



Llywodraeth Cymru  
Welsh Government



Welsh Government

# Legislation Handbook on Subordinate Legislation

September 2020

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## CHAPTER 1 – INTRODUCTION

**This chapter sets out what subordinate legislation is, the intended audience and purpose for this guidance, how it will be kept up to date, and what to do if you have any queries about the guidance.**

**It also explains some key considerations for working on subordinate legislation in respect of:**

- **Submitting advice to Ministers, and**
- **Prioritisation of business as usual subordinate legislation.**

### **What is subordinate legislation?**

- 1.1 Subordinate legislation is law made by a Minister, or occasionally by a public body, under powers given to them by primary legislation (e.g. Acts of the UK Parliament, Assembly Measures, and Acts of Senedd Cymru, including Acts which received Royal Assent before the Senedd was re-named). Subordinate legislation is sometimes also referred to as “secondary legislation” or “delegated legislation”.
- 1.2 Where the term “subordinate legislation” is used in an Act of Senedd Cymru or in a Welsh subordinate instrument, it means

*“...regulations, orders, rules, Orders in Council, schemes, warrants, byelaws and other instruments made under –*

- (a) an Assembly Act,*
- (b) an Assembly Measure,*
- (c) an Act of the Parliament of the United Kingdom, or*
- (d) retained direct EU legislation.*

See section 5 of and Schedule 1 to the Legislation (Wales) Act 2019.

- 1.3 The Senedd’s Standing Orders have a similar definition of subordinate legislation as *“an Order in Council, order, rule, regulation, scheme, warrant, bye-law and other instrument made or to be made under any Act of the Senedd, Act of the UK Parliament or Assembly Measure, or to be made under subordinate legislation”*. Elsewhere in the Standing Orders it is also made clear that subordinate legislation can also take *“the form of a report, guidance, code of practice or other document”*.
- 1.4 Because there are different definitions of subordinate legislation which apply for different purposes, it is important for officials to be aware of these different definitions and what requirements apply, when working on an item of subordinate legislation.
- 1.5 The Minister’s power to make subordinate legislation is set out in primary legislation and the purpose is to make detailed changes to the

law. Primary legislation often will not contain all the detailed changes to the law required to implement a policy so this is dealt with in subordinate legislation. In order to make subordinate legislation there must always be a specific statutory power which is called an “enabling power” and is in the “parent Act” (e.g. the Assembly Measure or Act of Senedd Cymru or Act of the UK Parliament which delegates the power to make the subordinate legislation).

- 1.6 Further information and advice about understanding subordinate legislation, and in particular statutory instruments, can be found in Chapter 3.

### **Audience and purpose for this guidance**

- 1.7 The primary audience for this guidance is Welsh Government policy officials tasked with preparing and delivering subordinate legislation to be made by the Welsh Ministers. The guidance will also be of interest to other Welsh Government officials who are involved in the process of preparing subordinate legislation, such as lawyers and those involved in managing and coordinating legislative activity. (It should also be helpful to those developing primary legislation, who may need to understand the different types of, and procedures for, subordinate legislation, as well as the timescales for implementing an Act through subordinate legislation.)
- 1.8 This guidance has been drafted to assist policy leads and other interested officials with the practicalities of developing subordinate legislation. It should be read in conjunction with the Welsh Government [Legislation Handbook on Assembly Bills](#) (soon to be published in an updated version as the Legislation Handbook on Senedd Bills). Where appropriate this guidance also signposts to other relevant Welsh Government guidance.<sup>1</sup>

### **Ministerial advice on subordinate legislation**

- 1.9 The powers being used to make subordinate legislation are those of the Welsh Ministers,<sup>2</sup> thus Ministers must be asked to make all the key decisions by a submission of written advice to Ministers.
- 1.10 This guidance highlights the key individuals/roles who should be involved in the drafting and agreeing of a submission, and provide examples of the decisions which require Ministers’ agreement.

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<sup>1</sup> Those Welsh Government officials working on subordinate legislation related to the UK’s exit from the EU should read this guidance in conjunction with the separate guidance available from the European Transition Team on that work.

<sup>2</sup> Or occasionally the powers of the First Minister or of the Counsel General, as the case may be.



- 1.11 Ministers should normally be given at least a week to consider advice, but consideration should be given to the detail they are being asked to approve, the length of the advice, etc. and whether this should be a longer period. It is advisable to liaise with the relevant Private Office on clearance times.
- 1.12 Further advice and guidance, along with templates for submissions, can be found on the Welsh Government intranet.

### **Prioritisation of business as usual subordinate legislation**

- 1.13 A system of prioritisation is used to manage all subordinate legislation within the wider context of legislative and policy priorities and resources. Policy officials need to discuss the prioritisation of any items of subordinate legislation with their Group Legislation Lead and Legal Services at an early stage so that their items of subordinate legislation are included within the planning system. Further advice can be sought from the Legislative Programme and Governance Unit (LPGU).

### **Keeping the Legislation Handbook up to date**

- 1.14 The Legislation Handbook will be reviewed periodically, and, where necessary, updated or corrected to reflect changes in procedure and practice as they occur. Whilst LPGU will endeavour to alert staff to relevant changes, the electronic version of the Legislation Handbook is the most up-to-date version.

### **Queries**

- 1.15 Any queries in relation to any aspect of this guidance should be directed to LPGU in the first instance:

Mailbox: [LegislativeProgrammeGovernanceUnit@gov.wales](mailto:LegislativeProgrammeGovernanceUnit@gov.wales)

Telephone number: **03000 257016**.

## CHAPTER 2 – WHO DOES WHAT IN THE LEGISLATIVE PROCESS

**This chapter provides information about who is involved in the process of preparing and making subordinate legislation and what they do. This is split into those within government and those outside of government, primarily in the Senedd.**

**It sets out the key players and explains their particular role in the process, as well as signposting to those who can provide advice to ensure that the process runs smoothly.**

### THE WELSH MINISTERS

#### Ministers and Deputy Ministers

- 2.1 Powers to make subordinate legislation under which Ministers and Deputy Ministers may act are delegated to the legal entity “the Welsh Ministers”.<sup>3</sup> In legal terms, this means that:
- a. any of the Welsh Ministers can exercise a power to make subordinate legislation; and
  - b. the Welsh Ministers are collectively responsible for the subordinate legislation that any of them makes (i.e. a challenge to that legislation is brought against the Welsh Ministers as a whole).
- 2.2 Politically and practically, Ministers are responsible for making subordinate legislation within their portfolio. They will decide on the policy and agree to legislate. They will also agree to the method and length of any consultation, approve final versions of all documents and make (by signing) statutory instruments, which is the point when the statutory instrument becomes law (though it may not come into force at this time).
- 2.3 Sometimes the lead for an item of subordinate legislation is a Deputy Minister rather than a Minister. In general, if advice is being put to a Deputy Minister then the Portfolio Minister must be a copy recipient. Decisions that will have a financial impact **must** also be made by the Minister with portfolio responsibility, as they have the budget responsibilities for the Deputy Minister’s policy portfolio. However it is the Deputy Minister who signs, and thus makes, the statutory instrument.

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<sup>3</sup> The term Minister(s) is used throughout the handbook to refer to both Ministers and Deputy Ministers. Where specific reference is made to either one, it will be made explicit in the guidance.

- 2.4 There are occasions when more than one portfolio Minister has an interest in an item of subordinate legislation, in particular where:
- c. Budget responsibility for one or more aspects of the subordinate legislation sits under a different Minister. In such cases the agreement of the Minister with financial responsibility should be sought to those cost implications falling to their area(s);
  - d. The policy aspects of the subordinate legislation are cross-cutting in nature. The Minister will have overall responsibility, but will wish to ensure that where the subordinate legislation affects the portfolio of other Ministers they are informed and involved in its development.

