

Health and Social Care Committee

HSC(4)-10-11 paper 1

White Papers and Draft Bills – Implications for Assembly Committees

Purpose

1. This paper outlines the various factors that committees, and more specifically the Health and Social Care Committee, may wish to consider when taking decisions about their involvement in the scrutiny of government white papers and draft bills.

Background

2. The First Minister announced details of the Welsh Government's legislative programme for the next five years on 12 July 2011. The programme included details of 21 bills that will be introduced during the fourth Assembly. He also indicated the government's intention to introduce some bills in draft form and to publish white papers for others. In addition the Presiding Officer has already signalled her intention to hold ballots for individual Members to seek agreement to introduce legislation, the first of which took place on 19 October 2011.

White papers and draft bills

What is the purpose of white papers and draft bills?

3. White papers and draft bills are mechanisms used by governments to consult the wider public or particular interest groups on proposed new laws. As such, there is no provision in the Assembly's standing orders for their consideration.
4. White papers set out detailed policy proposals with a view to introducing a bill to give effect to those proposals, while draft bills allow consultation and pre-legislative scrutiny on specific legislative proposals.
5. In publishing white papers and draft bills, the government is, to some extent, responding to recommendations from third Assembly committees calling for the policy rationale for new laws to be tested more thoroughly by pre-legislative consultation. Government support for greater use of this type of consultation was outlined by the then Counsel General in Plenary on 15 March this year.¹

¹ National Assembly for Wales, Plenary, RoP <http://www.assemblywales.org/bus-home/bus-third-assembly/bus-chamber/bus-chamber-third-assembly-rop.htm?act=dis&id=212756&ds=3%2F2011#dat2>

Do committees have to consider white papers or draft bills?

6. There is no requirement for committees to consider or scrutinise white papers or draft bills. The role of committees in scrutinising legislation is set out clearly in Standing Order 26, under which a bill must be introduced by being laid. Usually, the Business Committee then refers it to a responsible committee for consideration of its general principles (Stage 1) and then to consider the detail of the bill through consideration of specific amendments (Stage 2). Other committees with an interest in the bill, such as the Constitutional and Legislative Affairs Committee, may also choose to consider and report on aspects of the bill.
7. The Business Committee is not required to refer a bill to a responsible committee at Stage 1 for consideration. However, in the third Assembly, this discretion was used very sparingly; only once in relation to a government proposed Measure - the *Learner Travel (Wales) Measure 2008*.

Implications for Committees

8. The five broad subject committees, established by the fourth Assembly, have the dual role of looking at both policy and legislation within their subject area. One of the strengths of this approach is that legislation will be scrutinised by committees that will develop a degree of expertise in the subject matter of bills.
9. As well as considering bills after they are introduced into the Assembly, committees may also wish to consider white papers and draft bills. This could help committees engage with the subject matter of bills at an early stage and could also help them to influence a bill, and its underlying policy, prior to its formal introduction should the committee wish to do so.
10. The principal point that committees will need to address when deciding whether to engage with white papers and draft bills is— what is their objective in doing so? Is it—
 - a. to seek to influence the government with a view to them amending their proposals, or
 - b. to seek to inform themselves of the policy area and impact of legislation in preparation for their formal consideration of the bill?
11. In addition to points (a) and (b) above, there are a range of other factors that committees will wish to consider in deciding the extent to which they want to engage with draft bills and white papers. Some of these issues are discussed further below.

White papers

12. As noted above, a white paper sets out detailed policy proposals the government intends to give effect to via legislation. Although white papers usually set out well-developed policy proposals, and a firm commitment to legislate², they also offer scope for the public and interest groups to engage

² In his statement of 15 March 2011 the then Counsel General said that they would “...ensure that the Welsh public can influence proposals at the policy development stage, before the decision to legislate has even been taken.”

with the proposals and to seek to influence and change them before legislation has been drafted. In this respect, they could present an opportunity for committees to engage with policies they are likely to have to consider as bills and to have a chance to influence both the content and the terms of debate around those bills.

