

To: Constitutional and Legislative Affairs Committee
From: Committee Clerk

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Role of the Committee and Working Methods during the 4th Assembly

Purpose

1. This paper sets out the role and remit of the Constitutional Affairs Committee. It explains the:
 - functions that the Committee is required to carry out by the Assembly's Standing Orders; and
 - other, discretionary, functions that the Committee can carry out if it chooses to do so.
2. This paper also sets out proposed arrangements for scrutinising subordinate legislation and invites Members views on how the Committee can best discharge its discretionary functions.

Committee's Remit

3. The Committee's remit as agreed by Plenary is:

... to carry out the functions of the responsible committee set out in Standing Order 21 and to consider any other constitutional or governmental matter within or relating to the competence of the Assembly or Welsh Ministers.
4. This remit contains both non-discretionary duties as well as a broad range of discretionary functions. These are discussed further below.

Non-Discretionary Duties

5. Standing Order 21.2 lays a duty on the Committee to consider all relevant subordinate legislation laid by the Government, test it against the specific grounds listed in the Standing Order and, if the Committee has any concerns, report these to the Assembly within 20 days. The full Standing Order and the specific reporting grounds are set out in the Annexe A to this paper.
6. Generally, the grounds for reporting under Standing Order 21.2 are matters that might call into question the legality or legal correctness of the legislation concerned. For this reason, they are often referred to as technical matters, although they often relate to issues of legal principle as well as

more mundane drafting issues. This is the bread and butter work of the Committee.

Discretionary Functions

7. In addition, the Committee has a number of discretionary functions. These are as follows:

Standing Order 21.3

8. The Committee may report on a number of other matters concerning individual Statutory Instruments. These reports have become known by the shorthand term of “**merits reports**”. Most often, reports under this standing order are because the Committee believes that a piece of subordinate legislation:

“...is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly.”

9. This provides the Committee with a mechanism for drawing attention to subordinate legislation that, while it may not give concern on technical grounds, raises other matters that the Committee believes should be drawn to the attention of the Assembly.

10. There are no hard and fast rules about what these issues might be. It can be simply to point out that a matter is politically contentious or significant. Alternatively, it might be because it raises issues concerning the rights of individuals or that, however laudable its policy intentions might be, the subordinate legislation does not implement these intentions in the way claimed. It has also been used to draw the Assembly’s attention to the first use of a particular enabling power.

Standing Order 21.7

11. Standing Order 21.7 allows the Committee to consider and report on a range of matters including proposed subordinate legislation powers in Assembly Bills and UK Acts of Parliament and draft legislation on which the Government is consulting. It also allows the Committee to consider and report on “*any legislative matter of a general nature within or relating to the competence of the Assembly or Welsh Ministers*”. This particular power gives the Committee wide latitude to consider Constitutional and Legislative matters and to hold inquiries if it wishes into these matters.

Standing Order 21.8 - 21.11

12. This is a new function in the Standing Orders. It allows the Committee to consider:

“...draft European Union legislation relating to matters within the legislative competence of the Assembly or to the functions of the Welsh Ministers and of the Counsel General in order to consider whether it complies with the principle of subsidiarity.”

13. If the Committee has concerns about whether the principle of subsidiarity is being complied with, it can make written representations to the Parliamentary Committees dealing with the matter with a view to that committee incorporating those concerns into a reasoned opinion for the relevant European Union authorities.

14. Standing Order 21.11 allows the Committee to delegate its functions under this Standing Order to the Committee Chair to act on its behalf when the Assembly is in recess. This is particularly important during the summer recess because of the time limits referred to below. The Committee Chair would then be required to report to the Committee as soon as possible thereafter.

15. The Committee will wish to consider whether to exercise the discretion to delegate its functions to the Committee Chair during no-sitting weeks.