### **Counsel General**

- 2.5 The Counsel General is the Government's Law Officer; he is responsible for the provision of legal advice to the First Minister and the rest of the Government. The Counsel General's legal advice is the final and authoritative legal advice within the Government. The Counsel General may be asked to provide advice on specific legal issues relating to an item of subordinate legislation, for example where the development of an item of subordinate legislation is proposed but there is a question relating to the Minister's powers to make it and whether it falls within the scope of the "enabling power".
- 2.6 In certain circumstances the Counsel General's consent to specific matters related to the subordinate legislation must be sought. An example is the convention that where it is proposed that subordinate legislation has retrospective effect when it comes into force the Counsel General's consent must be obtained. Guidance on the convention, and advice on when the Counsel General's consent is required, can be provided by Legal Services.
- 2.7 Under section 1 of the Legislation (Wales) Act 2019 the Counsel General has a duty to keep the accessibility of Welsh law under review, this includes subordinate legislation. This requires a focus on the law as a collective, be that the law on a particular subject or the statute book as a whole. The Counsel General's obligation is also relevant when the Welsh Ministers are considering whether to propose new legislation, and in such situations regard should be had to how the approach taken to legislating could impact upon the accessibility of the law. For more information, see the Explanatory Notes to the 2019 Act.

## **WELSH GOVERNMENT OFFICIALS**

### **Policy officials' role**

- 2.8 Policy officials will be responsible for the development and implementation of the policy, and for ensuring that the policy intention is fully delivered by the subordinate legislation.
- 2.9 Policy officials will need to work with all stakeholders, both internal and external, in developing the policy. Early engagement with all the relevant teams within Welsh Government is critical to ensure subordinate legislation is prepared and delivered in a timely manner. Properly engaging with the right external stakeholders at the right time can be crucial to subordinate legislation which is received and implemented as is intended.
- 2.10 Policy officials are responsible for meeting the deadlines, and for ensuring that all work is cleared by Legal Services, relevant Deputy Directors, Operations Teams, and where necessary others, including Strategic Budgeting (see the Finance Notice 01/2019 for more details, available on the Welsh Government intranet).
- 2.11 Key responsibilities of policy officials include:
- Developing the full detail of the policy;
  - Assessing the intended and/or expected outcomes of the policy;
  - Seeking legal advice on proposals to develop subordinate legislation (having obtained consent from the relevant Deputy Director in the policy area);
  - Developing detailed instructions to lawyers;
  - Seeking the Minister's agreement to legislate on the policy intention;
  - Undertaking consultation with all relevant stakeholders, analysing responses, and if necessary seeking Ministerial agreement to amend policy;
  - Preparing the Explanatory Memorandum and, if required, a regulatory impact assessment (RIA);
  - Ensuring full consideration is given to the statutory framework under which the Welsh Government operates. This includes meeting duties to develop the policy in certain ways from the start, for example, in respect of the Well-being of Future Generations (Wales) Act, Welsh Language, UNCRC etc. (Please note there are other statutory requirements that may need to be considered – the Integrated Impact Assessment (see Chapter 4 below) can help you identify many of these, and policy officials can also seek advice from their lawyers).

## **Legal Services**

- 2.12 Lawyers are based within Legal Services and will provide advice on the existing law in the policy area, the scope of the powers of the Welsh Ministers and the legal implications for the policy options that may be under consideration. They are also responsible for drafting most statutory instruments, based on the instructions provided by policy officials. They should be involved at the earliest stages when policy officials are developing the policy so that they can help to find the best legal route for achieving the policy objective and can often save a lot of wasted work. It will also help them to understand the policy objectives so that when drafting the statutory instrument they can ensure that it meets the policy requirements.
- 2.13 Lawyers must also provide their clearance to all advice before this is submitted to the Minister.

## **Office of the Legislative Counsel**

- 2.14 The Office of the Legislative Counsel (OLC) is a team of specialist lawyers responsible for drafting Welsh Government Bills and some subordinate legislation. If it is intended to use a statutory instrument (SI) to amend primary legislation (an Act or Measure), OLC must clear the proposed amendments before the statutory instrument is approved by Ministers.
- 2.15 OLC may be instructed to draft SIs that do not amend primary legislation. This might be useful if the project involves complex or potentially contentious drafting challenges. The availability of SI drafting services from OLC is subject to available staff resources and the priority that needs to be given by OLC to Bills in the legislative programme and SIs that amend primary legislation. If you would like OLC to draft an SI, contact the OLC subordinate legislation team in the first instance. (In these cases the arrangements for translation and equivalence will still need to be discussed and agreed with LTU and LS.)

## **Legislative Codes Office**

- 2.16 This office is part of OLC and is responsible for delivering the Government's programme to improve the accessibility of Welsh law. In respect of subordinate legislation, this includes:
- a. arranging for the final statutory instrument to be signed (by the Minister);
  - b. registering and publishing Welsh Statutory Instruments with The National Archives (see Chapter 4 below, paragraphs 4.96 onwards for further details); and

- c. providing final copies of statutory instruments (and supporting documentation) to the Legislative Programme and Governance Unit (LPGU) for laying before the Senedd.
- 2.17 The Legislative Codes Office is also responsible for improving the way Welsh law is published and explained. This includes improving the [Cyfraith Cymru/Law Wales](#) website and will include updating existing legislation to incorporate amendments made by subsequent legislation and publishing legislation by reference to its subject matter.

## **Translation Service**

- 2.18 The work of the Translation Service falls into two categories: the General Translation Unit deals with the supporting documentation which does not constitute legislation, such as Explanatory Memoranda and technical reports. It also translates some text which is 'legislative in character' such as Directions and Guidance which have been drafted by policy officials. The Legislative Translation Unit (LTU) specialises in the translation of legislative text, such as statutory instruments and Bills. For further details on which Unit deals with which type of text see the information on the intranet.
- 2.19 Both units have limited resources. It is therefore imperative that those working on subordinate legislation engage with the Translation Service at the outset to discuss and agree the time required for translation and how best to plan for the project. Where the statutory instrument or other subordinate legislation introduces new terminology, early discussions with the Translation Service will allow preparatory terminological work to be carried out to ensure that the most appropriate wording is adopted from the outset.

## **Ministerial Private Offices**

- 2.20 Each Minister is supported by a secretariat, which acts as the main liaison between the Minister and the organisation. They deal with all correspondence to the Minister, arrange meetings with and for them and organise their appearances before Senedd committees. Private Offices are very busy and deal with a significant number of queries and calls from across the organisation. It is important policy teams know when the Minister (or Ministers if across portfolios) are available to consider papers. There are often several matters the Private Office will be asked to bring to the Minister's attention for 'urgent' consideration so speaking to the Private Office in advance will help in planning timelines and in understanding competing demands.

## **Special advisers**

- 2.21 Special advisers add a political dimension to the advice and assistance available to Ministers while reinforcing the political impartiality of the permanent Civil Service by distinguishing the source of political advice and support.
- 2.22 They are appointed by the First Minister to help Ministers on matters where the work of government and the work of the governing party overlap and where it would be inappropriate for permanent civil servants to become involved. They are an additional resource for the Minister, providing assistance from a standpoint that is more politically committed and politically aware than would be available to a Minister from the permanent Civil Service.
- 2.23 It is helpful for policy officials to engage with special advisers when preparing advice to Ministers in relation to subordinate legislation which could be of significant public or political interest.

## **Legislative Programme and Governance Unit**

- 2.24 Legislative Programme and Governance Unit (LPGU) provide advice and guidance on the Senedd's subordinate legislation procedures. They act as the main liaison with the Senedd on matters relating to subordinate legislation, and co-ordinate correspondence on legislation between the Welsh Government and the Senedd's committees.
- 2.25 LPGU are responsible for laying subordinate legislation before the Senedd, arranging Plenary slots for debates on subordinate legislation subject to the affirmative procedure, and for tabling motions and commissioning briefing from policy officials for affirmative and annulment motion debates (for more detail on Senedd procedures for subordinate legislation see paragraphs 3.15 onwards).
- 2.26 Officials should give LPGU the opportunity to comment on all Ministerial advice regarding subordinate legislation, and key supporting documents such as Explanatory Memoranda, prior to being submitted to the Minister. It is important that LPGU are engaged early on the drafting of advice to Ministers so that any points relating to Senedd processes, procedures and handling are reflected accurately, and to ensure consistency with the Welsh Government approach.

## **Constitution and Justice**

- 2.27 Constitution and Justice includes two teams of particular relevance to those working on subordinate legislation: the Constitutional Affairs and Parliamentary (UK) Legislation Team (CAPL) and the Justice Policy Team.

