

# LEGISLATION COMMITTEE MEETING

## MINUTES (LEG(2)-13-2006):

**Meeting Date: 2 May 2006**

**Meeting Time: 9:30 a.m.**

**Meeting Venue: Committee Room 1, Senedd**

### Assembly Members in Attendance:

<b>Assembly Member</b>	<b>Constituency</b>
Eleanor Burnham	North Wales
Rosemary Butler	Newport West
David Melding (Chair)	South Wales Central
Dai Lloyd	South Wales West
Jeff Cuthbert	Caerphilly
Janet Ryder	North Wales

### Officials

<b>Name</b>	<b>Job Title</b>
Gwyn Griffiths	Legal Adviser
Joanest Jackson	Assistant Legal Adviser

### Committee Service

Name	Job Title
Olga Lewis	Committee Clerk
Richard Miltiadis	Committee Deputy Clerk
Frank Rae	Business Analyst

## **Videoconference: Scottish Subordinate Legislation Committee Members**

Name
Sylvia Jackson MSP (Convener)
Stewart Maxwell MSP

### **Item 1: Apologies for absence: Brynle Williams, Ann Jones, Christine Gwyther, Murray Tosh MSP**

### **Item 2: Minutes of the Previous Meeting – LEG(2)-12-2006**

2.1 The Committee agreed the minutes of the meeting held on 4 April 2006.

### **Item 3: Chair's Report**

3.1. The Chair noted that it was the Deputy Clerk's last meeting and thanked him for his assistance.

### **Item 4: Assembly Orders for Consideration**

4.1 LC1271 - Planning and Compulsory Purchase Act 2004 (Commencement No.4 and Consequential, Transitional and Savings Provisions) (Wales) (Amendment) Order 2006

Ms Jackson presented the report to the Committee. It was noted that there were several Statutory Instruments on the Agenda that followed the Executive Procedure; many of them coming into force in March. As the Legislation Committee met regularly in March it was queried why the Executive procedure was necessary as the Committee could scrutinise the legislation. Mrs Jackson referred the Members to the Explanatory letters from the Business Minister which explained the reasons for the choice of procedure. Another concern was that yet again, the legislation was made in English only. It was further noted that monolingual legislation was clearly a recurring problem: the Chair had written to

various Ministers on a number of times commenting on the absence of the Welsh texts. It was decided that the Chair would write to the Business Minister to urge her to speak to her colleagues in the Cabinet about the problems that monolingual legislation causes for a bilingual institution. Action: Chair/Clerk. The Members agreed that the report should be made in the form of the draft presented to the Committee by the Legal Advisers.

#### 4.2 LC1276 - The Public Services Ombudsman (Wales) Act 2005 (Consequential Amendments to the Local Government Pension Scheme Regulations 1997 and Transitional Provisions) Order 2006

Mr Griffiths presented the report to the Committee. It was noted that although several pieces of legislation on the Agenda were in English only and the Chair would highlight this problem to the Business Minister, this particular Order was very brief and the absence of time for translation could not have been an excuse for it having been issued monolingually. It was decided that the Chair would write to the Minister for Finance, Local Government and Public Services Sue Essex AM invite her to comment on this matter. Action: Chair/Clerk. The Members agreed that the report should be made in the form of the draft presented to the Committee by the Legal Advisers.

#### 4.3 LC1278 – The Education (National Curriculum for Wales) (Disapplication of Science at Key Stage 4) Regulations 2006

Ms Jackson presented the report to the Committee. It was noted that this Order referred to the ACCAC – Qualifications, Curriculum and Assessment Authority for Wales. This body has been abolished now and its functions were absorbed by the Welsh Assembly Government. It was queried if there was a footnote covering this point as there might be a conflict between the duties of an outside body as opposed to the body which now acts as part of the government. Ms Jackson explained that the Regulations had such a footnote and agreed that in the future it would be a good idea to check that such footnotes were present in similar legislation. The Members agreed that the report should be made in the form of the draft presented to the Committee by the Legal Advisers.