Other Functions

16. In addition, to the functions in Standing Order 21, the Committee also has a broader remit to consider any “constitutional or governmental matter within or relating to the competence of the Assembly or Welsh Ministers.” This could include specific Ministerial functions such as the First Minister’s responsibilities for relationships with the rest of the UK and Europe but allows the Committee wide latitude to consider cross-cutting issues that have constitutional implications.

17. The Committee may also, from time to time, be required to consider Legislative Consent Memoranda that may be referred to it by the Business Committee under Standing Order 29.4

Committee’s Working Arrangements for Considering Statutory Instruments

18. The Committee’s consideration of statutory instruments under Standing Order 21.3 is demand led. However, the large number of statutory instruments that the Committee has to consider (almost 600 in the 3rd Assembly) together with the limited time available for doing so (within 20 days of being laid) means that the Committee generally has to meet every week when the Assembly is sitting.

19. Each Statutory Instrument is looked at by the Committee’s Legal Advisers who consider whether it raises any issues of concern under Standing Order 21.2. If any issues arise, legal advisers prepare a draft report for the Committee and at the same time invite comments from the Welsh

government. The draft report and government response are put on the agenda for the next available meeting for the Committee to consider. The draft report, the Statutory Instrument itself and the accompanying Explanatory Memorandum are all provided to Committee Members as papers for the meeting.

20. Consideration of “merits” issues under Standing Order 21.3 follows a similar but parallel process. Instruments are considered by the Committee Clerk, legal advisers or research staff. If any issues arise, a draft report will be provided to the next meeting of the Committee to consider. However, it is not generally the practice to invite comments from the government on merits reports. That may be done, for example, if the ‘merits’ report raises a technical issue such as inappropriate implementation of EU law (SO21.3(iv)).

21. Any instruments that do not raise reporting issues are listed on the Committee’s agenda, and a link to the instrument provided for Members. However, the instruments themselves are not provided routinely as meeting papers.

22. The agenda for this part of each meeting will generally be divided into two parts

- Subordinate Legislation that raises no reporting issues under Standing Order 21.2 or 21.3
- Subordinate Legislation to be reported to the Assembly under Standing Order 21.2 or 21.3

Each of these is sub divided into:

- Negative resolution subordinate legislation; and
- Affirmative resolution subordinate legislation.

23. Once the Committee has agreed a report on Statutory Instruments, it is formally laid before the Assembly as part of the meeting report. In the case of merits reports (which are fewer in number), the Clerk of the Committee will also send copies direct to all Assembly Members for information. In addition, the Committee Chair may also write to the Minister responsible asking for their views on any further matters identified by the Committee during their consideration of an Instrument.

What happens once the Committee has considered a Statutory Instrument?

24. Once the Committee has reported, its role under standing orders in the consideration of Statutory Instruments is ended. However, where an instrument is debated in Plenary (because a Member has tabled a motion to annul it or because it needs to be made by an affirmative resolution of the Assembly), it is usual for the Committee Chair to speak in the debate to draw the Assembly’s attention to the Committee’s report.

Working Arrangements in relation to the Committee's Powers under Standing Order 21.7

25. The Committee's work under Standing Order 21.7 is discretionary and partly demand led. As well as further powers in relation to the scrutiny of certain specific types of subordinate legislation, the most noteworthy powers it gives the Committee are those that allow it:

- to scrutinise proposed subordinate legislation provisions in Assembly and Parliamentary Bills – SO21.7(ii); and
- to look at “any legislative matter of a general nature within or relating to the competence of the Assembly or Welsh Ministers) - SO21.7(v).

Subordinate Legislation within Assembly and Parliamentary Bills (SO21.7ii)

26. The third Assembly Constitutional Affairs Committee scrutinised and reported on the subordinate legislation provisions in all Assembly Measures. In doing so, it usually took both oral and written evidence from the Minister in charge of the Measure but did not generally take evidence from others, which was seen as the prerogative of the legislation committee responsible for scrutinising the Measure. Given that the Assembly's legislative competence in the 4th Assembly is considerably greater than in the 3rd, it seems likely that this area of the Committee's work will increase.