- 2.28 CAPL provide advice and support regarding constitutional issues, relating both to the Welsh devolution settlement and to wider UK constitutional developments. They also provide advice about the UK Government's legislative programme and other UK parliamentary legislation affecting Wales, including subordinate legislation to be made only by a UK Government Minister (a Minister of the Crown) or by Order in Council.
- 2.29 CAPL can advise policy officials when the Senedd's consent is required to such subordinate legislation and the appropriate steps to take. They will also assist in the development of a Statutory Instrument Consent Memorandum and they will prepare a Statutory Instrument Consent Motion (SICM) should one be required.
- 2.30 CAPL provide guidance on some other forms of UK Government subordinate legislation, such as Orders made under section 109 of the Government of Wales Act 2006, Regulatory Reform Orders, Legislative Reform Orders, Transfers of Function Orders, and Public Bodies Act Orders.
- 2.31 Further guidance about subordinate legislation made only by the UK Government which affects Wales is available from CAPL.
- 2.32 The Justice Policy Team works with other Welsh Government teams with justice responsibilities and external justice stakeholders, including the Ministry of Justice and Her Majesty's Courts and Tribunals Service, on the development and delivery of justice in Wales. When working on subordinate legislation, it will always be important to consider whether there could be an impact on the justice system. Guidance on assessing justice impacts can be found via the intranet and within the Integrated Impact Assessment. After policy officials have reviewed this guidance and discussed matters with their Legal Services team, they should either complete and submit to the Ministry of Justice a Justice System Impact Identification form or contact the Justice Policy team for further advice.

### **Welsh Treasury – Economists**

- 2.33 The Chief Economist's team in the Welsh Treasury advise on the need for a regulatory impact assessment (RIA – see Chapter 4 below, paragraphs 4.54 onwards for further information) and they have an important role in helping policy officials produce evidence in support of the impact, costs and benefits of legislation. It is essential that policy officials speak to them at an initial stage of policy development as they will advise on methods for obtaining the information needed.
- 2.34 The Chief Economist has overall responsibility for clearing RIAs.



## **Welsh Treasury - Strategic Budgeting**

- 2.35 The Strategic Budgeting Division leads the Government's budget process to allocate resources in line with the Government's priorities for the people, communities and businesses in Wales. Its focus is on improving the use of evidence and analysis to support strategic decision making. Strategic Budgeting must be engaged where the cost implications of subordinate legislation cannot be met within existing budgets, and may need to be involved in clearing Ministerial advice relating to it.

## **Group Finance Team**

- 2.36 The Group Finance Team will help policy officials to ascertain how to finance the policy, and how monies will be allocated from budgets. They also can advise policy officials about the need to engage with Strategic Budgeting. The Group Finance Team must clear all Ministerial advice with financial implications that exceed £50,000 (exclusive of VAT), before submission to the Minister. Those with financial implications below £50,000 (exclusive of VAT) do not require Group financial clearance where the approving Deputy Director is satisfied that the financial implications are fully afforded within their own existing budget delegations. Policy officials may also need to obtain clearances from other departmental Operations Teams and/or the Local Government Finance Team if the scope of the policy impacts on their responsibilities and budgets.

## **Group Legislation Leads**

- 2.37 Legislation Leads perform a co-ordinating role within policy Groups. Policy officials should seek advice from the Group's Legislation Lead about the support they can provide on the development and delivery of subordinate legislation.

## **Knowledge and Analytical Services**

- 2.38 Knowledge and Analytical Services (KAS) are an extremely important source of information when considering the evidence base for the subordinate legislation. KAS are able to provide expertise in areas such as statistics, social research, geographical technology and library services. Note also that analysts (who are economists, social researchers and statisticians) may also be embedded within Groups. KAS may be able to offer assistance with devising consultation questions to deliver answers that allow for straightforward analysis, analysing consultation responses, or commissioning specific data gathering exercises. KAS can also provide advice and support regarding post-implementation evaluation.

## European Transition Team

- 2.39 The European Transition Team leads on the delivery of the Welsh Government's work in relation to the UK's exit from the European Union (EU). Its primary aim is to protect and promote the interests of Wales during EU exit which involves providing guidance in respect of the legislative consequences of the UK's exit from the EU. Legal Services can provide advice and guidance where officials are dealing with transposition of an EU directive into domestic legislation.<sup>4</sup>

## Communications Directorate

- 2.40 The Communications Directorate leads the development and delivery of external communications for the Welsh Government. Of particular relevance is the Directorate's work covering web and digital communications, news, press and media relations, and communications planning, coordination, efficiency and effectiveness. Whilst in many instances subordinate legislation may attract little public or media attention, some may have significant impact on stakeholders, or attract public interest, and policy officials should engage with the Head of Communications and Marketing for the policy Group, who can provide advice, guidance and support on an appropriate communications approach. In many cases a consultation will also be needed as part of the process of developing subordinate legislation and policy officials should engage with the Design Team as part of preparing the consultation (as outlined in the consultation guidance available via the Welsh Government's intranet).

## OUTSIDE WELSH GOVERNMENT

### Other Administrations

- 2.41 There are occasions where the Welsh Ministers are required to make statutory instruments jointly with other UK administrations. There may also be occasions where the Welsh Ministers choose to exercise their powers 'compositely' with Ministers from other UK administrations (see Chapter 6 below for further details). It is expected that Welsh Government and other UK administrations will establish and maintain close working relationships when taking forward legislation in relation to Wales, in the context of the [Memorandum of Understanding between the UK Government and Devolved Administrations](#), and the UK Government's [Devolution Guidance Notes](#) for its civil servants.
- 2.42 Discussions on forthcoming legislation are conducted on a confidential basis and there will be tight deadlines. Lead officials should seek to

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<sup>4</sup> The UK left the EU in January 2020. At the time of issuing this guidance transposition of EU directives which fall within the scope of the withdrawal agreement remains a requirement during the transition period (which is currently due to end on 31 December 2020). This guidance will be updated in the future as needed.

agree timescales and deadlines as early as possible and make clear to colleagues the importance of meeting them.

- 2.43 CAPL need to be aware of proposals for subordinate legislation where the powers rest with a Minister of the Crown/Secretary of State (and not with the Welsh Ministers) and it is proposed (or agreed) that the UK Government will legislate on behalf of the Welsh Ministers.

## **The Senedd**

- 2.44 Some of the procedures by which the Senedd considers subordinate legislation are set out in its [Standing Orders](#).

### *Committees*

- 2.45 The Senedd's Legislation, Justice and Constitution Committee (LJC Committee) must consider all statutory instruments laid before the Senedd and report on whether the Senedd should pay special attention to the instrument or draft instrument. The grounds for this consideration are laid out in Standing Order 21. This Standing Order also allows LJC Committee to consider and report on any other subordinate legislation laid before the Senedd (other than that subject to Special Senedd Procedure – see Chapter 3 below, paragraph 3.47 onwards), or any legislative matter of a general nature within or relating to the competence of the Senedd or the Welsh Ministers.
- 2.46 In addition Standing Order 27.8A allows the Finance Committee to consider statutory instruments relating to devolved taxes.
- 2.47 Standing Order 27.8 enables other committees to consider some statutory instruments that fall within their remit (those subject to an affirmative procedure, or a provisional or made affirmative procedure – see Chapter 3 below). Should they wish to report on such a statutory instrument, they must notify the Welsh Government of their intention to do so no later than seven days after the statutory instrument has been laid before the Senedd. In addition, Standing Order 17.56 allows any committee to report to the Senedd on matters within its remit and has been used in the past to report on subordinate legislation.

### *Plenary*

- 2.48 As set out in Chapter 3 below the Senedd has a role in approving or annulling some items of subordinate legislation. This will happen in a Plenary session, where all Members of the Senedd may be present. Officials should be aware of the concerns Members may have regarding the legislation, or related topics, in order to identify any subjects which may arise.

## *Llywydd*

- 2.49 The Llywydd (or Presiding Officer) is the highest authority in the Senedd and chairs the meeting of all 60 Members of the Senedd in Plenary, remaining politically impartial at all times. The functions of the Llywydd are:
- to chair Plenary meetings;
  - to determine questions as to the interpretation or application of Standing Orders;
  - to represent the Senedd in exchanges with any other bodies, whether within or outside the United Kingdom, in relation to matters affecting the Senedd;
  - chairing the Senedd Commission; and
  - such other functions conferred by any enactment, by the Senedd or by its Standing Orders.

## *Senedd Commission*

- 2.50 The Senedd Commission is the corporate body for the Senedd. The Commission consists of the Llywydd and four other Members nominated by the main political parties. The staff of the Commission are employees of the Commission and are headed by the Chief Executive and Clerk of the Senedd.