13. Committees will need to consider how much time and resource to give to the consideration of white papers, as well as how they can ensure they are properly informed about the proposals. They will also want to ensure that consideration of white papers does not lead to disproportionate time being spent in a way that detracts from the scrutiny of other, equally important areas of government activity, particularly as the formal legislative proposals flowing from white papers will come before the Committee at some point.
14. Should they choose to engage with white papers, there are a number of ways committees might go about this. Whether these should involve the whole committee, a sub-committee or a rapporteur group would need to be considered in light of how important the white paper proposals are perceived to be and the committee's workload at the time. Possible approaches might include—

- *The traditional "inquiry"; calling witnesses etc.*

Realistically, at white paper stage, interest groups may want to focus their efforts on engaging with the government rather than with the Assembly. This may not, therefore, be the most productive or appropriate approach for a committee. The Committee may also feel that, if they undertake this work at white paper stage, there is a risk of Stage 1 of the formal legislative process appearing to be a repetitious exercise. However, if the issue is considered significant enough, this approach need not be discounted.

- *Respond formally to the Government's Consultation.*

Committees may wish to consider responding to the government's consultation. However, this approach could involve a committee being seen as 'just another consultee', with insufficient weight being given to their formal role in scrutinising legislation. Furthermore, for the reasons outlined above, committees may find it difficult at this stage to engage with stakeholders to inform their views.

- *Take evidence from the responsible Minister and officials*

As an alternative to a full inquiry, committees could choose to invite the relevant Minister and/or officials, to attend committee to give evidence.

In considering this option, however, committees will want to be mindful of the recent correspondence between the First Minister and the Presiding Officer. In his letter, the First Minister sets out the government's position in relation to the attendance of Ministers at committee meetings for the purpose of considering white papers and draft bills. He also refers to making government officials available to committees to provide technical briefings to Members. A copy of the First Minister's letter is attached as

Annex A to this paper, along with a copy of the response from the Presiding Officer at Annex B.

- *Obtain expert advice*

Along with expert advice from the Assembly's Research Service, committees could engage expert advisers or external reference groups to help them identify key issues in the white paper to be considered / addressed.

- *Follow the development of the Bill in preparation for formal scrutiny*

Committees could decide not to engage directly in the government consultation and use the time to keep abreast of the issues and track the development of the legislative proposals through briefing from the Research Service and regular discussion in committee. This could include an invitation to the Minister and/or government officials either at the beginning or the end of the consultation.

Draft bills

15. Draft bills are somewhat different in nature to white papers. They are more specific proposals that are at a more advanced stage of policy formulation. Draft bills have become more common in the UK Parliament in recent years, and are often scrutinised by a committee before being formally introduced. However, this practice has developed partly because there is no equivalent of the Assembly's Stage 1 scrutiny process in Westminster. In Scotland, although the Scottish Government does publish some bills in draft, there is little scrutiny of these by parliamentary committees. The Parliament only considered one draft bill in the last session³, largely because the bill impacted directly on the work of that committee in relation to scrutiny of subordinate legislation. It should also be noted that there is no discretion to by-pass the Scottish equivalent of our Stage 1.
16. There is no standard period of time following the end of a consultation on a white paper within which the government is required to bring forward a draft bill (if it chooses to do so). Depending on the comments received during the course of the consultation exercise, the draft bill could follow relatively soon after the end of a consultation, possibly with few changes of substance, or there could be some delay in its publication and the draft may have changed considerably. Whilst not undertaking any work on draft bills could lead to possible criticism that committees had not taken every chance to influence the content of a bill, there is the risk that attempting detailed consideration at this stage could compromise or confuse Stage 1 consideration by committee.
17. As with white papers, the approach taken by committees in deciding how best to respond to draft bills will need to take account of the relative importance of the bill, the workload of the committee and the need to avoid duplicating effort. Any consultation on a draft bill will be carried out by the government,

³ Sub Leg Committee 2009 – considered draft Interpretation and Legislative Reform Bill. April 2009 – took evidence. Stage 1 consideration in September 2009.

and may focus on different questions from those that committees may wish to ask of interest groups.

18. These factors suggest that the “inquiry” approach to draft bills is likely to be of less value than it would be for white papers and that responding formally to the government’s consultation at the draft stage could confuse the committee’s role, as well as give insufficient weight to its formal role.
19. However, some of the other approaches outlined above, such as the provision of expert advice, briefing from the Research Service or a technical briefing from government officials may be utilised to ensure that committees are fully prepared for Stage 1 scrutiny as well as to provide an appropriate opportunity to influence the government’s thinking.

Outcome of consideration

20. Whatever the approach to pre-legislative scrutiny of white papers and draft bills, committees will need to consider what the outcome of their consideration should be and the impact their involvement might have on their formal scrutiny role. The approach used will be a matter for judgement at the time. In some cases, committees may wish to make a formal report to the Assembly on their findings, while in others they may simply want to outline any issues in correspondence to the relevant Minister. However, in all cases, it is important that committees use the outcome of their consideration to inform their later work in scrutinising the bill at Stage 1.

