

Subordinate Legislation Committee

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Title: The Work of the Committee in the Third Assembly

Purpose

1. The purpose of this paper is to consider how the Committee may choose to work in the Third Assembly.

Background

2. Standing Order 15.1 provides that there is to be a Subordinate Legislation Committee. Standing Order 10 contains matters of general application to committees.

3. These Standing Orders are appended to this paper, for Members' convenience, at Annexes A and B.

4. The Committee's remit is set out in Standing Orders 15.2 to 15.7.

5. The previous Legislation Committee produced a report on the 'Technical Scrutiny of Legislation by the National Assembly from May 2007'. This report was submitted as evidence to the Committee on Standing Orders and formed the basis for the Standing Orders governing the new Subordinate Legislation Committee.

6. The Subordinate Legislation Committee will consider the technical aspects of all statutory instruments or draft statutory instruments made or to be made by the Welsh Ministers. It may also undertake limited policy scrutiny of Assembly Measures; for example, to ascertain the appropriateness of provisions which grant powers to make subordinate legislation to Welsh Ministers. However, the Committee may not question the policy itself.

7. The Subordinate Legislation Committee will scrutinise subordinate legislation made under both the 'negative' and 'affirmative' procedures; see explanatory note at Annex C.

8. In the case of an instrument subject to the affirmative procedure, section 6 of the Statutory Instruments Act provides that it shall not be made until after the expiration of 40 days, beginning on the day a copy of the draft instrument is laid before the Assembly and if, within the period of 40 days, the Assembly resolves that the instrument shall not be made, then no further proceedings shall be taken in respect of it.

9. In respect instruments which are to be made utilising the negative procedure (instruments subject to annulment), such instruments are to be laid

before the Assembly and a period of 40 days will be available to table a motion that the instrument be revoked. If within the period of 40 days the Assembly resolves that the instrument should be revoked, then no further proceedings shall be taken in respect of it and the Welsh Ministers have power to revoke the instrument by order.

Mandatory Functions

10. The Subordinate Legislation Committee is required to consider all statutory instruments and draft statutory instruments laid before the Assembly; and to report on whether the Assembly should pay special attention to the instrument or draft on any of the grounds set out in Standing Order 15.2.

11. Legal Advisers to the Committee will consider beforehand all instruments and draft instruments to be considered by the Committee; and prepare advice to the Committee identifying matters arising under Standing Order 15.2, which the Committee may discuss in greater detail should it so wish. Instruments where no points are identified under Standing Order 15.2 will be included in an itemised list in the agenda.

Discretionary Functions

12. Additionally, the Committee may report on the matters set out in Standing Order 15.3 or 15.6.

13. All reports made under Standing Order 15.2 or 15.3 must be made not later than 20 days after the instrument or draft has been laid before the Assembly.

14. Matters arising under Standing Orders 15.3 or 15.6 will not necessarily be reported on by Legal Advisers. Committee Members may raise matters arising under these Standing Orders; and the Committee Secretariat or Legal Advisers may raise some technical points or clarify the legal position as appropriate. The Welsh Assembly Government may have an official in attendance, who may be asked to clarify the official position on such matters. The Committee could also invite any Ministers/officials/specialist advisers to attend the meetings, to assist the Members with their work.

15. In addition to the technical scrutiny of subordinate legislation made by the Welsh Ministers under Standing Orders 15.2 and 15.3, the Committee may, under Standing Order 15.6, consider various miscellaneous matters including the appropriateness of provisions in Assembly Measures or Bills of the UK Parliament that grant powers to make subordinate legislation to the Welsh Ministers, First Minister or the Counsel General - Standing Order 15.6(ii) - and the consequences for legislation subject to the consideration of the Assembly under Part 1 of the Legislative and Regulatory Reform Act 2006 - Standing Order 15.6(iii).

16. Additionally, the Committee may consider any legislative matter of a general nature within or relating to the competence of the Assembly or the Welsh Ministers - Standing Order 15.6(iv). This could include matters relating

to the drafting of legislation which may repeatedly be identified by the Committee.

17. Draft legislative competence orders and statutory instruments required to be laid before Parliament are beyond the remit of the Committee; see Standing Order 15.7.

Core Work

18. The core work of the Committee will be the statutory technical scrutiny of subordinate legislation made by Welsh Ministers. Almost all subordinate legislation will be subject to either the 'negative' or 'affirmative' resolution procedure; mostly the former.