## **Stakeholders**

- 2.51 Stakeholders typically include the people affected by the subordinate legislation, the people and organisations that will deliver the subordinate legislation, and the people and organisations with the most expertise in the subject concerned. Stakeholders represent a significant source of information, and frequently are the people who will experience the actual outcomes of the subordinate legislation; therefore their experience and evidence needs to be taken into account, alongside their influence on others. On consultation, see further Chapter 4, paragraphs 4.34-4.37; Chapter 5, paragraphs 5.14 – 5.17; and the Welsh Government guidance on consultation available on its intranet.

## CHAPTER 3 – UNDERSTANDING SUBORDINATE LEGISLATION

**This chapter sets out:**

- where the need for subordinate legislation can come from and how it is often used;
- the different types of subordinate legislation; and
- what different procedures may apply to subordinate legislation.

### **The need for subordinate legislation and how it is often used**

- 3.1 Primary legislation does not generally include the fine detail for many of the subsidiary and procedural matters necessary to give effect to a policy embodied in it. It would not be practical or practicable for every detail to always be included in primary legislation, which would then be considerably longer and would usually require further primary legislation to be passed to effect any changes.
- 3.2 As a result primary legislation may give powers to the Welsh Ministers (and on occasion other bodies) to make subordinate legislation which can set out the technical and detailed elements of the policy in order for it to be fully implemented.
- 3.3 Subordinate legislation is usually concerned with detailed changes to the law made under powers from an existing Act (or Measure). Subordinate legislation is used to change the law. Most often the need to change the law through subordinate legislation is to implement Welsh Government policy. This need can arise in a number of ways, for example as a result of:
- a duty under primary legislation;
  - a court judgment;
  - a manifesto commitment;
  - a Ministerial decision;
  - ongoing review as part of the policy development cycle;
  - consequential changes resulting from other Welsh Government policies;
  - practical operational problems identified by stakeholders;
  - European transition; or
  - changes to European law.<sup>5</sup>

### **General considerations**

- 3.4 It can therefore be used for a wide variety of purposes. These may range from relatively narrow and technical matters, such as the timings of a school day, to more significant matters, such as the establishment

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<sup>5</sup> See paragraph 2.39 and footnote 4 above.

of a new public body like Natural Resources Wales, or reorganising NHS bodies.

- 3.5 Using subordinate legislation to make detailed changes to the law allows laws to be enacted in a way that facilitates a proportionate amount of Senedd scrutiny on technical matters. This allows the Senedd to focus more of its scrutiny on matters of principle and significant policy changes, such as those set out in primary legislation.
- 3.6 Subordinate legislation can be flexible enough to deal quickly with changing circumstances. For example, although there are often long lead-in times to develop all kinds of legislation, once the scrutiny process is reached, subordinate legislation may be made and come into force in a matter of days or weeks, where a Bill's passage through the Senedd would usually take a number of months. Subordinate legislation may also be used in emergencies when very swift action is required, as a statutory instrument can, in an emergency, be drafted, enacted and brought into force in a matter of hours.
- 3.7 Subordinate legislation is made most often by Ministers but may also be made by other persons and bodies. Examples include:
  - Temporary Road Orders (e.g. to put a temporary speed limit on a certain stretch of road) made by civil servants under the authority of the Minister;
  - Rules made and issued by the President of the Welsh Language Tribunal;
  - The Code of Practice on the Human Transplantation (Wales) Act 2013 issued by the Human Tissue Authority.

## **TYPES OF SUBORDINATE LEGISLATION**

- 3.8 As discussed below, subordinate legislation can take many forms. The type and form of the subordinate legislation will normally be determined by the parent Act.
- 3.9 Lawyers within Legal Services will be able to check and advise policy officials on their assessment of the powers under which the Welsh Ministers can make subordinate legislation to give effect to policy requirements. They will also check and advise on the assessment by policy officials of what procedure the subordinate legislation should follow in order to be made. This is also normally set out in the Act or Measure giving the powers to make the subordinate legislation.
- 3.10 It is important to have an early discussion with Legal Services, the Legislative Programme and Governance Unit, the Legislative Codes Office and appropriate Group Legislation Leads when working on subordinate legislation. This will enable policy officials to plan appropriately and ensure the resources are in place to deliver the subordinate legislation in a timely manner. More information about

developing and planning subordinate legislation can be found in Chapters 4 and 5.

- 3.11 Much of the Welsh Government's subordinate legislation is made by **statutory instrument** (SI). The term derives from section 1 of the Statutory Instruments Act 1946 and applies to the exercise by a Minister of the Crown (or as may be the case the Welsh Ministers) of any power to make subordinate legislation where the power provides for exercise by statutory instrument. The principal significance of whether a piece of subordinate legislation takes the form of a statutory instrument or not is the application of the provisions in the 1946 Act for printing and publication (for more on the printing and publication of subordinate legislation see Chapter 4 below, at paragraphs 4.96-4.104).
- 3.12 Examples of the types of subordinate legislation are set out in Table 1 below.

**Table 1: Types of subordinate legislation**

Type	Description
Orders	Orders are usually SIs and tend to be made by Ministers. The Welsh Government's current drafting policy <sup>6</sup> is generally to provide for order-making powers only in respect of commencement of primary legislation.
Regulations	Regulations are usually SIs and tend to be made by Ministers. Regulation-making powers are often taken to set out the detail of systems established by primary legislation.
Statutory Guidance	This supplements the provisions of an Act or Measure by providing guidance as to how particular functions or powers are expected to be exercised. The weight to be applied to adherence to the guidance will depend on the provisions of the parent Act. An example is guidance issued by the Welsh Ministers under the Well-being of Future Generations (Wales) Act 2015 for all public bodies covered by the Act to help public bodies set well-being objectives, publish a well-being statement, review well-being objectives and report on progress.

<sup>6</sup> As set out in [Writing Laws for Wales: A guide to legislative drafting](#) (October 2019)

Type	Description
Codes of Practice	<p>Codes of Practice are documents setting out standards and practices expected of those subject to the parent Act. The weight to be applied to adherence to the code will depend on the provisions of the parent Act. For example, the Welsh Ministers issue codes of practice for the care of various types of animals under the Animal Welfare Act 2006. A breach of a provision of a code is not an offence in itself but, if proceedings are brought against a person for a welfare offence under the Act, the court may take into account the extent to which they have complied with the code in deciding whether they have committed an offence or have met the required standard of care.</p>
Directions	<p>A means by which (in the case of government) Ministers or senior officials from Welsh Government give legally binding instructions to a public body about the way it exercises its functions. An Act or Measure may confer a power on a Minister to give Directions so as to enable that Minister (or senior officials) to give instructions to a public body or group of public bodies which are not under the Minister's direct control.</p> <p>However, because they are generally of interest to a relatively limited group of public bodies, Directions are not generally made in the form of statutory instruments, but are instead published or notified to the affected bodies as the Minister sees fit and/or the parent Act requires.</p>
Rules	<p>Rules generally set out procedures, for example rules governing court procedures. Rules are usually made by Ministers or, if specified in the parent Act, a senior judge (for example some Tribunal Rules would be made by the President of the Tribunal) or other body (for example Social Care Wales may make rules regarding their registration processes, such as training requirements for prospective registrants).</p>
Schemes	<p>A means by which the Welsh Ministers (or others) can set out details of how a system will operate. For example section 73 of the Government of Wales Act 2006 requires the Welsh Ministers to make a scheme ("the local government scheme") setting out how they propose, in the exercise of their functions, to sustain and promote local government in Wales.</p>



Type	Description
Byelaws	Byelaws are laws of limited application (usually restricted to certain places) made by Local Authorities or certain other bodies (e.g. the National Trust) to control the activities of people in public spaces, such as in public parks.