27. The Committee also occasionally considered UK Parliament Bills that affected the powers of the Assembly, Welsh Ministers or had particular implications for Wales. There were, however, practical difficulties in trying to consider these Bills (usually within a very tight Parliamentary timetable) and report to the Welsh and UK Governments in time to have a reasonable chance of influencing the Bill's content. The Assembly's new powers in the 4th Assembly suggest that there is likely to be less for the Committee to consider in this area than in the 3rd Assembly.

28. The Committee will wish to consider its general approach to the scrutiny of proposed subordinate legislation powers in Assembly and UK Bills.

Power to Consider Legislative Matters of a General Nature - SO21.7(v)

29. This power needs to be considered along with the Committee's remit to consider constitutional and governmental matters. Together they give the Committee wide latitude to consider constitutional and legislative matters and to hold inquiries into these matters if it wishes. The previous Committee held a number of such inquiries and we anticipate that the new Committee will also wish to do so in due course.

30. The Committee will wish to consider its approach to future Committee inquiries. There are a number of sources of ideas for potential scrutiny work including:

- Members' suggestions based on their political and personal experiences and interests,
- Suggestions based on analysis of emerging issues of concern (including relevant legislation and manifesto commitments), normally identified by the Research Service;
- Suggestions based on issues raised in the course of committee and Assembly proceedings (including through the public petitions process, or as a result of a resolution in Plenary);
- Seeking ideas from stakeholders or groups with an interest in the Committee's work.

31. The Research Service has drawn up a provisional list of possible subjects for inquiry for initial consideration by the Committee. This has been circulated to Committee Members separately. The Committee may also wish to consider commissioning further work from the Assembly's Research Service on possible areas for inquiry.

Working Arrangements in relation to the Committee's Powers under Standing Order 21.8

32. The consideration of subsidiarity issues is a role that the Committee has taken over from the European and External Affairs Committee of the 3rd Assembly. It arises from a protocol to the Lisbon Treaty, which makes specific reference to the role of 'regional' legislatures. Article 6 of the 2nd Protocol to the Lisbon Treaty states that: "... It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers."

33. Copies of Explanatory Memoranda in relation to draft European legislation are forwarded to Assembly staff by counterparts at Westminster who advise the European committees of both Houses and by the Welsh Government. These are reviewed by Assembly legal and research staff who will draw the Committee's attention to any issues that it might wish to consider.

34. The process is characterised by very tight timescales. Member State legislatures are given eight weeks to respond to notification of legislative proposals. As any concerns that are to be raised by way of Reasoned Opinion have to be agreed by the relevant House after committee consideration, which itself will be informed by representations from devolved legislatures, the period available for Assembly consideration is much shorter than eight weeks.

35. Fortunately, matters of concern under this limited issue of subsidiarity arises relatively infrequently, but the Committee has to be able to respond

swiftly to proposals as they arise. A more detailed paper will be prepared for the Committee on consideration of subsidiarity.

Recommendation

36. Members are invited to note the contents of this paper and:

- indicate whether they are content, at this stage, with the working arrangements for subordinate legislation outlined in paragraphs 10-16;
- consider whether it wishes to delegate its functions under Standing Order 21.8 to the Committee Chair for weeks when the Assembly is not sitting;
- consider its general approach to the scrutiny of proposed subordinate legislation powers in Assembly and UK Bills; and
- consider its approach to considering matters of a general legislative nature including possible matters for inquiry.

Steve George
Committee Clerk

STANDING ORDER 21 – Constitutional and Legislative Affairs Committee or Committees

21.1 In proposing the remits of committees under Standing Order 16.2 or 16.3, the Business Committee must ensure that responsibility for the functions in Standing Order 21 is assigned to a committee or committees (referred to within Standing Order 21 as “a responsible committee”).