Other Work

19. The matters referred to in paragraphs 12, 15 and 16 are at the discretion of the Committee. Several of these activities could have significant implications for the operation of the Committee; in terms of the frequency and duration of meetings and the level of additional support required.

Frequency and Duration of Meetings

20. The previous Committee met weekly. Meetings were of short duration, usually less than half an hour, depending on the number of issues raised by the Legal Advisers or by Members. Depending on how many additional matters the Committee decides to pursue, the duration of meetings may need to be extended. Initially, it is suggested that the Committee meets weekly.

Internal Support

21. For technical scrutiny activities, the Committee will have the support of Legal Advisers, who will prepare advice on issues under Standing Order 15.2. The Clerk will provide procedural advice, prepare reports and deal with routine administrative matters. Depending on the nature of any additional work the Committee decides to undertake, further support may be required from the Research Service; for example, researchers could provide briefing on the policy objectives behind a particular item of subordinate legislation.

External Support

22. Depending on the nature of any additional work the Committee decides to undertake, external support might be required; for example, an expert adviser could be appointed to provide specialist advice on policy issues, or the Committee could seek the views of relevant voluntary sector organisations.

Relationship with Other Committees

23. Once the Committee has determined how it wishes to proceed, it might be helpful to explore possible relationships with other committees; for example: -

- To agree a protocol with the European and External Affairs Committee on how to ensure that subordinate legislation appropriately implements European Union legislation – Standing Order 15.3(iv).
- To take advice from a scrutiny committee, when considering whether or not an item of subordinate legislation imperfectly achieves its policy objectives – Standing Order 15.3(v).
- To provide advice to a measures committee on the appropriateness of provisions in proposed Assembly Measures that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister or the Counsel General – Standing Order 15.6(ii).

Action

24. The Committee is invited to consider the matters described in this paper; particularly the optional work referred to at paragraphs 12, 15 and 16 – and to determine which, if any, it wishes to pursue.

Chris Reading
Committee Service
June 2007

STANDING ORDER 10 – Committees

General

- 10.1 Standing Order 10 applies to every committee of the Assembly other than where disapplied by another Standing Order.
- 10.2 Any Member may table a motion to give specific or general instructions to any committee.

Membership of Committees

- 10.3 The Assembly must consider a motion tabled by the Business Committee to determine the membership of each committee established by any Standing Order or by a resolution of the Assembly.
- 10.4 No amendments may be tabled to a motion under Standing Order 10.3.
- 10.5 A motion to determine the membership of a committee under Standing Order 10.3 cannot be passed unless:
- (i) The membership reflects (so far as is reasonably practicable) the balance of the political groups to which Members belong; and
 - (ii) (If the motion for it is passed on a vote), at least two-thirds of the Members voting support it.
- 10.6 If a motion to determine the membership of a committee under Standing Order 10.3 is not passed:
- (i) The Assembly must consider a motion tabled by the Business Committee to determine the size of the committee; and
 - (ii) Places on that committee must be allocated in accordance with the operation of sections 29(3) to (7) of the Act as modified in accordance with Standing Order 10.7.
- 10.7 If in respect of any place to be allocated on a committee in accordance with section 29(3) to (7) of the Act:
- (i) The number of Members belonging to two or more political groups is the same and exceeds the number belonging to any other political group; or
 - (ii) The number produced by the operation of section 29(6) of the Act is the same for two or more political groups and is greater than that so produced for any other political group,

The Presiding Officer must determine to which political group that place is to be allocated.

10.8 If places on any committee are to be allocated to a political group in accordance with Standing Order 10.3 or 10.6, it is for the leader of that political group to determine the names of the Members allocated from his or her group.

10.9 Any motion under Standing Order 10.3 or 10.6 must (so far as is reasonably practicable, having regard to the total number of places on committees) ensure that:

- (i) Every Member who does not belong to a political group is offered a place on at least one committee; and
- (ii) The total number of places on committees allocated to Members belonging to each political group is at least as great as the number of Members belonging to the political group.

10.10 A vacancy occurs on a committee when a Member:

- (i) Resigns from the committee by notifying the Business Committee;
- (ii) Is removed from the committee by a resolution of the Assembly;
- (ii) Ceases to be a Member; or
- (iv) Ceases to be a member of the committee in accordance with Standing Order 10.11.

10.11 A Member ceases to be a member of a committee if he or she joins or leaves a political group.

10.12 When a vacancy occurs on a committee, the Business Committee:

- (i) Must consider the effect of that vacancy on the membership of that committee and of any other committee;
- (ii) Must, having regard to that consideration, table a motion under Standing Order 10.3 proposing the membership of the committee on which the vacancy occurred; and
- (iii) May, having regard to that consideration, also table one or more motions under Standing Order 10.3 proposing the membership of any other committee.

