

Mick Antoniw MS
Chair, Legislation, Justice and Constitution Committee

3 March 2021

Dear Mick,

Draft Standing Orders for a Consolidation Bills procedure

Thank you for your letters of 11 October 2019 and 4 December 2019 in relation to the proposed new procedures relating to Consolidation Bills. As part of its current review of certain Standing Orders, Business Committee has considered the comments you made.

We are grateful for your careful consideration of the draft procedure. A detailed response is attached.

The Committee will lay a report proposing the Senedd adopt the draft Standing Orders before dissolution.

Yours sincerely,





Elin Jones MS

Y Llywydd and Chair of the Business Committee



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Annex A

Standing Order 26C.1:

We wish to draw your attention to Standing Order 26C.1, particularly in terms of whether it is necessary and appropriate for the consolidation of common law to be included within its scope.

1. Incorporating case law has not been a particularly common feature of Consolidation Bills in the UK, and it is not expected to be very common in Consolidation Bills introduced in the Senedd.
2. It is appropriate to ensure that common law can be included within a consolidation exercise because, when a Consolidation Bill brings together legislation on a topic, it may also be appropriate to include relevant case law and other elements of the common law in order to provide a more complete restatement of the existing law and improve accessibility. I.e. to incorporate the effect of case law about the meaning of the existing legislation, or rules of common law that are closely related to the statutory provisions. For example, there might be case law clarifying the meaning of a provision, or limiting the effect of a provision in a way that was not set out on its face. This kind of case law might be included in the consolidation so that it accurately reflected how the existing legislation actually worked. In some cases, failing to incorporate case law could result in an incomplete and misleading restatement of the law.
3. This matter has been considered by the Law Commission in their own consolidation exercises for the UK Government, and in their ***'Form and Accessibility of the Law Applicable in Wales'*** report, they suggest that codification could include "settled case law establishing rules within the subject area of a code that could usefully be made more accessible by their inclusion in the code, as well as case-law that supplements particular statutory provisions by, for example, filling gaps or supplying definitions of undefined statutory terms." More recently, in Chapter 7 of the Law Commission's Scoping Paper for its project on *Planning Law in Wales*, the Commission considered the question of whether case law should be included in a consolidation of planning legislation. The paper¹ considered the circumstances in which it would be appropriate to incorporate case law and the types of case law that might be included, giving some examples.

¹ Available at: <https://www.lawcom.gov.uk/project/planning-law-in-wales/>



4. As the Counsel General has stated in evidence to the LJC Committee, the Welsh Government has no intention to consolidate free-standing rules of the common law.

Standing Order 26C.2:

Standing Order 26C.2(i): the information provided in the draft guidance indicates that this Standing Order would permit the changing of conjunctions in an existing provision in an Act. As 'and' and 'or' have different meanings and affects when used in a list of provisions, we are mindful that such a change could amount to policy reform.

5. This is not about changing the substance of the law, but about how it is presented. A Consolidation Bill may seek to consolidate different Acts which use conjunctions in different ways or that do not use them in the way that we would now. The aim would always be to make a Consolidation Bill consistent within itself and with current drafting style as much as possible. Ultimately, the responsible committee will decide in the first instance whether any changes of this kind are appropriate within the parameters of SO26C, and any such changes must also be approved by the Senedd as a whole either at Detailed Senedd Consideration (DSC) or Final Stage.

Standing Order 26C.2(iii): the information provided in the draft guidance indicates that this Standing Order would permit the omission of provisions in existing Acts where there is no longer an intention to commence that provision. We respectfully suggest that 'intention' is something that will be dictated by policy choices. It may, therefore, not be considered appropriate to enable a present government to use a Consolidation Bill to remove legal duties which it has no intention to use, but which others may wish to utilise in the future.

6. Standing Order 26C.2(iii): this is about removing provisions that are no longer needed and there is obviously a question about who judges that. In the first instance, that will be for the government in deciding what to include in its Consolidation Bill, and it will be for the Counsel General to consider when determining whether or not the Bill can be proposed as such. However, as always, the final decision about whether a provision can be removed from the law will be for the responsible committee and Senedd. Where a power has not been used, any question about whether the power is going to be used in the future will depend on whether there is a realistic likelihood of the power being used. The question should be not just whether current Ministers are likely to use a power, but whether there is a realistic likelihood of it being used by any government in future. It is quite normal for UK Consolidation Bills to repeal powers on the basis that Ministers or others are not likely to use them. Commencement powers, for example, are generally given to the Welsh Ministers, so it will be their intentions (now and in the future) that are relevant. The Law Commission's final report on Planning Law in Wales includes



recommendations not to restate various provisions of planning legislation, some enacted more than 50 years ago but others as recent as 2008, on the basis that they are no longer needed. These include powers to set up “planning inquiry commissions” and “simplified planning zones” that were intended to improve the planning process but have never been used, and provisions about including energy policies in development plans and stopping up highways that have been superseded by other powers.