- 3.13 The parent Act will specify the type of subordinate legislation that can be made under it. However, section 39 of the Legislation (Wales) Act 2019 provides a power to make subordinate legislation in different forms. It applies where the Welsh Ministers have a power to make subordinate legislation by statutory instrument, and the power specifies that the subordinate legislation is to be made in the form of regulations, rules or an order. Section 39 enables the subordinate legislation to be made in any of those forms, regardless of which is specified. For example, a power to make an order may be used to make regulations, or vice versa. The main purpose of section 39 is to facilitate the combination of provisions made under different powers in the same statutory instrument. See the Explanatory Notes to the 2019 Act for a fuller account.
- 3.14 Section 39 applies to any power or duty of the Welsh Ministers to make regulations, rules or an order by statutory instrument, regardless of how or when the power or duty was created. It applies to powers and duties under both devolved and UK legislation, and under legislation enacted both before and after the section came into force – although this is subject to some limits which lawyers in Legal Services and Office of the Legislative Counsel can explain further. Where section 39 of the 2019 Act is not available, it will only be possible to use a power to make the particular type of subordinate legislation specified in the parent Act.

## **PROCEDURES FOR MAKING STATUTORY INSTRUMENTS AND OTHER SUBORDINATE LEGISLATION**

- 3.15 The procedure to be used for making subordinate legislation is usually set out in the parent Act. Legal Services will confirm what procedure, if any, the subordinate legislation must follow.
- 3.16 The two most commonly used procedures are:
- Negative Procedure – for subordinate legislation that may be made and come into effect unless objected to by the Senedd, signified by the agreement to an annulment motion; and
  - Affirmative Procedure – where the Senedd must approve the proposed subordinate legislation before it becomes law.

- 3.17 Further details on both these procedures, as well as other procedures, are set out below. As the Senedd's Standing Orders for these procedures describe these mainly as procedures for statutory instruments (SIs), the rest of this section will describe the procedures for statutory instruments. However, it is important to be aware that any of these procedures can also apply to other subordinate legislation.
- 3.18 It is also worth noting that under section 40 of the Legislation (Wales) Act 2019 subordinate legislation subject to different Senedd procedures can be combined in a single statutory instrument that is subject only to the stricter of those procedures – see Chapter 6 for details.
- 3.19 Finally, it is also important to note that subordinate legislation cannot, except in extremely rare instances where the parent Act provides otherwise, be amended or adapted by the Senedd. The Senedd simply expresses its wish for the legislation to be annulled or passed into law, as the case may be.

### **Negative Procedure (subject to annulment)**

- 3.20 A statutory instrument subject to the negative procedure is made by the Welsh Ministers. The Minister first approves the final draft of the statutory instrument, signs it, and agrees to lay it before the Senedd. The statutory instrument will specify a point in time when it comes into force. The statutory instrument must then be laid before the Senedd.
- 3.21 The Senedd may vote to annul the statutory instrument within a set period. This means that any Member of the Senedd may table a motion seeking the Senedd's agreement to annul the legislation. The Senedd's Business Committee will then decide whether the motion will be debated. Should they agree, they will schedule a debate on the annulment motion in Plenary (usually during non-government time).
- 3.22 The motion to annul the statutory instrument requires a majority vote in order to be agreed by the Senedd. If the Senedd votes to annul the legislation, then, while any action already taken under the instrument is lawful, no further action can be taken. Under such circumstances, the government would be obliged to bring forward an instrument under section 5 of the Statutory Instruments Act 1946 to revoke it and effectively remove it from the statute book.

#### *Annulment period*

- 3.23 Standing Orders provide that an annulment motion must be debated and voted on within a 40 calendar day period. The 40 day period commences from the date of the statutory instrument being laid before the Senedd, and is sometimes referred to as the annulment period.

This means a statutory instrument could come into force but later be the subject of a successful annulment motion.

- 3.24 Standing Orders do not limit the right of the Welsh Ministers to make and lay subordinate legislation subject to the negative procedure while the Senedd is in recess; however, the annulment period does not include any days when the Senedd is in a recess of more than 4 days. For example, if the subordinate legislation is laid during the Senedd's summer recess, the annulment period begins on the first sitting day after laying (in September). See Table 2 later in this chapter for some worked examples illustrating this.
- 3.25 The assumption should be that an item of subordinate legislation is made and laid when the Senedd is sitting, unless there are good policy or practical reasons to do otherwise.

#### *21 day convention for statutory instruments*

- 3.26 By convention most statutory instruments subject to the negative procedure do not come into force until at least 21 days after they are laid. (This convention is commonly referred to as "the 21-day rule", even though it is not a rule as such.)
- 3.27 The purpose of the convention is to give sufficient notice to those affected by the instrument to allow them to prepare prior to it coming into force. It also allows scrutiny of the statutory instrument by the Legislation, Justice and Constitution Committee (LJC Committee) in line with Standing Orders (see Chapter 2 above, at paragraph 2.45, and Chapter 4 below, at paragraph 4.72 onwards, for more details of LJC Committee's role in scrutinising subordinate legislation).
- 3.28 The 21 days are calculated as 21 calendar days from the date of the statutory instrument being laid before the Senedd. The statutory instrument can then come into force on the 22nd day (counting the laying date as the first day). Statutory instruments can also come into force at a point later than the 22nd day. Unlike the annulment period, the 21 day period does include days when the Senedd is in recess, so there is the potential for a considerable period to elapse between coming into force and the end of the annulment period.
- 3.29 Statutory instruments may come into force before the end of the 21 day period, but the Statutory Instruments Act 1946 requires notification be given to the Presiding Officer (the Llywydd) drawing attention to the fact that a copy of it has not been laid before the Senedd at least 21 days before the statutory instrument comes into operation and explaining why. Cases of statutory instruments coming into force before the end of the 21-day period due to exceptional circumstances are rare.

- 3.30 If dealing with a statutory instrument which may need to come into force before the end of the 21 day period, please contact LPGU as soon as possible for detailed advice on the clearance and notification procedures which need to be followed.

*Practical examples*

- 3.31 Table 2 below sets out examples of timelines for the making, laying and coming into force of subordinate legislation and the dates of the 21 day and annulment periods, showing the impact of recesses on the annulment period. The table demonstrates that a statutory instrument could be made and laid before the summer recess, come into force during summer recess, but still be open to annulment until October. Officials need to be alert to the issues that can arise from the interplay between 21 day period, annulment period and recesses.

**Table 2: examples of dates for making, laying, coming into force and annulment periods for statutory instruments subject to the negative procedure**

<b>Made</b>	<b>Laid</b>	<b>First day for coming into force after 21 day period</b>	<b>Comes into force</b>	<b>Annulment period</b>	<b>Notes</b>
Thursday 7 May 2020	Monday 11 May 2020	Monday 1 June 2020	Wednesday 3 June 2020	Monday 11 May – Friday 26 June 2020	Annulment period includes half term recess: 25 May to 31 May 2020
Thursday 28 May 2020	Monday 1 June 2020	Monday 22 June 2020	Saturday 27 July 2020	Monday 1 June to Friday 10 July 2020	No recess dates affect annulment period
Wednesday 17 June 2020	Friday 19 June 2020	Friday 10 July 2020	Monday 22 June 2020	Friday 19 June – Tuesday 22 September 2020	Coming into force date before the end of the 21 day period due to exceptional circumstances, requiring the Llywydd to be notified and given an explanation of the reason why this is necessary  Annulment period straddles summer recess: 20 July – 13 September 2020
Wednesday 8 July 2020	Friday 10 July 2020	Friday 31 July 2020	Tuesday 4 August 2020	Friday 10 July – Tuesday 13 October 2020	Annulment period straddles summer recess: 20 July – 13 September 2020
Tuesday 11 August 2020	Friday 14 August 2020	Friday 4 September 2020	Tuesday 8 September 2020	Monday 14 September – Friday 23 October 2020	As SI is laid during summer recess (20 July – 13 September 2020) the annulment period commences at end of summer recess.

## **Affirmative Procedure (subject to approval of the Senedd)**

- 3.32 A statutory instrument subject to the affirmative procedure must be approved by the Senedd before it is made or brought into effect by the Welsh Ministers. The Minister first approves the final draft of the statutory instrument and agrees to lay it in draft before the Senedd. Only if it is agreed by a motion debated in Plenary can the Minister sign the statutory instrument in order to make it. The legislation can come into force at any specified point in time after it is agreed and made.
- 3.33 Standing Orders state that the motion may not be debated before whichever of the following two events is the sooner:
- The statutory instrument has been laid for 20 calendar days (not counting days in recess periods of more than 4 days), or
  - The LJC Committee, Finance Committee (for legislation related to devolved taxes) or any other Committee which has given notice, have considered and reported on the statutory instrument in advance of the debate in Plenary.
- 3.34 A majority of votes in favour is required for the statutory instrument to be approved (unless no Member objects to the motion, in which case the motion will be deemed to be agreed under Standing Order 12.36). If a majority of Members vote against the motion, the legislation is not approved and cannot be made. Should the vote be tied, the Llywydd is required by Standing Order 6.20 to vote in the negative, following the principle that where no further discussion of a matter is possible, decisions should not be taken without majority support; and the statutory instrument will not be approved.