10.13 If the effect of a motion referred to in Standing Order 10.12(ii) is only to fill the vacancy with a Member from the same political group, then Standing Order 10.5(ii) does not apply.

10.14 Any question arising under Standing Orders 10.5 and 10.9 must be determined by the Presiding Officer.

Sub-committees

10.15 Any committee may resolve to establish one or more sub-committees. A resolution to establish a sub-committee must set out its membership, remit and duration.

10.16 No sub-committee may consist only of Members from the political group or groups with an executive role and every sub-committee must contain at least one Member from a political group with an executive role.

10.17 A sub-committee is regulated, as appropriate, by the Standing Orders relating to the committee of which it is a sub-committee.

Chairs

10.18 Each committee must elect a chair. In doing so the committee must have regard to the need to ensure that the balance of chairs across committees reflects the political groups to which Members belong.

10.19 Each committee has the power to appoint a temporary chair in the absence of its chair.

10.20 Except where Standing Orders provide otherwise, the chair of a committee must determine its procedures, having regard to any written guidance which may be issued by the Presiding Officer after consulting with the Business Committee and the chairs of committees.

10.21 In relation to the business of a sub-committee, the chair of the sub-committee has the powers of the chair of the committee of which it is a sub-committee.

Behaviour in Committees

10.22 The chair is to maintain order in committee meetings and must call to order any Member who:

- (i) Is engaging in conduct which would, in the opinion of the chair, constitute a criminal offence or contempt of court;
- (ii) Is obstructing the business of the Assembly;
- (iii) Seeks to raise a matter outside the scope of the issue before the committee;
- (iv) Is guilty of discourteous or unbecoming conduct;

- (v) Is using disorderly, discriminatory or offensive language or language which detracts from the dignity of the Assembly;
- (vi) Refuses to conform to any Standing Order or any other requirement for the conduct of Members; or
- (vii) Disregards the authority of the chair.

10.23 A Member must comply with any directions given by the chair about any conduct for which he or she has been called to order.

10.24 A Member may be required by the chair to withdraw from the remainder of the meeting if the chair considers their conduct such as to warrant withdrawal. If a Member refuses to withdraw when required to do so, the chair may adjourn the meeting and report the matter to the Presiding Officer; and, with the permission of the Presiding Officer obtained in advance, a Member may propose that the Member be excluded from Assembly proceedings for a period in accordance with Standing Order 8.13.

10.25 In case of grave disorder arising in a committee meeting or in any other circumstance where he or she thinks it appropriate to do so, the chair may adjourn a meeting or may suspend the meeting for a specified time.

Sub-judice

10.26 Subject to the right of the Assembly to legislate on any matter or to discuss subordinate legislation, a Member must not raise or pursue in committee meetings any matter where court proceedings have been initiated or where notice of appeal has been given in the United Kingdom, or where the Children's Commissioner for Wales or the Commissioner for Older People in Wales has decided to conduct an examination of a case, until the time when judgement has been given or a report has been made by either Commissioner, unless the chair is satisfied that:

- (i) The matter is clearly related to a matter of general public importance or a ministerial decision is in question;
- (ii) The matter does not relate to a case which is to be heard, or is being heard, before a criminal court or before a jury or to a case which is to be heard, or is being heard, in family proceedings;
- (iii) The Member does not, in his or her comments, create a real and substantial risk of prejudice to the proceedings of a court either generally or in respect of a particular case.

Relations with the Judiciary

10.27 Unless the matter is the subject of a substantive motion, Members must not, in committee meetings, make criticisms of the conduct of judges of the courts of the United Kingdom in the discharge of their judicial office; and in Standing Order 10.27 “judge” includes persons holding the position of judge, whether full-time or part-time.

10.28 Committees must not discuss individual judicial appointments.

Quorum

10.29 A committee meeting must be declared inquorate if there are fewer than three Members, or less than one-third of the committee’s members, whichever is the higher, present.

10.30 A committee meeting must be declared inquorate if, at the beginning of the meeting, the Members present represent only one political group.

10.31 On declaring a meeting inquorate under Standing Order 10.29 or 10.30 the chair, or in the absence of the chair the clerk to the committee, must suspend the meeting until a quorum is present. But if a quorum is not present within 20 minutes, the meeting will stand adjourned.