Conflict of interests

21. Committees will also need to give careful consideration to whether a real or perceived conflict of interest could arise where a committee is involved in helping the Minister shape the content of a bill and is then subsequently the Committee tasked with formal consideration of that bill at Stages 1 and 2.

Decision

22. There is no right or wrong approach to the consideration of draft bills and white papers. Committees will need to consider each instance separately, taking account of their own priorities at the time.

Action

23. The Committee is invited to discuss the contents of this paper, and give some thought to how it wishes to approach the consideration of white papers and draft bills within its subject area remit.

Legislation Office

Y Gwir Anrh/Rt Hon Carwyn Jones AC/AM
Prif Weinidog Cymru/First Minister of Wales



Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: LF/FM/5121/11

Rosemary Butler AM
Presiding Officer
Chair, Business Committee
National Assembly for Wales
Cardiff Bay
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17 October 2011

Dear Rosemary

I am writing to you to clarify the Welsh Government's position in relation to the handling of its White Paper and Draft Bill consultations.

The Welsh Government has made a commitment to consulting prior to introducing legislation, whether it be at policy stage, White Paper stage, or by way of a Draft Bill. We have already published a White Paper relation to the School Standards and Organisation Bill, and will shortly be publishing a White Paper on Organ Donation. Later this year we will also publish a number of Draft Bills for consultation.

While I consider both White Papers and Draft Bills to be primarily Government consultations, I have asked Ministers to ensure that Assembly Members are informed prior to publication by way of a Written Ministerial Statement. These consultations are however an exercise in listening to and engaging with stakeholders and the wider public.

We would of course welcome the views the Assembly may have in relation to the proposals outlined in these consultations, whether they come from individual Assembly Members or an Assembly Committee.

However, the appropriate time for the Assembly to properly scrutinise Ministers on Welsh Government legislative proposals is during the formal scrutiny stages once the Bill is formally introduced. We would not wish to undermine the Assembly's scrutiny of Government legislation by circumventing these proceedings.

As such, we would not expect Ministers to be called to appear before Committees during these consultations to discuss a White Paper or Draft Bill. We would however be happy to arrange for officials to provide technical briefings to Committees on individual White Papers or Draft Bills.

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It is of course for Committees to decide how best to consider these consultations, if they wish to do so, and they may wish to invite evidence from key stakeholders. The Government's position will be clearly set out in each White Paper or Draft Bill, on which we are seeking the views of stakeholders.

I hope that this letter clarifies the Government's position on this matter

Yours sincerely

A handwritten signature in black ink, consisting of a large, stylized 'C' followed by a smaller 'J' and a short horizontal stroke.

CARWYN JONES



Rt Hon Carwyn Jones AM
First Minister of Wales
Welsh Government
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Your ref: LF/FM/5121/11
Our ref: RB/AC/CJN/PO143

18 October 2011

Dear Carwyn

Thank you for your letter concerning the Welsh Government's position on White Paper and Draft Bill consultations.

Consultation on proposals for Government legislation is a welcome development and I sincerely hope that it will result in wider engagement with the process of making legislation and, ultimately, in better law.

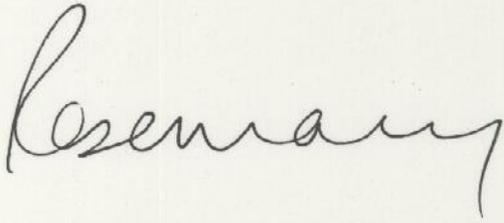
I am pleased that you recognise the importance of the Assembly's formal scrutiny procedures and share your desire that these should not be undermined or circumvented by the process of legislative consultation. Thank you also for signalling the Government's willingness to provide committees with technical briefings from your officials. I am sure that this will be appreciated.

I will share these points with committee Chairs and members of the Business Committee for their information but I am afraid that I cannot guarantee that committees will never invite Ministers to attend committees to discuss White

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Papers and Draft Bills. It is not a matter for me to dictate to committees how they should approach their work and there might well be occasions when it is perfectly appropriate for them to hear from Ministers when major policy proposals are being formulated. That said, I agree that it would be undesirable for Ministers routinely to be called before committees during consultation periods only to go over exactly the same ground during the Stage 1 scrutiny process.

A handwritten signature in cursive script that reads "Rosemary". The signature is written in black ink and is positioned above the printed name and titles.

Rosemary Butler AC, Llywydd
Rosemary Butler AM, Presiding Officer