

Quick guide

The Constitution - Subordinate Legislation

November 2010

Introduction

Subordinate legislation is legislation that is made by a person or body under powers conferred by primary legislation such as an Act or Assembly Measure (as opposed to Primary legislation which is used to describe legislation made by legislative bodies, rather than the executive body).

Subordinate legislation supplements Assembly Measures and Acts of the UK Parliament and can take the form of Statutory Instruments (SIs) (the most common form) and in some cases, codes of practice, reports, orders, regulations, rules, schemes or guidance. A Welsh SI is a type of subordinate legislation which applies specifically to Wales and which is made under the authority contained either in Acts of Parliament relevant to Wales or in Measures of the National Assembly for Wales.

National Assembly procedure on Statutory Instruments

Many SIs are subject to parliamentary and National Assembly control. These SIs will follow one of the procedures laid down in the *Statutory Instruments Act 1946*¹; either the negative resolution procedure, affirmative resolution procedure or no procedure (which the Explanatory Memorandum to a parent Measure or Act will specify). The Explanatory Memorandum which accompanies an SI or draft SI will also indicate which procedure that SI will follow².

Negative procedure

Subordinate legislation that is subject to the negative procedure will come into effect unless there is an objection from the National Assembly. The majority of SIs are likely to be subject to the negative resolution procedure.

Where an SI is subject to a negative resolution:

- The relevant SI is first 'made' (formally signed off) by Welsh Ministers;
- It is then laid before the National Assembly and must be accompanied by an

¹ [Statutory Instruments Act 1946 \(c.36\)](#)

² Further to this, Standing Order 24 sets out certain procedural requirements in relation to subordinate legislation subject to the negative or affirmative resolution procedure. In very rare cases subordinate legislation will be subject to special Assembly procedure, which is set out in Standing order 25. In addition some subordinate legislation will be subject to no procedure (e.g. commencement orders).

Explanatory Memorandum, which must include any Regulatory Impact Assessment prepared in relation to that SI;

- It should normally ‘come into force’ (i.e. become law) after at least 21 business days has passed since the laying date, unless the Presiding Officer has received notification from the relevant Welsh Minister explaining why this is not to be the case;
- Within 40 days³ of the subordinate legislation being laid, Members may approve a motion (which is not amendable) resolving that the SI be annulled⁴.

Affirmative procedure

A small proportion of the most important subordinate legislation is subject to the affirmative procedure and has to be formally approved by the National Assembly before it takes effect.

Where an SI is subject to affirmative resolution:

- The SI is first laid before the Assembly usually in draft (it normally cannot be made by Welsh Ministers until being formally approved by the Assembly) and must be accompanied by an Explanatory Memorandum, which must include any Regulatory Impact Assessment prepared in relation to that SI;
- A Welsh Minister tables a motion (which is not amendable) seeking Assembly approval of the SI;
- A motion to approve an SI cannot be considered in Plenary until the Constitutional Affairs Committee or any other committee (which has notified the Welsh Government of its intention to do so within 7 days of laying) has reported on the draft SI, or, at least 20 days have elapsed since laying (whichever is the earlier);
- If the motion is approved by the Assembly, the Welsh Ministers can then make the SI.

Super-affirmative procedure

The super-affirmative procedure is a relatively new procedural development in relation to the control of subordinate legislation. It is a mechanism which is used in exceptional circumstances to approve legislation which delegates wide executive powers by regulation. The precise detail of such a provision can vary, but broadly it involves:

- Imposing a requirement on a Welsh Minister proposing to make regulations to lay a draft before the legislature for an extended period of time (typically for a period of 60 days);

³ The period of 40 days is a statutory requirement arising from the *Statutory Instruments Act 1946*. The 40 days are calendar days but do not include recesses of four or more days.

⁴ This differs to what’s included in Standing Order 24.2. In practice, the provisions of Standing Order 24.2 mean that any Member might consider that a motion to annul could be tabled on the 40th day after the SI was laid, and that motion debated at a later date. However, as the provisions of the *Statutory Instruments Act 1946* state that the resolution to annul must be made within the 40 day period, if a motion is tabled late in that 40 day period, this might not allow sufficient time for it to be debated, and a resolution passed, within the 40 day deadline.

- The Welsh Minister taking into consideration representations made by the legislature (or by a committee of the legislature) during that period; and
- Considering whether, in the light of representations, to revise the draft which is actually laid before the legislature for approval.

Whilst there is no set super-affirmative procedure contained in the *Statutory Instruments Act 1946* or outlined in the National Assembly's Standing Orders, the Constitutional Affairs Committee has considered it to be appropriate that there should be such an additional level of scrutiny when it is proposed that a very significant policy development could be implemented by Welsh Ministers through subordinate legislation as specified in the parent Act or Measure.