Voting

10.32 Voting in committees is by a show of hands and, when any member of the committee requests that the vote be recorded, the names of those voting (including those recording an abstention) must be recorded in the minutes of the committee’s proceedings.

10.33 Chairs of committees may vote. If there is an equality of votes, the chair must rule as to the disposal of the business in accordance with Standing Order 2.20.

10.34 No vote in any committee is valid if less than one-third of its members vote. Members recording an abstention are to be regarded as having voted.

10.35 If a vote is not valid under Standing Order 10.34, the chair must adjourn the item of business of which it formed a part to the next meeting of the committee.

Openness of Committees

10.36 Subject to Standing Orders 10.37 and 11.9, committees must meet in public and broadcasting access for public meetings must be permitted in accordance with such arrangements as the Commission from time to time agrees.

10.37 A committee may resolve to exclude the public from a meeting or any part of a meeting where:

- (i) International relations, national security, the investigation of alleged illegality, the effectiveness of law enforcement or the proper administration of justice requires the proceedings to be held in private;
- (ii) A particular item of business cannot be discussed without disclosing personal information relating to specific identified or identifiable individuals which ought not to be disclosed;
- (iii) Discussion in public of a particular item of business would be likely to cause harm to commercial or economic interests;
- (iv) Discussion in public of a particular item of business would be likely to cause harm to the health or safety of an individual, the public, or the environment;
- (v) A particular item of business cannot be discussed without reference to material which would be likely to be considered defamatory of any person;
- (vi) The committee is deliberating on the content, conclusions or recommendations of a report it proposes to publish; or is preparing itself to take evidence from any person;
- (vii) A particular item of business cannot be discussed without disclosing either legal advice supplied in confidence, or information supplied in confidence by, or confidential correspondence with, a person or organisation (including a public authority) which was not under any legal obligation to disclose that information and has not consented to its disclosure to the public;
- (viii) A particular item of business cannot be discussed without reference to a document or documents which would be excluded or exempted from disclosure under legislation; or
- (ix) Any matter relating to the internal business of the committee, or of the Assembly, is to be discussed.

10.38 A motion proposed under Standing Order 10.37 must identify the grounds which the Member proposing it believes should give rise to the exclusion of the public.

10.39 So far as is appropriate in the circumstances and reasonably practicable, notice of motions and documents relating to business to be taken at any committee must be made available to all members of that

committee in English and Welsh at least two working days before the meeting to which they relate.

- 10.40 Members of committees and other persons addressing committees may speak in English or in Welsh and simultaneous interpretation facilities must be available for proceedings in Welsh. Persons other than Members may address committees in other languages by prior agreement with the chair.

Meetings

- 10.41 A committee chair may, after consulting the Presiding Officer, call a meeting of the committee in a week which is not a sitting week.

Substitutions at Meetings

- 10.42 A committee member who has given advance notice to the chair may be represented at a meeting, or a part of a meeting, by another Member from the same political group who has been identified in advance. The nominated representative may participate in the meeting of the committee in all respects as if he or she were a member of it. No Member may represent more than one committee member at a meeting.

Attendance at Meetings

- 10.43 Members who are not members of a committee may, with the permission of the chair, participate in a committee meeting but may not vote.
- 10.44 Committees may invite any person to attend meetings for the purpose of giving evidence, or providing advice and may invite any such person or body to submit evidence and produce documents.
- 10.45 Any committee may, subject to sections 38 and 40 of the Act, exercise the powers in section 37 of the Act, to require persons to attend their proceedings or to produce documents.
- 10.46 Chairs may require a person who has been required to attend a committee to take an oath (or make an affirmation), to be administered by the clerk to the committee.

Meetings with Other Committees

- 10.47 Committees may meet concurrently with other committees of the Assembly.
- 10.48 Committees may meet concurrently with any committee of either House of Parliament or any joint committee of both Houses.

Committee Advisers

10.49 Committees may appoint advisers in accordance with guidelines issued by the Commission for the purposes of providing expert advice.

Committee Reports

10.50 Any committee may report to the Assembly on matters within its remit.

Duration of Committees

10.51 Subject to Standing Order 12.3, committees established by Standing Orders 11 to 19 must be established for the duration of an Assembly.

10.52 The Assembly must, on a motion tabled by the Business Committee, determine the duration of any other committee.

STANDING ORDER 15 - Subordinate Legislation Committee

15.1 There is to be a Subordinate Legislation Committee.

15.2 Subject to Standing Order 15.7, the 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
- (x) That there appears to have been unjustifiable delay in sending notification under section 4(1) of the Statutory Instruments Act 1946 (as modified).