4.4 In relation to the following Statutory Instruments Members agreed that the reports should be made in the form of the drafts presented to the Committee by the Legal Advisers:

LC1272 – The General Dental Services and Personal Dental Services Transitional and Consequential Provisions (Wales) Order 2006

LC1273 – The Functions of Local Health Boards and the NHS Business Services Authority (Awdurdod Gwasanaethau Busnes y GIG) (Primary Dental Services) (Wales) Regulations 2006

LC1277 – The Animal By-Products (Wales) Regulations 2006

LC1279 – The Education Act 2005 (Commencement No. 1 and Transitional Provisions) (Wales) Order 2006

## **Item 5: Committee Correspondence**

5.1 The Chair reminded the Members that at the meeting of the Legislation Committee 14.03.06 the draft reports on:

The Foot-and-Mouth Disease (Wales) Order 2006 (LC1234)

The Foot-and-Mouth Disease (Control of Vaccination) (Wales) (LC1235)

The Food Hygiene (Wales) Regulations 2006 (LC1236)

were considered on legislation which followed the Executive procedure. As it was too late to make corrections under the Memorandum of Corrections procedure, the Chair wrote to the Ministers concerned seeking their observations under Standing Order 11.6 before finalising the draft reports.

5.2 Having considered the Ministers' responses, the Members agreed that the Committee's report on "The Food Hygiene (Wales) Regulations 2006 (LC1236)" should be made in the form of the draft presented to the Committee by the Legal Advisers. The reports regarding "The Foot-and-Mouth Disease (Wales) Order 2006 (LC1234)" and "The Foot-and-Mouth Disease (Control of Vaccination) (Wales) (LC1235)" should be revised to include reference to the Minister's comments and presented to the next meeting. Action: Legal Advisers

## **Actions**

4.1 It was agreed that the Chair would write to the Business Minister to urge her to speak to her colleagues in the Cabinet about the problems that monolingual legislation causes for a bilingual institution. Action: Chair/Clerk.

4.2 It was agreed that as "The Public Services Ombudsman (Wales) Act 2005 (Consequential Amendments to the Local Government Pension Scheme Regulations 1997 and Transitional Provisions) Order 2006" was very brief, the absence of time for translation could not be an excuse for it having been issued monolingually. It was decided that the Chair would write to the Minister for Finance, Local Government and Public Services Sue Essex AM invite her to comment on this matter. Action: Chair/Clerk.

5.2 Having considered the Ministers' responses, the Members agreed that the reports regarding "The Foot-and-Mouth Disease (Wales) Order 2006 (LC1234)" and "The Foot-and-Mouth Disease (Control of Vaccination) (Wales) (LC1235)" should be revised to refer to the Minister's observations Action: Legal Advisers

## **Item 6: The Scrutiny of Legislation Following the 2007 Elections to the National Assembly**

### **Video Conference with the Subordinate Legislation Committee of the Scottish Parliament**

6.1 The Chair introduced the Members of the Scottish Parliament's Subordinate Legislation Committee: Sylvia Jackson MSP (Convener) (Labour Party) and Stewart Maxwell MSP (Scottish National Party) and welcomed them to the video conference.

6.2 The Chair apologised for the failure of translation facilities: as the video conference was the first one in the Senedd the process still remained to be perfected.

6.3 The Chair noted that the Committee had received various papers regarding the Scottish Committee and its inquiry into the regulatory framework in Scotland and that the Scottish Committee would publish its draft Phase II report later this month.

6.4 The Chair thanked the Scottish Members for their readiness to share some of the problems of their present system of considering legislation and subordinate legislation (which is based on the Westminster system) and give some indication of how they propose to tackle these.

6.5 The Convener (Sylvia Jackson MSP) explained to the Members that there were two phases to the inquiry conducted by the Subordinate Legislation Committee. At the moment the inquiry was in the process of completing its second phase. During its evidence sessions the Subordinate Legislation Committee had identified a number of problems and it was now ready to make recommendations on how to tackle those problems.

6.6 Members asked how the scrutiny was organised at the moment if Westminster legislation affecting Scotland was passed that would later become a responsibility of a relevant Scottish Minister. The Convener referred to the Sewel Convention which permits Westminster to legislate for Scotland on devolved as well as reserved matters. It was explained that the Scottish Parliament had developed a new procedure where the Scottish Executive provides the Parliament with a "Legislative Consent Memorandum" which gives details of a Westminster Bill which impacts on Scotland and provides information on relevant provisions which would be subject to scrutiny by the Scottish Parliament through its committees. The Subordinate Legislation Committee's responsibility was to consider those Westminster provisions that give the Scottish Executive new powers to make subordinate legislation. This was a very new procedure and thus far the Subordinate Legislation Committee had scrutinised only two such Memoranda. The Committee mostly scrutinised Scottish legislation.

