paper—and it was one of the many questions that I did not have an answer for—is that I am not sure to what extent subordinate legislation can go on being amendable by the Assembly. It would seem desirable if it is possible to do that, but I do not know enough to say whether it is. It would be a real disappointment if Measures could not be amended, even if there was quite substantial agreement in favour of amending them. The Assembly Government can take it back and produce a new draft, but that seems to be a rather time-consuming way of doing it. So, ideally, it would be good if there were some way of amending subordinate legislation.

[106] **Jenny Randerson:** Thank you. The Scottish Parliament has relied very heavily on the Sewel convention. Do you think that we need our own version of that?

[107] **Professor Miers:** Does it not exist already, in a sense? If Ministers want powers that they do not currently have, but which fall within their fields, they ask the Secretary of State to make provision for the power to appear in a Bill, or a Wales-only Bill. Scotland has the Sewel convention because its Parliament cannot enact enough legislation of a primary kind, so it relies on the United Kingdom Parliament to do it for it. That already exists here, does it not?

5.10 p.m.

[108] **Jenny Randerson:** The procedure exists, shall we say, but, really, I am wondering whether we need to make it subject to a specific agreement or convention.

[109] **Ms Sherlock:** I suppose that what David has presented is the practical side, because legislation is needed. There is also the constitutional, political side, where Westminster is not treading on the affairs of the Scottish Parliament without its consent. There will initially be quite limited areas where that would apply in relation to the Assembly, but I cannot see a problem in having such a convention. It would be applicable only where there is a matter listed in Schedule 5.

[110] **Professor Miers:** Sewel proceeds from the notion that Scotland, if not sovereign, can create its own Acts of Parliament—Acts of the Scottish Parliament. It is for that reason that you might need such a convention, which is consensual. That is its nature. As Ann rightly observes, when you go to the Secretary of State for Wales and say, 'Please could you promote a Bill for us next year on a commissioner for older people, for younger people or for children?', that is clearly a consensual activity. Apart from having a devolution guidance note or a memorandum of understanding with the Secretary of State, I cannot quite see what more you would need. Maybe I am missing something completely.

[111] **Jocelyn Davies:** I think that what Jenny is getting at is that there is a motion where the Scottish Parliament agrees that the UK Parliament shall legislate for both. Even though the Scottish Parliament has the powers, it will say to the UK Parliament, 'You are making legislation on that, so why not make it apply to Scotland also?'. I can see situations in the future where, instead of duplicating work, you would say to the UK Government, 'Actually, you are already passing a Bill on such and such, so why do you not make it an England-and-Wales Bill?', and then we will not have to waste our resources by duplicating what it is doing, because the policy is the same. I can imagine that it could happen. Let your imagine run riot. Then, however, there is a motion to say that we agree that the UK Parliament should legislate for us as the same time as it legislates for itself.

[112] **Jenny Randerson:** I cannot envisage needing it to begin with, because we would not have had any powers given to us by an Order in Council, but, over a period of time, if the Orders in Council are drawn up broadly enough, they will effectively delegate power to us over many things. However, as Jocelyn says, it is possible that we will still want Westminster to do things within those powers occasionally. Maybe I am looking too far ahead.

[113] **Professor Miers:** Yes, I can understand that.

[114] **Ms Sherlock:** I think that it will happen some time down the road, because, initially, it would seem very odd if the Assembly manages to secure an Order in Council and the power to make Measures immediately, and then immediately says to Westminster, 'Please use these powers for us'. I think that there would be a lot of disappointment. Presumably, also, an Order in Council will have come because there is a specific thing that the Assembly wants to do differently. I think that you are right to say that, further down the line, when Schedule 5 contains far more matters, it could arise as an issue.

[115] **Jocelyn Davies:** In terms of this matter of having a motion, it would be that the Assembly agrees that the UK Government should also legislate on its behalf. Perhaps we need time to think about that. You have probably been thinking about it longer than us, Jenny.

[116] **Jane Hutt:** It might be something that a future Assembly might want to return to. We will use our powers; indeed, we have memoranda of understanding already, which will probably suffice in the first phase. In the future, or even in the third phase, it may be an appropriate consideration, but not at present.

[117] **Professor Miers:** To try to answer the question, I think that Ann is right, for political reasons, as well as just the way in which things pan out. I can see value in having an Assembly procedure under which a Minister could put a proposal to the Assembly, which is, I think, what you have in mind, separate from the Order in Council procedure. Westminster could then enact a clause in a Bill that would give you the proposed power, rather than your having to go through the Order in Council procedure. Exactly what Order in Council proposals will contain and what they will look like is, of course, an unknown quantity as far as we are concerned at this end of the table. You might just want some small specific power that would not really warrant the Order in Council procedure.

[118] **Jocelyn Davies:** I was thinking along the lines of why we are making duplicate subordinate legislation to that made in England, on potatoes originating in Egypt, for example. It would be a matter of confidence to say, 'You are doing that, so why can it not apply to England and Wales, because otherwise we will just be making one exactly the same and duplicating resources?'. That could apply, because I think that the UK Government has reserved its right to legislate on devolved matters. I am just giving legislation on potatoes from Egypt as an example, because it was mentioned earlier. I do not think that it would be controversial to say, 'Why do you not do it for us as well, given that you are doing it in England, and save us a few bucks that we can then spend on something more important?'.