Standing Order 26C.2(iv): the draft Standing Order uses the words ‘minor’ and ‘satisfactory’. Given that the meaning of these terms is subjective, we suggest that this drafting is considered further;

7. The idea of making changes to achieve a satisfactory consolidation is not a new one: it is the basis on which Westminster Consolidation Bills make minor changes to the law. The draft guidance goes into a lot of detail about the kind of change that is envisaged and this would be publicly available. As with everything else in SO26C.2, the government – based on the advice of the Counsel General and First Legislative Counsel - will form a view when preparing a Consolidation Bill and will have to justify its position both when it introduces the Bill, and during subsequent Senedd scrutiny. Whether any changes proposed can justifiably be described as ‘minor’, and whether they are necessary for a satisfactory consolidation are among the questions that the responsible committee will need to satisfy itself of as part of the Initial Consideration process.

Standing Order 26C.2(iv): the information provided in the draft guidance states that this Standing Order would enable provisions to be moved from primary to secondary legislation. Again, given that this amounts to a significant change, we suggest that this is given further consideration.

8. The draft guidance document refers to the possibility of moving material in both directions (either from primary to secondary or, occasionally, from secondary to primary). The Law Commission in their proposals for planning law have identified situations where both are desirable. Legislative practice has changed over time so there may be legislation that deals with things in ways that we would no longer expect. Different Acts that are being consolidated may be inconsistent in what they include on their face and what they leave to regulations; there may be too much detail in an Act, or too much important material in subordinate legislation. The purpose is to improve the coherence of the body of legislation as a whole and, as always, any changes would be scrutinised by the responsible committee and require approval by the Senedd as a whole.

Standing Order 26C.2(vi) – it is unclear to us why transitional arrangements would be needed during the act of consolidation.



9. Transitional arrangements and saving provisions can be needed when the law is being changed or moving from one system to another. In a consolidation, it is necessary to ensure that everything that has happened/is in progress under the existing legislation continues to work under the new legislation. If minor changes are made to the law as part of the consolidation, it would be necessary to deal with how those changes affect things that have been done or are in progress under the previous law. For example, if a planning application had been submitted under the existing legislation, but would not be determined until the new consolidated legislation was in force, transitional and savings provisions could provide for the existing application to be dealt with under the new consolidated Act.

Standing Order 26C.3:

We note that Standing Order 26C.3 enables the Presiding Officer to issue written guidance to Assembly Members on the interpretation of Standing Orders 26C.1 and 26C.2, and the operation of SO 26C generally. Given that Standing Order 6.17 already enables the Presiding Officer to "issue written guidance to Members for the proper conduct of Assembly proceedings", it is not clear to us why Standing Order 26C.3 is necessary.

10. Its inclusion is presentational. Whilst the draft procedure could have relied on SO6.17, given the importance of the guidance in providing more detail and examples of what is acceptable to be done via a Consolidation Bill, it was considered appropriate to include a specific provision here so as to give it greater prominence. It also means that the guidance is issued under the Consolidation Bill Standing Order and that there is a direct link between that guidance and the procedure it complements.

Standing Order 26C.6:

The note accompanying Standing Order 26C.6 states that the Presiding Officer will need to consider whether the determination for Bills will need to be amended in any way for Consolidation Bills. We are not clear why the form of a Consolidation Bill should be different to that of a public bill, particularly as a purpose of consolidation is meant to bring provisions in older Acts in line with modern and accessible drafting styles which are already enabled by the determination on the proper form of public Bills.

11. At this point neither Senedd nor Government officials are aware of any need to amend the Determination on Proper Form. We expect that Consolidation Bills will be drafted and set out in the same way as law reform bills under SO26 and the intention is to review the determination for SO26 to see if it can be applied for SO26C should Business Managers agree the Standing Order. However, as we proceed through any drafting process new issues that are unique to Consolidation



Bills could become apparent and the intention is to draw Members' attention to this possibility and to provide for it.

Standing Order 26C.9:

Standing Order 26C.9(v) has the effect of allowing an Explanatory Memorandum that accompanies a Consolidation Bill to not include information about transitional provisions, consequential amendments and repeals of existing legislation. We suggest that this Standing Orders should capture 26C.2(ii) to (vi), and not just 26C.2(ii) to (v).