Examples of Assembly Measures which have made provisions for the use of the super-affirmative procedure include:

- ***Local Government (Wales) Measure 2009***⁵: Section 31 of the Measure allows Welsh Ministers to confer on local authorities any powers which they consider necessary in order to ensure their compliance with statutory duties outlined elsewhere in the Measure. As a result, section 32 sets out a specific procedure which is to apply to orders made under this section. A draft order containing proposals under section 32 must not be laid before the Assembly (for debate) unless a draft containing such proposals has been previously laid before the Assembly for a period of sixty days and any representations received within the said period of sixty days have been considered.
- ***Education (Wales) Measure 2009***⁶: Section 18 of the Measure gives Welsh Ministers powers to add, remove or modify the rights of children in relation to appeals and claims made by a child to the Special Education Needs Tribunal for Wales. The Measure includes a provision in section 25 which requires Welsh Ministers to consult with persons 'as appear to them to be representative of interests affected by their proposals' and to have regard to their views before laying an order under section 18 of the proposed Measure.

Other procedures

Depending on their parent Act, some SIs (e.g. commencement orders) do not require parliamentary or Assembly scrutiny and therefore are required to be laid before the Assembly after being made.

Some SIs, such as SIs of local application (e.g. compulsory purchase orders, byelaws etc.) are not required by their parent Act to be laid at all, and therefore Parliamentary procedures do not apply.

⁵ [Local Government \(Wales\) Measure 2009](#)

⁶ [Education \(Wales\) Measure 2009](#)

Committee scrutiny of Statutory Instruments

The way the National Assembly deals with SIs is outlined under Standing Order 15. This establishes a **Subordinate Legislation Committee** (renamed the **Constitutional Affairs Committee** since February 2010) and sets out how the Committee should consider and scrutinise SIs and the powers delegated to Ministers by subordinate legislation.

The Constitutional Affairs Committee is the only Committee in the Assembly which has a defined role in relation to the scrutiny of SIs subject to either the negative or affirmative procedure. Its purpose is to draw the Assembly's attention to SIs which are worthy of more detailed consideration. This does not however stop other committees in the Assembly from reporting on specific aspects of SIs should they wish to do so.

Broadly the Constitutional Committee may consider SIs in two ways:

1. **Technical (mandatory) scrutiny:**

Under Standing Order 15.2, the Constitutional Affairs Committee is required to undertake mandatory 'technical' scrutiny of SIs. This requires the Committee to consider all relevant SIs or draft SIs and to report on whether the Assembly should pay special attention to the SI (i.e. during a Plenary debate) on any of the following grounds:

- That there appears to be doubt as to whether it is *intra vires* (i.e. within the competence of Welsh Ministers);
- 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;
- That the enactment which gives the power to make it contains specific provisions excluding it from challenge in the courts;
- That it appears to have retrospective effect where the authorising enactment does not give express authority for this;
- That its drafting appears to be defective or it fails to fulfil statutory requirements;
- That there appear to be inconsistencies between the meaning of its English and Welsh texts;
- That it uses gender specific language;
- That it is not made or to be made in both English and Welsh;
- That there appears to have been unjustifiable delay in publishing it or laying it before the Assembly; or
- That there appears to have been unjustifiable delay in sending notification under section 4(1) of the *Statutory Instruments Act 1946* (as modified).

Legal advisers to the Committee will consider beforehand all SIs and draft SIs to be considered by the Committee in this way and prepare advice, in the form of a report, identifying the technical matters arising under Standing Order 15.2 which the Committee

may discuss in detail.

2. Merits (discretionary) scrutiny:

Standing Order 15.3 also allows the Constitutional Affairs Committee to use its own discretion to undertake policy scrutiny of certain SIs and to report on whether the Assembly should pay special attention to any SIs on the following (non-technical) grounds:

- 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 rendered, or prescribes the amount of any such charge or payment;
- That it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly;
- That it is inappropriate in view of the changes circumstances since the enactment under which it is made or is to be made was itself passed or made;
- That it inappropriately implements European Union legislation; or
- That it imperfectly achieves its policy objectives.

This type of discretionary scrutiny is described as ‘merits’ scrutiny (i.e. the political and legal merits or otherwise of the SI in question). This would include considering whether the SI achieved its policy objective and whether it was the most effective way of doing so. It would not, however, question the policy objective of the SI itself.

In the UK Parliament, merits scrutiny is undertaken by the House of Lords’ Merits of Statutory Instruments Committee⁷. This Committee was established in December 2003 as a result of the Wakeham Commission which recommended that a ‘sifting’ mechanism should be established, either by way of a joint committee or a Lords-only committee, to identify those statutory instruments which were important and merited further debate or consideration⁸.