## **Other procedures**

- 3.35 The affirmative and negative procedures set out above are the most common that are applied to statutory instruments. However there can be variations on these procedures, or other procedures, set out in the parent Act. The following section sets out some that may be encountered. Lawyers in Legal Services should be able to explain the precise requirements to make the statutory instruments in individual cases.

## **Laying only**

- 3.36 This procedure applies when the parent Act does not set out a Senedd or Parliamentary scrutiny process, but only the requirement for laying. Consequently there is no formal scrutiny process in the Senedd, and the legislation is simply made by the Minister and then laid before the Senedd. However LJC Committee may choose to consider and report on it, if they deem it is sufficiently legislative in character to merit their attention.

## **No Procedure**

- 3.37 In this case the parent Act does not apply any procedure or requirement to be laid before the Senedd to the statutory instrument. It is simply made or agreed by the Minister, and comes into force after being made.
- 3.38 Examples of statutory instruments subject to no procedure include:
- a commencement order, which brings an Act or specified provision of an Act into force on a specified date;
  - an appointed day order – which brings subordinate legislation or a group of subordinate legislation into force on a specified date.
- 3.39 Examples of other subordinate legislation not made by way of statutory instrument (informally referred to as “non-SI sub leg”) and subject to no procedure include:
- some codes of practice; and
  - directions.
- 3.40 The LJC Committee may consider and report on the exercise of commencement powers under Standing Order 21.7(iv). Officials should therefore inform LPGU of any such proposed legislation being made, as LPGU bring commencement orders to the attention of the LJC Committee for their information, as a courtesy.
- 3.41 In respect of subordinate legislation not made by way of statutory instrument the Legislative Codes Office also provide an internal registration number prior to publication.

## **Draft negative procedure**

- 3.42 This procedure is similar to the negative procedure, in that the Senedd can resolve not to approve the statutory instrument. However it is not made before it is laid, thus it is considered to be laid in draft. The statutory instrument cannot be formally published or brought into force, in the form of the draft laid, until the annulment period has been successfully completed. The exact requirements of the parent Act can vary; for example in some cases a separate no procedure order has to be made to bring the statutory instrument into force.

## **“Super” or “Enhanced” negative or affirmative procedure**

- 3.43 Some statutory instruments are sometimes described as being subject to the “super” or “enhanced” negative or affirmative procedure. There is no set definition of these procedures, but they are generally characterised by a power for the Senedd to either annul or approve the statutory instrument, combined with procedural requirements set out in

the parent Act which are above and beyond the normal affirmative or negative process. Examples include:

- A duty to consult on a draft of the statutory instrument, either generally or with specified bodies or individuals, before it can be laid before and considered by the Senedd;
- A requirement for the statutory instrument to be laid before the Senedd for a longer period than under the normal procedure, e.g. sixty days, and for any representations received within that period to be considered;
- A duty to lay a statement of changes made to draft legislation following consultation or receipt of representations during an extended laying period;
- The procedure set out in section 19 of the Public Bodies Act 2011, which amongst other things allows the Senedd to resolve to extend the period draft Orders under sections 13 and 14 to that Act must be laid before they can be approved.

3.44 Where the parent Act specifies timings for the Senedd's consideration of legislation, the Standing Orders setting out timescales for committee consideration and reporting do not apply. Instead, Business Committee may establish a timetable for consideration and reporting that fits the timings set out for the specific statutory instrument.

### **“Provisional affirmative” or “made affirmative” procedure**

3.45 Under this procedure, the statutory instrument may come into force on the day it is made by the Minister. However, unless the Senedd agrees a motion to approve the statutory instrument within the timeframe specified in the parent Act, the instrument will cease to have effect.

3.46 Examples can be found in the Land Transaction Tax and Avoidance of Devolved Taxes (Wales) Act 2017 and the Landfill Disposals Tax (Wales) Act 2017, where the Welsh Ministers may make regulations setting rates and bands for these taxes with immediate effect. The Senedd must approve the regulations within 28 days<sup>(7)</sup> of their being laid. In the case of the tax Acts above, should the regulations not be approved, there is provision for the treatment of any taxes paid during the period the new rates and bands were in force.

### **Special Senedd Procedure**

3.47 Certain powers exercisable by the Welsh Ministers (or, in exceptional cases, by the First Minister or the Counsel General) to make or confirm subordinate legislation have to comply with the Special Senedd Procedure. This subordinate legislation is referred to as a Special Procedure Order. The Special Senedd Procedure itself is set out in

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<sup>7</sup> Disregarding any period during which the Senedd is dissolved or in recess for more than 4 days.



Standing Order 28. The power to make Special Procedure Orders regarding devolved powers is delegated by the Senedd or UK Parliament to the Welsh Ministers or a body such as a local authority. If the power to make a Special Procedure Order has been delegated to a local authority or other similar body it can only become law if confirmed by Ministers.

- 3.48 Special Procedure Orders are normally specific to a certain area of land and they can only become law after the public who could be affected by the decision have been given the opportunity to petition the Llywydd against them under the Special Senedd Procedure.
- 3.49 Lawyers and LPGU will advise policy officials if the subordinate legislation is subject to the Special Senedd Procedure. Special Procedure Orders are rare – an example is the London To Fishguard Trunk Road (A40) (Penblewin to Slebech Park Improvement) Order 2008.
- 3.50 Further information can be found on the Senedd's website about [Special Senedd Procedure](#).

## CHAPTER 4 – DELIVERY OF SUBORDINATE LEGISLATION

**This chapter provides guidance on the stages for making subordinate legislation and how to plan for preparation and delivery. It includes information about how subordinate legislation progresses through the different procedures under Standing Orders and what action is required at key points.**

### Key stages in making subordinate legislation

- 4.1 The key steps in making subordinate legislation are similar, whatever procedure it is made under. Although presented in a linear form below, some of the key steps can be conducted in parallel or in another order:
- Developing policy;
  - Instructing Legal Services or Office of the Legislative Counsel;
  - Consultation;
  - Drafting the subordinate legislation;
  - Drafting and agreeing supporting documentation;
  - Making the final subordinate legislation;
  - Senedd scrutiny; and
  - Printing and publication.
- 4.2 Ministerial approval is needed for each of these stages, although sometimes approval may be sought for several stages at the same time. Further detail on the supporting documentation referenced above can be found below at paragraphs 4.49 onwards.
- 4.3 Note: Policy officials are responsible for the drafting for some types of non-SI subordinate legislation, such as a Code of Practice, sometimes referred to as “soft law”. In such circumstances the steps of instructing Legal Services and their drafting legislation do not apply. However, the aims, concepts and processes of developing the subordinate legislation set out below are still relevant.

### DEVELOPING POLICY

- 4.4 Paragraph 3.3 above in Chapter 3 sets out a number of the different ways in which the need for subordinate legislation can be identified. Once the policy or change in policy is identified, policy officials must engage with colleagues in Legal Services to identify which existing powers can facilitate the policy change and the best legislative vehicle to take this forward. This could result in the need to make subordinate legislation.
- 4.5 Further guidance on developing policy may be found on the Welsh Government’s intranet. In addition Chapter 7 of the [Legislation](#)

[Handbook on Assembly Bills](#), in the section on ‘policy development and consultation’ at paragraphs 7.10-7.21, refers to the development of policy for Senedd Bills. However, the same principles also apply to the development of policy leading up to subordinate legislation.

- 4.6 Ensuring there is a solid evidence base should be an integral part of the policy making process. Work on the regulatory impact assessment and other impact assessments (see paragraphs 4.54-4.59 below) should begin at the start of the policy making process and be kept under review throughout the process.

### **Making Good Decisions**

- 4.7 Making good law is based on making good decisions. Welsh Ministers’ powers are not unlimited and they must act within the law. When deciding whether they have done so the courts will apply principles of administrative law. For example Welsh Ministers must act fairly, proportionately, in good faith, and use their powers appropriately and for the purpose they were intended. They must also use their powers in a way that is compatible with human rights (e.g. rights to privacy, and peaceful enjoyment of property); and with EU law (e.g. the Services Directive). If they do not, then the subordinate legislation made under these powers may be challenged by judicial review in the courts and could be quashed. If this happens the Welsh Government could have to pay legal costs and damages, and face reputational damage.
- 4.8 The Welsh Government has published guidance to assist public authorities in Wales in [making good decisions](#) (including on legislation) that are lawful and comply with the Rule of Law principles.