12. Not all of the changes permissible under this Standing Order will require drafting notes to explain what has been done – for example, removing references to Wales or to the Welsh Ministers from legislation left behind would be very self-explanatory. Where it was considered that scrutiny of the Bill would be aided by an explanation, one would be included in the Explanatory Memorandum. It is envisaged these could be a mixture of general remarks explaining an overall approach, or more detailed points on individual provisions/changes.

Standing Order 26C.9(vii) requires an Explanatory Memorandum to confirm that the provisions of the Consolidation Bill give rise to no additional significant expenditure payable out of the Welsh Consolidated Fund. It is not clear to us how a Consolidation Bill, which does not change policy, may give rise to additional expenditure.

13. Whilst it is true that a Consolidation Bill cannot give rise to 'significant' additional expenditure (hence why that is ruled out and there is no provision for a financial resolution), it may be the case that there are occasional financial implications most likely arising out of the transitional arrangements needed to be put in place from moving from the existing to the new legislation. Possible costs could include those associated with updating websites, familiarisation training, updating guidance notes and advice papers. Other costs could include, for example, new planning application forms which need to reflect new section numbers and any changes in structure, language and/or format that arise from the consolidation. The intention is to make the Senedd aware of the best estimates of those costs, if they arise from a particular consolidation.

Dealing with consequential provisions

Paragraphs 44 to 47 of the paper considered by Business Committee set out a proposal which involves a separate Bill to the main Consolidation Bill that would include "consequential provisions that are tangential to its purpose". We suggest that further detail on this proposed procedure is needed; in particular the proposals that these Bills would be grouped by motions and would therefore stand and fall together, and the proposal for consecutive amending stages. We also believe that it would be helpful if examples of this procedure working in practice elsewhere could be provided. Finally, we suggest clarity is



provided on how both Bills would appropriately fall within the current proposed definition of a Consolidation Bill, as set out in Standing Order 26C.1.

14. The Government is considering this approach as a way of enabling the consequential repeals and amendments to other legislation to be kept out of the main Acts that set out the law for the future. As a result the main Act would set out all of the law in Wales that people would need to know once the consolidation had taken place, and that the consequential provisions Act would set out amendments to other legislation, such as any amendments to UK Acts that were needed to remove provisions relating to Wales and ensure that they continued to work for England. This idea is not a new one – there are precedents for this approach in large scale consolidation exercises carried out in Westminster. For example, the consolidations of housing law in 1985, of planning law in 1990, of water law in 1991, and of NHS legislation in 2006. Each consolidation exercise included two or more substantive Acts plus a consequential provisions Act.
15. It is important to note that the draft Standing Order does not specifically provide for or require this approach, but neither does it prevent it, and that both Bills would need to satisfy the requirements of the Standing Order. The approach may not need to be taken in all cases under this Wales-specific procedure, and it has been suggested that Business Managers review arrangements once they have been tested in practice.
16. Regarding the Committee's request for (i) further detail (ii) examples of the procedure working in practice elsewhere (iii) clarity on how both Bills fall within the current proposed definition of a Consolidation Bill as set out in SO26C.1, further information is included in Annex B.

Timetabling the scrutiny of Consolidation Bills

Substantial time and effort has already been spent in preparing for the consolidation of planning law as it is applicable in Wales. The Law Commission for England and Wales took four years to undertake a detailed review of planning law, such is the breadth of that task. While providing an interim response to the Report in May of this year, we understand that the Welsh Government will not fully respond to the Law Commission's recommendations until the new year. We believe that the time taken for the Law Commission to complete its work supports our view that the responsible committee should be afforded as much time as is needed to undertake thorough and robust scrutiny of any Consolidation Bill proposal. In our view, a sufficient period for scrutiny and appropriate resources are particularly vital if, as Standing Order 26C.17 suggests, the responsible committee will be tasked with considering



whether the scope of the consolidation is appropriate, whether the relevant existing law has been included within the Consolidation Bill, and whether the consolidation of those enactments is correct. Furthermore, the Counsel General told us that he accepted that the circumstances around where there may be a need to consolidate legislation urgently are difficult to describe, and we agree.

17. Draft Standing Order 26C.13 states that 'the Business Committee must establish and publish a timetable for the consideration of a Consolidation Bill'. Whilst it is expected that Consolidation Bills will generally be larger than most reform Bills, they are not implementing new policy, and there will be few changes in legal effect. Consolidation is a technical exercise, and the Standing Order (in particular SO26C.2) and accompanying Llywydd's guidance reflects that. Taken together, they are designed to ensure that that the Senedd will conduct the scrutiny process in the way other Parliaments do – as a technical assessment of the consolidation.
18. The Counsel General has set out the Government's view that Consolidation Bills should be considered in an effective and efficient manner. We expect that, in bringing forward a proposed timetable, the Government will be mindful of the timing concerns LJC note. As is usual practice, the Business Committee will consult the 'responsible committee' on the proposed timetable for each Bill. Consolidation Bills are less likely to be time-sensitive than reform Bills under Standing Order 26, which should help in establishing timetables acceptable to all.