- 15.3 Subject to Standing Order 15.7, the 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.
- 15.4 The Committee must make any report under Standing Order 15.2 or 15.3 in respect of any statutory instrument or draft statutory instrument no later than 20 days after the instrument or draft has been laid.
- 15.5 In calculating for the purposes of Standing Order 15.4 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.
- 15.6 Subject to 15.7, the Committee may also consider and report on:
- (i) Any other subordinate legislation laid before the Assembly;
 - (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; or

- (v) Any legislative matter of a general nature within or relating to the competence of the Assembly or Welsh Ministers.

15.7 The Committee may not consider:

- (i) Any draft legislative competence order; or
- (ii) Any statutory instrument or draft statutory instrument that is required to be laid before Parliament.

Subordinate Legislation Procedure

Background

1. From May 2007, in accordance with the provisions of the *Government of Wales Act 2006* ('the 2006 Act'), the powers to make subordinate legislation will be directly vested in Welsh Ministers¹ and not in the National Assembly for Wales. Subordinate legislation can take the form of statutory instruments (the most common form) and in some cases, codes of practice, reports or guidance.
2. Essentially, almost all subordinate legislation will be subject to either the **negative** or **affirmative resolution procedure**.²
3. Briefly, under the **negative procedure**, the subordinate legislation is made by Welsh Ministers without the Assembly's approval but could then be overturned (annulled) by the Assembly. Under the **affirmative procedure**, subordinate legislation must be approved by the Assembly before it is made by Welsh Ministers³. More detail on these procedures is provided below.
4. The procedure a piece of subordinate legislation is subject to will be determined by the parent Act, Schedule 11 to the 2006 Act or, in the future, an Assembly Measure⁴. The majority of subordinate legislation is likely to be subject to the negative resolution procedure.
5. Further to this, Standing Order 24 sets out certain procedural requirements in relation to subordinate legislation subject to the negative or affirmative resolution procedure.

Negative Resolution Procedure

6. Where a statutory instrument (SI) is subject to annulment (i.e. negative resolution):
 - (i) the relevant SI is first made by Welsh Ministers;
 - (ii) it is then laid before the Assembly (making and laying can occur on the same day) and must be accompanied by an Explanatory Memorandum, which must include any Regulatory Impact Assessment prepared in relation to that SI⁵;

¹ Welsh Ministers, the First Minister or the Counsel General are able to make subordinate legislation.

² In very rare cases subordinate legislation will be subject to special Assembly procedure, which is set out in Standing Order 25 (an adaptation of the current Standing Order 27). In addition, some subordinate legislation will be subject to no procedure e.g. commencement orders.

³ On rare occasions, affirmative subordinate legislation can be made before approval but would only take effect once approval has been given.

⁴ The only way the procedure set down by an existing Act could be changed is by an amendment to that Act.

⁵ Standing Order 24.1

- (iii) it should not normally come into force less than 21 days⁶ after being laid, unless the Presiding Officer has received notification from the relevant Welsh Minister explaining why this is not to be the case⁷;
- (iv) within 40 days⁸ of the subordinate legislation being laid, a Member may table a motion⁹ (which is not amendable) proposing that the SI be annulled¹⁰.

7. There will be no equivalent to a fast track “executive” procedure, so urgent SIs could be made, laid and come into force almost immediately, subject to the Presiding Officer being notified, as referred to in paragraph 6(iii) above.

8. Broadly the same process that applies to statutory instruments would apply to other subordinate legislation such as codes of practice, reports or guidance that are subject to the negative resolution procedure (with appropriate modifications).¹¹

⁶ The 21 days are calculated as 21 calendar days and include Assembly sitting days and recesses.

⁷ This requirement stems from an amendment to the *Statutory Instruments Act 1946* effected by paragraph 3 of schedule 10 to the 2006 Act

⁸ The period of 40 days is a statutory requirement arising from the 1946 Act. The 40 days are calendar days but do not include recesses of four or more days.

⁹ In parliamentary terms, a motion that an SI be annulled is known colloquially as a “prayer” and hence the term “praying against” an SI.

¹⁰ Standing Orders 24.2-24.3. Standing Order 24.9 provides that SIs cannot be amended, reflecting provisions of the 1946 Act, so annulment is the only option.

