

Lord Lang of Monkton
Chair, Constitution Committee
House of Lords
London
SW1A 0PW

27 January 2017

Dear Lord Lang

Legislative process inquiry

I refer to your ongoing inquiry on the legislative process.

As you will be aware from our previous discussions, our predecessor Committee reported on the legislative process in Wales in its 2015 report, **Making Laws in Wales**. It is likely that we will review the impact that report has had during the Fifth Assembly. In the meantime, I'm sure that there will be valuable lessons we can learn from your work.

In particular, we have noted your recent call for evidence on delegated legislation. While our predecessor Committee's Making Laws report touched on this issue, its **legacy report** covered it in more detail.

I enclose as an annex an extract of that report covering amending primary legislation and also the use of Commencement Orders.

We support the views expressed in our predecessor Committee's report.

In relation to the amendment of primary legislation, we continue to report on this basis. Already in the first few Bills of the Fifth Assembly, we have encountered not only fairly extensive use of Henry VIII powers but also Henry VIII powers which use the negative procedure.



Your report on these issues will therefore be of considerable interest to us.

Yours sincerely

Huw Irranca-Davies

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Chair

Croesewir gohebiaeth yn Gymraeg neu Saesneg.

We welcome correspondence in Welsh or English.



Amending primary legislation

It is a clear principle that subordinate legislation that permits the amending of primary legislation (so called “Henry VIII powers”) must be subject to the affirmative procedure at the very least.

However, while some Welsh Government Bills and accompanying Explanatory Memoranda have recognised this important constitutional point, others have not. This has led us to make recommendations in seven Bill reports seeking a change of procedure from negative to affirmative. It is regrettable that the Welsh Government has not accepted all our recommendations on this important point of principle.

In October 2015, we **wrote** to the First Minister explaining why this issue was so important:

“In our view, any proposed change to an Act (however trivial it is perceived to be), which has been subject to a four stage scrutiny process by the legislature, deserves to be approved by the legislature. If a matter is purely technical or administrative in nature, it will not be delayed by applying the affirmative procedure.”

We also highlighted that it is important to take into account how powers to make subordinate legislation could be used by a future administration, not just how they are intended to be used by a Minister who introduces the Bill. The affirmative procedure therefore provides added protection to ensure the rights of the legislature are respected.

The First Minister **replied** and during a scrutiny session on the 22 February 2016 told us that using the affirmative procedure would be the “norm” and “usually used” before adding:

I can’t imagine a situation where it wouldn’t be, if I can make that clearer.

Recommendation 4. We recommend that our successor committee continues to monitor the procedure attached to subordinate legislation contained in Bills that provides powers for the Welsh Ministers to amend primary legislation.

Recommendation 5. We recommend that our successor committee considers reporting to the Assembly under Standing Order 21.3 on subordinate legislation that amends primary legislation using no procedure or the negative procedure.

Commencement orders

It is standard practice that no procedure is prescribed for commencement orders. Such orders commence provisions within Assembly Acts (or Measures).

However, in the course of our work scrutinising Bills we have become increasingly concerned that some commencement powers permit incidental, supplementary, consequential, transitory or transitional provisions. We have taken the view that such orders should be subject to the negative procedure as they do more than simply announce a date for the commencement of a particular provision. We do not consider the absence of a procedure to be satisfactory. In our view, it would be sensible to consider whether there are any technical reporting points or, from the perspective of merits reporting points, they do not go beyond what is expected of incidental, supplementary, consequential, transitory or transitional provisions.

We have raised our concerns with the First Minister and this correspondence is available on our [website](#).

We have made numerous recommendations suggesting the application of the negative procedure to such commencement orders but the Welsh Government has rejected them.

Although we are content that no inappropriate use has been made of commencement orders, we remain of the opinion that there is a risk of them being used inappropriately. As a consequence, and given the Welsh Government's disagreement with our view, we suggest an alternative approach for our successor committee.

Recommendation 6. We recommend that our successor committee scrutinises incidental, supplementary, consequential, transitory or transitional provisions contained within commencement orders and writes to the relevant Welsh Minister where it identifies issues of concern.