### **Accessible law**

- 4.9 Each law-making project, including each piece of subordinate legislation, is part of the Government’s responsibility to uphold and maintain the rule of law. Building and maintaining an effective system of law to safeguard freedoms and rights and promote social, economic and environmental well-being is a key role of government. Each piece of subordinate legislation will form a small part of the wider system of law within existing statutory frameworks. It will need to work well for those who will use it within that context.
- 4.10 The aim is to produce law which is accessible: that is, law which is clear and certain in its effect, as well as being easily available and navigable. This needs to be the case not only in respect of individual Acts and subordinate legislation, but also collectively – all of the law on a particular subject and the statute book as a whole.

## *Equal status of Welsh and English texts*

- 4.11 Section 5 of the Legislation (Wales) Act 2019 provides that where a Welsh subordinate instrument is enacted in both Welsh and English, the two language texts have equal status for all purposes. This means the full expression of the law is that contained in both texts, not merely one. The practice of legislating bilingually for Wales is well established. Subordinate legislation made by the Welsh Ministers is, almost without exception, made in both languages.<sup>8</sup> Further information on section 5 can be found in the Explanatory Notes to the 2019 Act.

## **Instructing Legal Services<sup>9</sup>**

- 4.12 When policy officials want lawyers to draft an SI, there should always be an initial meeting between LS and policy officials before instructions are sent to inform the instructing process.
- 4.13 In order to start work on an SI, LS will need:
- a. Ministerial consent to drafting;
  - b. A draft timetable; and
  - c. Instructions.
- 4.14 Instructions should use straightforward, clear language and consistent terminology which is as free from jargon as the substance allows.
- 4.15 Instructions will differ, depending on the context, but they should cover the following points in a logical way. Detail may be presented in annexes or tables if that seems to help clarity.
- 4.16 The following is general guidance intended to be a starting-point to help policy officials structure and draft instructions to LS on drafting an SI, and can form the basis for the initial meeting. It is also worthwhile considering the points set out in Chapter 5, which will inform planning of an SI more generally.

## *Introduction*

- 4.17 Instructions should give a general overview of what the SI is intended to achieve and why. An example might be: *“We want to amend the Building Regulations 2010 to require all new buildings in Wales and those subject to major renovation, to be equipped with physical infrastructure to a point where connection can be made to high speed electronic communications networks. We want this to implement Article*

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<sup>8</sup> For statutory instruments laid before the Senedd, a failure to produce an instrument in both languages is a ground for drawing it to the attention of the Senedd, see Standing Order 21.2(ix).

<sup>9</sup> As noted previously, occasionally lawyers within the Office of the Legislative Counsel will prepare certain subordinate legislation – the guidance on instructing set out here is also relevant to instructing Legislative Counsel.

*8 of Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks."*

*Explain the problem – what is the SI trying to change?*

- 4.18 Which existing law needs to be amended or revoked to achieve the objective? Explain what it is about the current law or any state of affairs that prevents the achievement of the objective or with which any new system needs to fit. (The instructions will not generally need to set out a detailed description of the law unless in the context this is necessary - e.g. this might be needed if there is uncertainty or dispute about the effect of existing legislation or case law.)

*Detailed proposals – what is the government wanting to achieve?*

- 4.19 Describe the desired end state of affairs, including things like:
- a. The **purpose** of the proposed legislation – i.e. what is it intended to achieve;
  - b. **Who** the SI will require to do something or not to do something;
  - c. **What** exactly is it that person has to do or not to do;
  - d. **How** is that person to do that thing;
  - e. **When** are they to do it or not to do it;
  - f. **What happens if** the person does not do it (or does it where they are required not to);
  - g. Any **exceptions** to the general policy;
  - h. The nature of any **appeal or review**.
- 4.20 Examples are often useful to explain what is wanted.
- 4.21 State if the policy has been framed by reference to that achieved by legislation for another territory, e.g. England or Scotland. If it has, set out any differences in the objective for Wales. Note that LS does not find it helpful to be instructed by being provided with draft wording or provisions. This is because LS need to understand what the problem is and how policy officials plan to remedy it. If policy officials suggest drafting it just tells LS what they want to see on the paper – which will not necessarily solve the problem. Instructions in this form will slow things down because LS will need to deconstruct the suggested wording to establish the desired policy effect.

*Legal powers*

- 4.22 Cite the powers which policy officials think the government will rely on to make the SI.
- 4.23 Explain any queries policy officials have as to whether those powers can cover what is wanted.

### *Technical necessities*

- 4.24 State if the government has complied with any pre-conditions to the exercise of a power, e.g. consultation.
- 4.25 Is any provision needed to move smoothly from the current state of affairs to the new one created by the SI? Do any provisions need to be saved?
- 4.26 When would the government intend the provisions to come into effect – how long do those affected need to get ready for it to come into force?
- 4.27 Have the human rights implications of the policy been considered?
- 4.28 Is the SI implementing any EU obligation? If so officials will need to be satisfied which of the following situations apply:
  - a. There is an existing power conferred by an Act of the UK Parliament or Act of Senedd Cymru on the Welsh Ministers that is sufficiently broad enough to implement the obligation;
  - b. The Welsh Ministers are relying on an existing designation order made under section 2(2) of the European Communities Act 1972 as saved by section 1A of the European Union (Withdrawal) Act 2018; or
  - c. Section 58B of GOWA 2006 applies. This gives the Welsh Ministers an automatic right to implement EU law under section 2(2) of the European Communities Act 1972 (as saved) on matters that are within the Senedd's legislative competence in certain circumstances.
- 4.29 Does the proposal fall under the Technical Standards Directive or the Services Directive? (See below, Chapter 6.)

### *Supporting material*

- 4.30 Include links to any background material relevant to the proposals e. g.:
  - a. internal papers (e.g. previous legal advice);
  - b. white papers, green papers and other consultation documents;
  - c. related or relevant legislative proposals such as subordinate legislation produced in other jurisdictions;
  - d. reports by public bodies (e.g. the Law Commission).
- 4.31 Further advice on how to prepare instructions can be sought from Legal Services, as well as examples of previous instructions. And, in addition to the checklist above, [\*Common Legislative Solutions: a guide to tackling recurring policy issues in legislation\*](#) identifies issues that may need to be addressed when working up and instructing on a proposed solution to some particular policy problems.

- 4.32 The information contained in the instructions will also be helpful in informing the content of the consultation document and the Explanatory Memorandum (see below). Whether to consult first, or produce the instructions initially, is a matter for policy officials to decide. However, both instructions and the consultation paper should provide all the information in the bullet points above. Setting out this information at an early stage should save policy officials time and effort by acting as an initial template.
- 4.33 Further instructions may also be required after consultation if the responses to the consultation have required the policy to be revised (see paragraphs 4.38-4.40 below).

### **Consultation and involvement**

- 4.34 The development of subordinate legislation should be founded on appropriate engagement and consultation with stakeholders, based on the best available evidence. The stakeholders should typically include the people the policy is expected to benefit and affect, the people and organisations that will deliver the policy, and the people and organisations with the most expertise in the subject concerned. It is important for policy officials to ensure that involvement is with stakeholders that reflect the diversity of the population.
- 4.35 The Welsh Government has produced guidance on consultations which can be found on the intranet, and the Welsh Ministers' [Regulatory Impact Assessment Code](#) sets out the Welsh Government's commitments to consult in respect of subordinate legislation and what that consultation should involve.
- 4.36 There are decisions to be made on when to consult. It might be appropriate to consult on the policy intention to be delivered by the subordinate legislation, prior to finalising instructions and drafting the legislation. In some circumstances it may be preferable to consult on a draft of the subordinate legislation instead of, or indeed in addition to, a policy consultation.
- 4.37 Written advice must be submitted to the Minister seeking agreement to the type of consultation, and to the length and method(s) of consultation – the how, when and where. The Minister will also need to agree the final consultation approach and materials before publication. Officials should refer to the consultation guidance when preparing advice on this as it outlines what factors may need to be considered.