In the Assembly, merits scrutiny is undertaken by the Constitutional Affairs Committee. In May 2009, the then Subordinate Legislation Committee recommended that:

The scrutiny of the merits of statutory instruments is an important function to ensure the right level of checks and balances of the use of Ministers delegated powers. The Committee decided that undertaking merits scrutiny would be beneficial.⁹

A merits report on a SI will be prepared by the clerk in discussion with legal advisers and Members' Research Service staff and will outline the Committee’s grounds for conducting

⁷ This Committee complements the work of the Joint Committee on Statutory Instruments: Whereas the JCSI considers technical matters about the legality of proposals, the Merits Committee’s task is to consider the policy implications of Statutory Instruments.

⁸ More information on the work of the Merits of Statutory Instruments Committee can be found here: [Bristow, Paul, 2008, *The House of Lords Select Committee on the Merits of Statutory Instruments, The Table : The Journal of the Society of Clerks-at-the-table in Commonwealth Parliaments, Volume 76, p.10-18*](#)

⁹ [Subordinate Legislation Committee, *Inquiry into the scrutiny of subordinate legislation and delegated powers, May 2009*](#)

merits scrutiny and highlight the specific areas of concern that require the Assembly's consideration.

Dealing with negative procedure SIs

Should the Constitutional Affairs Committee wish to report on a specific SI, on the grounds specified in Standing Order 15.2 and 15.3, it has to do so within 20 days (this does not include days when the Assembly is in recess for more than 4 days). The reason for this is so that the Committee's reports can be taken into account by the Minister and the Assembly within good time before the provisions of the SI are enacted.

Other Assembly Committees can also report on negative procedure SIs should they wish. Again, they would need to report promptly (within 20 days) to enable Members to take account of the committee's view in deciding whether to table an annulment motion. It is important that committees are informed of new subordinate legislation as soon as possible in order to enable them to consider and report on relevant SIs in a timely fashion.

An SI should come into force after at least 21 days has passed since the initial laying date ('the 21 day rule'). If an SI is not laid before the Assembly at least 21 days before it comes into operation, notification must be sent to the Presiding Officer when it is laid to draw the Assembly's attention to the fact that this 21 day rule has been breached and explaining why this has happened.

It should also be noted that while there are 40 days in which it is possible to approve a motion (which is not amendable) resolving to annul an SI, that SI will normally come into force 21 days after it has been laid. This may therefore limit the time available to inform the debate on a specific SI and could influence when the Constitutional Affairs Committee or any other committee decides that it is best to report.

Dealing with affirmative procedure SIs

As indicated above, a motion to approve an SI cannot be considered in plenary until the Constitutional Affairs Committee or any other committee has reported on the draft SI or at least 20 days have elapsed since the SI was laid (whichever is earlier).

Where a committee other than the Constitutional Affairs Committee intends to report, it must notify the government of its intention to do so within 7 days of the SI being laid.

Given that a motion to approve an SI or draft SI can be tabled by the government once 20 days have elapsed, the Constitutional Affairs Committee or any other committee (which has given the required 7 days' notice) will have to report within this period in order to ensure their views can be taken account of in the debate. This highlights the importance of committees being aware of what subordinate legislation is being prepared so they can report quickly if they wish to do so.

Other types of legislation the Constitutional Affairs Committee may also consider

Under Standing Order 15.6, the Constitutional Affairs Committee may also consider and report on the following:

- Any other subordinate legislation laid before the Assembly;
- The appropriateness of provisions in proposed Assembly Measures and 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;
- Consequences for legislation subject to the consideration of the Assembly of draft orders under Part 1 of the *Legislative and Regulatory Reform Act 2006*¹⁰;
- The exercise of commencement powers by the Welsh Ministers; or
- Any legislative matter of a general nature within or relating to the competence of the Assembly or Welsh Ministers.

The Committee however is not allowed to discuss and scrutinise Legislative Competence Orders or any SI or draft SI that is required to be laid before the UK Parliament (including SIs made jointly with the Secretary of State), as is outlined in Standing Order 15.7.

Finding out about Subordinate Legislation

Further information about SIs are to be found on the following websites:

- Welsh SIs are published on the [subordinate legislation pages](#) on the National Assembly's website as soon as they are laid.
- The [Constitutional Affairs Committee's web page](#) includes information on future meetings, current inquiries and Committee papers.
- A full list of all subordinate legislation made by the National Assembly since 1999 is included on the [Wales Legislation Online](#) database.
- Other subordinate legislation (such as road closure orders) which have no formal procedure are included on the [Welsh Government's web pages](#).
- All published UK SIs since 1987 are available on [legislation.gov.uk](#).

Further information

For further information on aspects of subordinate legislation, please contact **Owain Roberts** (Owain.roberts@wales.gov.uk), Members' Research Service.

View our full list of [quick guides](#) here.

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¹⁰ [Legislative and Regulatory Reform Act 2006 \(c.51\)](#)