¹¹ Standing Order 24.13

Affirmative Resolution Procedure

9. Where an SI is subject to affirmative resolution, usually:
- (i) the SI is first laid before the Assembly usually in draft (it cannot be made until approved by the Assembly¹²) and must be accompanied by an Explanatory Memorandum, which must include any Regulatory Impact Assessment prepared in relation to that SI¹³;
 - (ii) a member of the government tables a motion (which is not amendable) seeking Assembly approval of the SI¹⁴;
 - (iii) a motion to approve an SI cannot be considered in plenary until the Subordinate Legislation Committee or any other committee (which has notified the 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)¹⁵.
 - (iv) if approved by the Assembly, the Welsh Ministers can then make the SI.
10. As there is no equivalent to a fast track “executive” procedure, urgent SIs subject to affirmative procedure would have to be arranged through political negotiation and agreement.
11. Broadly the same process that applies to statutory instruments would apply to other subordinate legislation such as codes of practice, reports or guidance that are subject to the affirmative resolution procedure (with appropriate modifications).¹⁶

¹² On rare occasions, affirmative subordinate legislation can be made before approval but would only take effect once approval has been given.

¹³ Standing Order 24.1

¹⁴ Standing Orders 24.4-5. Standing Order 24.9 provides that Statutory Instruments cannot be amended, reflecting provisions of the 1946 Act, so approval without amendment or refusal to approve are the only options.

¹⁵ Standing Order 24.6

¹⁶ Standing Order 24.13

Committee Scrutiny of Subordinate Legislation

12. In the new Standing Orders, the Subordinate Legislation Committee is the only committee which has a defined role in relation to the scrutiny of subordinate legislation subject to either negative or affirmative procedure. The Business Committee will no longer have a role (other than in relation to the timetabling of motions to annul subordinate legislation subject to the negative procedure).

13. Standing Order 15 sets out the Subordinate Legislation Committee's remit in detail; broadly this involves considering the technical aspects of all statutory instruments or draft statutory instruments but the Committee may also undertake policy scrutiny of those instruments (known as a "merits" function). This would include whether the legislation achieved its policy objective and was the most effective way of doing so. It would not, however, question the policy objective itself.

Negative Procedure Statutory Instruments

13. In relation to negative procedure statutory instruments, the Subordinate Legislation Committee would need to report promptly once the SI is laid in order to provide Members with information to assist in deciding whether to table a motion to annul the instrument.

14. Other Assembly committees will be able to report on negative procedure statutory instruments. Again, they would need to report promptly to enable Members to take account of the committee's view in deciding whether to table an annulment motion. It will be important for committees to be informed of new subordinate legislation to enable them to consider and report on relevant SIs in a timely fashion (as Committees will be able to set their own agendas, they could decide to scrutinise an SI at an earlier consultative stage). APS officials will be discussing with government officials how Committees could be best kept informed of new subordinate legislation.

15. It should also be noted that while there are 40 days in which it is possible to table a motion to annul an SI, that SI will normally come into force 21 days after it has been laid. This may therefore influence when the Subordinate Legislation Committee or any other committee decides that it is best to report.

Affirmative Procedure Statutory and Draft Statutory Instruments

16. As indicated in paragraph 9(iii) above, a motion to approve an SI cannot be considered in plenary until the Subordinate Legislation Committee or any other committee has reported on the draft SI or at least 20 days have elapsed since laying (whichever is the earlier)¹⁷.

¹⁷ Standing Order 24.6

14. Where a committee other than the Subordinate Legislation Committee intends to report, it must notify the government of its intention to do so within 7 days of laying. The member of the government who laid it (or a member of the government nominated by the First Minister) may participate in the proceedings of the committee but not vote¹⁸.

15. Given that a motion to approve an SI or draft SI can be tabled by the government once 20 days have elapsed, the Subordinate Legislation 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. Again 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.

Transitional provisions relating to subordinate legislation made between recess and the election

16. The *Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007* makes provision for any subordinate legislation, made between the Easter recess and 3 May by the executive procedure under the current standing orders, to be laid before the Assembly. This will enable retrospective scrutiny by the new Subordinate Legislation Committee once established.

General

17. In addition, and outside the provisions relating to annulment or approval, it would of course be open for a committee to examine an SI at any time after it has been made (e.g. in relation to its effectiveness after a certain period of time) and to report recommending that amendments are made to that SI. There would, of course, be no obligation on the government to implement those recommendations. The committee could however seek a Measure-making power (if one did not already exist) to enable a draft Measure to be considered that would implement the changes. However, such a proposal for a Measure would not be guaranteed to succeed.

¹⁸ Standing Orders 24.7-8.