Functions

21.2 A responsible committee must consider all statutory instruments or draft statutory instruments required by any enactment to be laid before the Assembly and report on whether the Assembly should pay special attention to the instrument or draft on any of the following grounds:

- (i) that there appears to be doubt as to whether it is intra vires;
- (ii) that it appears to make unusual or unexpected use of the powers conferred by the enactment under which it is made or to be made;
- (iii) that the enactment which gives the power to make it contains specific provisions excluding it from challenge in the courts;
- (iv) that it appears to have retrospective effect where the authorising enactment does not give express authority for this;
- (v) that for any particular reason its form or meaning needs further explanation;
- (vi) that its drafting appears to be defective or it fails to fulfil statutory requirements;
- (vii) that there appear to be inconsistencies between the meaning of its English and Welsh texts;
- (viii) that it uses gender specific language;
- (ix) that it is not made or to be made in both English and Welsh;
- (x) that there appears to have been unjustifiable delay in publishing it or laying it before the Assembly; or
- (xi) that there appears to have been unjustifiable delay in sending notification under section 4(1) of the Statutory Instruments Act 1946 (as modified).

21.3 A responsible committee may consider and report on whether the Assembly should pay special attention to any statutory instrument or draft statutory instrument required by any enactment to be laid before the Assembly on any of the following grounds:

- (i) that it imposes a charge on the Welsh Consolidated Fund or contains provisions requiring payments to be made to that Fund or any part of the government or to any local or public authority in consideration of any licence or consent or of any services to be rendered, or prescribes the amount of any such charge or payment;

- (ii) that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly;
- (iii) that it is inappropriate in view of the changed circumstances since the enactment under which it is made or is to be made was itself passed or made;
- (iv) that it inappropriately implements European Union legislation; or
- (v) that it imperfectly achieves its policy objectives.

21.4 A responsible committee must make any report under Standing Order 21.2 or 21.3 in respect of any statutory instrument or draft statutory instrument no later than 20 days after the instrument or draft has been laid.

21.5 In calculating for the purposes of Standing Order 21.4 any period of days, no account is to be taken of any time during which the Assembly is dissolved or is in recess for more than 4 days.

21.6 Standing Orders 21.2 and 21.3 do not apply to proposed or draft Legislative Competence Orders under Standing Order 25 or subordinate legislation subject to Special Assembly Procedure under Standing Order 28.

21.7 A responsible committee may consider and report on:

- (i) any other subordinate legislation laid before the Assembly other than that subject to Special Assembly Procedure under Standing Order 28;
- (ii) the appropriateness of provisions in proposed Assembly Measures and in Bills for Acts of the United Kingdom Parliament that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister or the Counsel General;
- (iii) consequences for legislation subject to the consideration of the Assembly of draft orders under Part 1 of the Legislative and Regulatory Reform Act 2006;
- (iv) the exercise of commencement powers by the Welsh Ministers;
- (v) any legislative matter of a general nature within or relating to the competence of the Assembly or Welsh Ministers; or
- (vi) draft legislation which is the subject of consultation.

21.8 A responsible committee may consider draft European Union legislation relating to matters within the legislative competence of the Assembly or to the functions of the Welsh Ministers and of the Counsel General in order to consider whether it complies with the principle of subsidiarity.

21.9 If a responsible committee considers that draft European Union legislation does not comply with the principle of subsidiarity it may make written representations, on behalf of the Assembly, to the relevant committee of the House of Commons or the House of Lords with a view to having those representations incorporated into a reasoned opinion to be submitted by that committee to the relevant European Union authorities.

21.10 If a responsible committee makes written representations in accordance with Standing Order 21.9, it must lay a copy of those written representations before the Assembly.

21.11 A responsible committee may, to enable its functions under Standing Order 21.9 to be exercised during any non-sitting week, delegate those functions to the chair of the responsible committee who must, if they are exercised, report that fact to the responsible committee as soon as possible.