6.7 Members asked what input the Subordinate Legislation Committee had on relevant European

legislation and at what stage; what scrutiny of such legislation and of its impact on Scotland the Committee conducted; what procedures existed to make sure that Scottish legislation did not contravene European legislation. The reply was that indeed there were procedures to ensure that the legislation passed in Scotland was compatible with the European legislation, including the European Convention on Human Rights. Although the Subordinate Legislation Committee has an input into ensuring that subordinate legislation in Bills are compliant with European Directives, the Scottish Parliament's subject committees have a role in terms of scrutinising the policy contained in Bills and that they are EC compliant. The Scottish Parliament also has a European and External Affairs Committee which monitors the work of the Scottish Executive in terms of Europe and European issues. The Subordinate Legislation Committee mainly deals with Acts of the Scottish Parliament and Legislative Consent Memoranda which accompany Scottish Bills (in addition to Scottish Statutory Instruments). The Convener promised to send the Chair information about the procedures on scrutiny of legislation with regard to European compliance. Rosemary Butler reported that recently in Brussels a Committee on Regions was set up, which had Scottish representation. This Committee would ensure that the regions had an early notification of the European legislation that concerned them.

6.8 Another question concerned the Subordinate Legislation Committee's workload: how many Bills were passed each year; did the Committee scrutinise the legality of the Bills; what were the implications for the Committee of the passage of the Bills. The Convener replied that the agenda of their latest meeting was a typical one – as far as "typical" went – there were two Bills on the agenda at different stages of progress. Generally there were three stages of the progress of the Bills:

1<sup>st</sup> stage – consideration of the general principles of the Bill – at this stage the Subordinate Legislation Committee looks at the delegated powers provisions in the Bill and their technical merits;

2<sup>nd</sup> stage – consideration of amendments to the Bill – the Subordinate Legislation Committee scrutinised amendments which insert or substantially alter provisions conferring powers to make subordinate legislation;

3<sup>rd</sup> stage – the final stage of the Bill - the Subordinate Legislation Committee did not have an input at that stage as it had secured an agreement with the Scottish Executive that it would not normally insert substantial subordinate legislation powers into a Bill at this stage. However it was becoming clear that there were increasing numbers of such amendments coming forward which required its technical scrutiny, and this is of concern to the Committee.

Apart from the Bills, there were various other Statutory Instruments on the Committee's agenda, as well as other issues, such as, for example, the consideration of the answers given by the Executive to the questions that the Committee had asked earlier on statutory instruments or on delegated powers in Bills.

On the whole, the Committee had a heavy workload. Although the meetings could last one hour to one and a half hour, they involved much preparation and a lot of materials to be read through. The Committee met weekly, issuing reports to subject committees and to the Parliament. Although the subject committees scrutinised the policy matters while the Subordinate Legislation Committee concentrated on delegated powers and more technical issues, one fed into the other and for the smooth passage of legislation it was necessary to pay attention to both aspects. It was then added that the work of the Subordinate Legislation Committee was driven by two factors: the work of the Executive and its timetable. According to the last year's Annual report, during the period 7 May 2005 - 6 May 2006 the Committee had considered nineteen Bills at 1<sup>st</sup> stage; ten Bills as amended at their 2<sup>nd</sup> stage and four hundred and eighty two Scottish Statutory Instruments.

6.9 There was a request to clarify the differences in scrutiny between the subject committees and the Subordinate Legislation Committee: what the scrutiny remits were. The Convener explained that the subject committees scrutinised policy matters whereas the Subordinate Legislation Committee concentrated on the delegated powers in Bills and their technical merits; what powers were given to the Ministers – issues of "vires" (the validity of provisions); how clear the drafting of the Statutory Instruments was – how easy it was to understand.

6.10 It was commented that post-2007 the National Assembly would continue to work as a bilingual institution and would have to provide all legislation bilingually. Consequently, another question concerned the extent to which the Gaelic language was used in the Scottish Parliament and whether it was likely to increase. The Convener replied that some Members of Scottish Parliament who came from the Gaelic speaking regions indeed made speeches in Gaelic, but generally English was the working language of the Parliament and although there were debates going on in respect of this subject, its use was unlikely to increase in the near future.

6.11 It was summed up that the Subordinate Legislation Committee had much work to do during the progress of Bills through the Scottish Parliament, focusing on the delegated provisions in Bills and subsequent amendments which involve delegated provisions. Consequently, another question concerned the technical assessment of these amendments by the Subordinate Legislation Committee. The Convener replied that the Subordinate Legislation Committee relied on its legal advisers to provide it with advice on Bills, and on the information included in the Executive's Explanatory Memoranda which accompanies all legislation. If the Committee felt that the Executive did not provide sufficient information to help its consideration, the Committee wrote to the relevant Executive Departments asking for more data. If the amendments made at the 3<sup>rd</sup> stage were technically incorrect, the Chamber itself would be the final arbiter, however the Subordinate Legislation Committee would make its concerns known to the Parliament either by way of amendments or verbally in debate.