Reviewing the Standing Orders once the procedure has been tested in practice

Embarking on the objective of consolidating Welsh law is a substantial task. We acknowledge the Counsel General's comments that there will be a process of learning in the next Assembly term as the first Consolidation Bills are brought forward for scrutiny. For that reason we agree with the Counsel General that there should be a review of the Consolidation Bill procedure after the National Assembly has scrutinised the first Consolidation Bill, to ensure the Standing Orders and procedures more generally are fit for their intended purpose.

19. It is usual practice when substantial new procedures of this type are introduced. At that point, Business Committee will most likely consult the responsible committee to inform that review and seek their views on any areas for reform.



Annex B – Further details on ‘Cognate Bills’

As drafted, the Standing Order enables consolidations involving two or more ‘cognate’ bills without seeking to define them. Since consequential bills will not be required in every instance and their use and purpose may vary, it would be cumbersome to seek to define such a concept in the Standing Order and to provide for it throughout the procedure. Rather, the idea of cognate bills makes use of the existing provisions, both in the proposed Standing Order 26C and elsewhere in the Senedd’s Standing Orders.

We would anticipate discussions between government and Senedd officials in the lead-up to the introduction of any Consolidation Bill(s) to consider the desirability and practicability of using ‘cognate’ bills in each case, and ultimately the decision would rest with Business Committee as to whether it agrees to more than one Bill being subject to the same timetable.

As a starting point, the current working assumptions are that the following principles would apply where the ‘cognate bills’ approach is used:

- in publishing a timetable for the consideration of the Consolidation Bills, the Business Committee would state that the Bills should be scrutinised concurrently and set the same timetable for the both Bills (SO26C.13);
- under SO26C.18, the Member in Charge would propose separate motions for each Bill proposing that they proceed as Consolidation Bills, but use Standing Orders 12.24 and 12.40 to enable the motions to be grouped both for debate and voting, meaning that they would stand or fall together;
- the responsible Committee could produce one report on the package of Bills stating whether they should proceed as Consolidation Bills (SO26C.16 and SO26C.36);
- any motion for Detailed Senedd Consideration to be triggered could include both Bills or take the form of two separate motions;
- amending stages: because both Bills stand and fall together they need to go through each stage together. It is envisaged that the Business Committee timetable and the way that the responsible committee organises its meetings would facilitate this – i.e. the reporting deadlines set by BC would be for both bills, and the responsible committee at Detailed Committee Consideration would deal with amendments either to both bills in one meeting, or at the next available opportunity. In either case, no proceedings would be held on the next stage of the Consolidation Bill until the consequential bill had completed its current stage (or not). ‘Further Detailed Committee Consideration’ has been introduced for the purpose of enabling further amendments to be made to one bill as a result of changes to the other (its equivalent, ‘further Stage 2’, does not exist under SO26) and it is envisaged



- that together with Detailed Senedd Consideration and ‘further Detailed Senedd Consideration’ (both based on SO26 Stage 3), the necessary provision is made to enable any additional amendments to be considered;
- The motions for the Final Stage would be grouped for debate and voting, so that the two Bills stand or fall together.

Examples of the procedure working in practice elsewhere:

The 2006 consolidation of legislation relating to the NHS included two new consolidated Acts, one for England and one for Wales as well as a “Consequential Provisions” Act. The three Acts followed the same timetables, and as far as we can tell were considered together during scrutiny. A similar process was followed when water and planning legislation were consolidated into new sets of Acts in the early 1990s. In the UK Parliament, this approach has generally been taken when the law is being consolidated into more than one new Act (because a consequential provision might relate to more than one of the new Acts).

Clarity on how both Bills fall within the current proposed definition of a Consolidation Bill as set out in SO26C.1:

Both Bills would be Consolidation Bills, because they would both have the purpose of bringing about the consolidation of the law, and they would only contain provisions of the kinds allowed by SO 26C.2. Any Bill which doesn’t go beyond that definition can be subject to the Consolidation Bill procedure; there is no requirement or expectation that any Bill contain all types of permitted provisions.

For example, it is envisaged that such amendments could include extracting ‘Wales’ from the legislation and making sure that the existing legislation continues to function for England (or any non-devolved legislation for Wales). As always the responsible committee (and later the Senedd as a whole) has the final say.