[119] **Professor Miers:** I can understand that.

[120] **Ms Sherlock:** The only issue that I can think of on that is that, when people have got used to 'The Assembly does this', they will then have to think, 'Oh, I need to check the UK's subordinate legislation as well'. It is an accessibility issue, but perhaps everyone is versatile and flexible.

[121] **Jenny Randerson:** That brings us to another topic, which is the issue of accessibility of Assembly legislation under the new regime and how the body of legislation prepared by the Assembly will be made publicly available.

[122] **Professor Miers:** Chair, I will declare an interest in this matter. As you all know, I manage, and Marie is the principal researcher for, Wales Legislation Online, which is co-funded equally by the Assembly Parliamentary Service and the Welsh Assembly Government. What we do is produce an analysis—Marie does the analysis—rather than simply a list, although there are lists under the fields, of how functions are transferred, what functions are transferred under which fields and what legislative actions, if any, the Assembly has taken under its transferred powers.

[123] Looking to the future, it is a constitutional principle of the first order that laws must be published and made accessible to the people. That has been repeated in the Constitution Committee in the House of Lords and in the Constitutional Affairs Committee in the House of Commons. Both committees have remarked on the need for accessibility and it seems to me that it is simply a given that the Assembly should make provision—I guess that we come back to the internet—for web-based access to Measures, subordinate legislation, statutory instruments and the Orders in Council.

[124] **Ms Navarro:** I have read somewhere—I am sorry that I cannot quote the exact authority—that Her Majesty's Stationery Office has said that it would publish the Measures. The final product in terms of the Measures will be published by HMSO. We had many discussions with David Lambert on draft Measures and draft instruments and whether they should be published by the Assembly, before or after the inclusion of the amendments. I really think that this is an issue that should be thought through by your committee and that the drafts, at the different amendment stages, should be published as well, if the Assembly is to function easily and to match the criteria of accessibility, openness and transparency.

5.20 p.m.

[125] **Jenny Randerson:** From the point of view of the Shadow Commission, I think that that has major resource implications. Are there any other questions?

[126] **Jocelyn Davies:** Chair, it is also a matter of us taking it seriously if we expect the public to take the Assembly seriously. They do say that ignorance of the law is no defence, but it might be a defence to be ignorant of the law if you have not been told what it is and if you have no way of accessing it.

[127] **Jenny Randerson:** I was not implying that it was not important.

[128] **Jocelyn Davies:** No; but I think that it is a matter of us taking ourselves seriously.

[129] **Professor Miers:** I will add a postscript; while the Shadow Commission is thinking about that, it is also worth thinking about the publication of non-general statutory instruments and all of the schemes, codes, directions and other temporary—admittedly—pieces of subordinate legislation that are made but which, nevertheless, for the time that they are in force, have an impact on a locality or a group of people to whom they refer. You are right that it is an expensive business.

[130] **Jenny Randerson:** Do any Members have any further questions that they want to ask our expert witnesses?

[131] **Lisa Francis:** I wondered whether you could outline in what exceptional circumstances you might envisage that legislation would not be made bilingually. Again, this is to do with resource implications.

[132] **Mr Owen:** There is no reason why any type of legislation cannot be produced bilingually, in principle, I would have thought. One thinks of the European Union producing legislation in 21 languages—all legislation is produced in 21 languages.

[133] **Lisa Francis:** Is that the case even for urgent legislation? I am thinking of legislation to do with avian flu, for example, or something like that.

[134] **Ms Sherlock:** That was the only exceptional circumstance that I could think of: something governed by time, as you say, a threat of disease, where something had to come in quickly. I think that, in that case, Standing Orders could perhaps require a translation within so many days. I would see it as quite exceptional not to legislate bilingually.

[135] **Professor Miers:** I think that that is right. You could permit it, but have a requirement that a Welsh-language version be produced within a fairly close period of time.

[136] **Jenny Randerson:** Are there any other questions?

[137] **Lorraine Barrett:** Just on that, and going back to the previous question about the publication of legislation in hard copy, obviously, we would have twice the volume to publish. With regard to the European Union and its 21 languages, are hard copies available? Obviously, it has to be stored somewhere.

[138] **Mr Owen:** Yes.

[139] **Lorraine Barrett:** It is?

[140] **Mr Owen:** Yes, it is.

[141] **Lorraine Barrett:** I am just thinking of the implications of where we would store all this stuff, because we do not have a library, as such, in that regard, where we store everything in hard copy. We just feel that there is so much available online, as it were, or out there in the virtual world, that we do not physically have the capacity to store all that stuff forever and a day. Obviously, these are things that we need to think about.

[142] **Ms Navarro:** Microfiche might help, because it saves on space but it is not amendable and not subject to electronic viruses.

[143] Jenny Randerson: Ann, did you have a comment?

[144] **Ms Sherlock:** I was about to make the same point about microfiche.

[145] **Jenny Randerson:** I see that there are no further questions. I thank our four expert witnesses very much indeed for their time, for their advice this afternoon and for the four papers, which have been extremely helpful and informative. I have no doubt that we will refer back to them on many occasions in the future.

[146] There is now tea and coffee available for Members. I also thank members of the Shadow Commission for attending this afternoon.

Daeth y cyfarfod i ben am 5.25 p.m.
The meeting ended at 5.25 p.m.