6.12 Another question concerned checking the robustness of the legislation – were the Regulatory Impact Assessments the most appropriate way to ensure that a proper consultation had taken place and how experienced the Subordinate Legislation Committee considered itself to be in this respect? The Convener replied that in her opinion there was scope for improvement in this respect and the

Subordinate Legislation Committee was looking at this issue as part of its Review. At the moment Regulatory Impact Assessments were few and far between and tended to be submitted where there is an impact on business. The Scottish Federation of Small Business was very keen on a system that involves the provision of RIAs. The Subordinate Legislation Committee thought that RIAs should not only be produced for every regulation that has an impact on business, but where there is an impact on other bodies, such as those in local government and voluntary sector.

6.13 The next question concerned the quality and quantity of the scrutinised legislation: how much comment the Subordinate Legislation Committee had to make to ensure that the legislation was clear and comprehensive. The Convener replied that it was a constant challenge to make legislation as clear as possible and at the same time as legally watertight as possible. There was a lot of improvement in the drafting of legislation and subordinate legislation as a result of the Committee's work so far, but this was an ongoing process. As part of its Review, the Committee has recommended the setting up a consolidation working group consisting of, among others, Executive officials and the Committee's clerks who would be responsible for bringing forward proposals to the Subordinate Legislation Committee on the consolidation of subordinate legislation. The Convener explained that the general view at Westminster was that if amendments were made five times, legislation or subordinate legislation was consolidated, but sometimes depending on the nature of the amendments, it may be necessary to consolidate after three amendments. The Committee was thinking along similar lines in terms of its inquiry recommendations.

6.14 Members asked if the Subordinate Legislation Committee considered the use of clear plain language in legislation drafting to be a matter of educating lawyers and the Committee members/staff. Stewart Maxwell MSP replied that it was indeed a matter of education and the Committee was working on this, but the use of the legal jargon was a still an issue. He observed that if the members of the Subordinate Legislation Committee could not understand some pieces of legislation even with the help of a lawyer, then members of the public would most likely find it even more difficult. Most legislation that the Scottish Parliament had inherited from Westminster was difficult to understand. Mr Maxwell stated that during the Committee's information gathering for their Review, the Committee learned that the Swedish Parliament employed linguists specifically to look at the clarity of legal language in legislation. There was a recognition however that in order to make legislation or subordinate legislation watertight, legal terminology was often necessary, but it was a question of trying to achieve a balance where terminology was also understandable.

6.15 The next question concerned the balance between negative and the affirmative procedures. In the National Assembly so far mainly the affirmative procedure had been used as the Assembly only has power to make subordinate legislation. However, post-2007 this would change and it was likely that most of the statutory instruments would follow the negative procedure. Did the Subordinate Legislation Committee have a role in determining which procedure a piece of legislation should follow? The reply was that the primary legislation sets down the procedure to be followed. However in those cases where a power is a wide one and is, for example, only subject to negative procedure, the Subordinate Legislation Committee may take the view that affirmative procedure would be more appropriate. This would subject the Statutory Instrument to more detailed scrutiny involving subject committees questioning Ministers.



To confirm the appropriateness of the procedure, the Subordinate Legislation Committee used set criteria, because although in some cases the issues might be technical, they can still have quite serious consequences. The impact of amendments to instruments was another area which the Subordinate Legislation Committee concentrated upon. At the moment, when an amendment to an instrument is proposed and the Executive agrees to it, the instrument has to be withdrawn and laid again. The Subordinate Legislation Committee was looking into the possibility of a process whereby an instrument would simply be amended without having to be revoked and re-laid, making the process much more streamlined.

6.16 The Chair thanked the Convener and Stewart Maxwell MSP for their participation in the video conference, which was very useful for the Members of the Legislation Committee of the National Assembly. He stated that the information that the Members of the Subordinate Legislation Committee had provided so far was most relevant and expressed his hope that they would be kind enough to send the copies of further Review materials when they were published, including a copy of its draft report.

## **Item 7: Any Other Business and Date of Next Meeting**

7.1 The next meeting of the Committee would be held on 9 May 2006.