### **After consultation**

- 4.38 Following consultation, policy officials will need to analyse the responses and input received, produce a summary report highlighting any resulting changes to the policy (if applicable) and set out how the

Government will respond to the consultation, including what the next steps will be. This should be published within 12 weeks of the closure of the consultation or (where this is not possible) an update should be provided to set out when this will happen. Written advice should be submitted to the Minister outlining the consultation responses and seeking agreement to publish the summary of responses, and the responses themselves where practical. Again, please refer to the consultation guidance highlighted earlier.

- 4.39 If the responses to the consultation indicate that changes to the policy or draft legislation are required as a result, the Minister should also be asked to agree these changes by way of a submission of advice.
- 4.40 Once the changes are agreed, supplementary instructions should be issued to Legal Services. These should clearly explain the changes required to the instructions previously submitted for the draft legislation, and the reasons for the changes.

## **DRAFTING SUBORDINATE LEGISLATION**

### **Statutory instruments (SIs)**

- 4.41 Legal Services (or OLC where appropriate) produce drafts of statutory instruments (SIs). When this takes place in the process will depend on the timetable for developing the SI (see Chapter 5 below). LS will also produce a draft of the Explanatory Notes which will accompany an SI.
- 4.42 Policy officials will be expected to consider and comment on these drafts, which should be studied carefully to check they do precisely what is wanted. If there is any doubt about whether the draft achieves the policy these doubts should be raised with the drafting lawyer. Conversely Legal Services may require clarification of points within the instructions, or that are identified during the drafting process. Officials should respond to any queries promptly, in order to ensure there is no slippage against the timetable. Working practices vary: discussions may be undertaken in correspondence with the drafting lawyer and/or in meetings.
- 4.43 Where issues arise which require a decision on substantive changes in policy, these should be agreed by Ministers by means of a written submission of advice.
- 4.44 SIs made by the Welsh Ministers are normally produced bilingually, and as set out above section 5 of the Legislation (Wales) Act provides that where the SI is enacted in both Welsh and English, the two language texts have equal status for all purposes.



- 4.45 SIs can be prepared first in either language. Where they are prepared first in English they are translated by LTU. In all cases, both texts are checked for legal equivalence within Legal Services.<sup>10</sup>
- 4.46 The Senedd's Standing Order 15.4 requires SIs to be laid in English and Welsh, so far as is appropriate in the circumstances and reasonably practicable. The working assumption should always be that the SI will be made bilingually. If policy officials anticipate that it may not be appropriate or practicable to prepare the subordinate legislation bilingually this should be discussed in the first instance with LPGU. The approach will also require the agreement of Ministers. (See also Chapter 6 below on joint and composite subordinate legislation, at paragraphs 6.2 – 6.18.)

### **Other subordinate legislation**

- 4.47 Once a need is identified and confirmed by Legal Services, policy officials are responsible for the drafting of most other types of non-SI subordinate legislation. Legal Services will need to be engaged throughout the drafting process to ensure the content of the subordinate legislation is accurate and within the powers of the Welsh Ministers.
- 4.48 Information on the types of written information the Welsh Government is always required to provide in Welsh is available on the intranet. If the document is not included in that list policy officials should contact their Bilingual Service Co-ordinator or email the Safonau Standards mailbox for advice.

### **DRAFTING SUPPORTING DOCUMENTATION**

- 4.49 A number of other documents may be required to be produced to support subordinate legislation.

### **Explanatory Memorandum**

- 4.50 An Explanatory Memorandum (EM) is a document which sets out the purpose for making the legislation, the intended effect of the legislation, the legal powers the Welsh Ministers have to make it, and the results and outcomes of any consultation.
- 4.51 Standing Order 27.1 requires any SI or draft SI laid before the Senedd to be accompanied by an EM. Standing Order 27.14 requires an EM to accompany any other subordinate legislation in the form of a report, guidance, code of practice or other document that is required by any enactment to be laid before the Senedd and is subject to a Senedd

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<sup>10</sup> If OLC draft the SI, the equivalence check of all or part of the SI will usually be undertaken by OLC.

procedure having the same or similar effect to the affirmative or negative procedure. If unsure whether the subordinate legislation requires an EM, please contact LPGU for advice.

- 4.52 The Welsh Government has an agreed template for such EMs, which is available from LPGU. Further details and guidance on this can be found in Part 1 of the template.
- 4.53 Policy officials lead on the drafting of the EM, with support from Legal Services. LPGU and your appropriate Group Legislation Leads may also be able to provide advice on the approach and content.

### **Regulatory Impact Assessment**

- 4.54 Any EM required by Standing Order 27 must include any regulatory impact assessment (RIA) which has been carried out in relation to the subordinate legislation. In this context an RIA is “*an assessment as to the likely costs and benefits of complying with relevant Welsh subordinate legislation*” (see section 76(2)(a) of the Government of Wales Act 2006).
- 4.55 Standing Orders do not set out any requirements regarding the content of an RIA. The Welsh Ministers’ policy, as set out in the [Regulatory Impact Assessment Code for Subordinate Legislation](#), is to carry out an RIA except in the following circumstances:
- Where the subordinate legislation does not meet the section 76 criteria, i.e. that it is not made by statutory instrument or required to be laid before the Senedd;
  - Where the subordinate legislation simply increases a statutory fee by a predetermined formula (for example, the rate of inflation);
  - Where routine technical amendments or factual amendments are required to update regulations etc. that have no major policy impact.
  - For commencement orders bringing into force primary legislation, including such orders also making consequential or savings provisions, etc.;
  - Where the relevant Welsh subordinate legislation is subject to an additional UK Parliament procedure. In those instances, a joint view with the relevant UK Government Department should be taken as to whether a regulatory impact assessment is required;

- Where the relevant Welsh subordinate legislation needs to be put in place quickly to deal with an emergency (previous examples include for Foot and Mouth or Avian Flu);
- Where relevant Welsh subordinate legislation is made in the exercise of statutory powers granted by an Act or Measure which do not in any way give the Welsh Ministers discretion as to how those powers should be exercised.

4.56 Policy officials are responsible for preparing RIAs. Further advice on the preparation of RIAs is available in the [Legislation Handbook on Assembly Bills](#). While the focus of that guidance is primary legislation, the general approach to option appraisal and cost-benefit is the same for both primary and subordinate legislation. The economists in Welsh Treasury are also able to advise on the preparation of RIAs. An assessment of costs and benefits, or ideally a draft RIA, should normally be published alongside any consultation exercise to provide stakeholders with an opportunity to consider and inform the analysis.

4.57 The Welsh Government also has an agreed template for RIAs for subordinate legislation. Further details and guidance on this can be found in Part 2 of the template for an Explanatory Memorandum for subordinate legislation.

### **Other impact assessments**

4.58 An essential part of building a comprehensive and balanced case for subordinate legislation is appraising the impact it is likely to have – both positive and negative, on all possible stakeholders, including individuals, businesses, public bodies, the voluntary sector and the justice system. In addition, some impact assessments are mandatory for all Welsh Government policies. The Integrated Impact Assessment form sets out which impact assessments are always required and which may be required – the form and further guidance can be obtained through the intranet.

4.59 The Senedd's Standing Orders do not require such impact assessments to be included in EMs for subordinate legislation, however it is good practice for policy officials to summarise any key findings in the EM. The publication requirements for each assessment vary and should be established from the relevant guidance. Where an assessment is published electronically, policy officials may wish to include a link to it from a summary of key findings in an EM.

### **Bilingual versions of supporting documents**

4.60 Information on the types of written information the Welsh Government is required to always provide in Welsh is available through the intranet. If a supporting document is not included in that list policy officials

should contact their Bilingual Service Co-ordinator or email the Safonau Standards mailbox for advice.

## **MAKING OR AGREEING THE FINAL SUBORDINATE LEGISLATION**

### **Statutory instruments**

- 4.61 Following agreement of a final version of the SI in both languages<sup>11</sup> with policy officials, lawyers will provide this to the Legislative Codes Office.
- 4.62 Policy officials will need to draft a submission of Ministerial Advice seeking final Ministerial approval of the SI and EM. If the SI is subject to the negative procedure, or only has to be laid before the Senedd, the written submission of advice must ask the Minister to:
- a. approve and sign the final SI (referred to as “making” it) and lay it before the Senedd; and
  - b. approve the EM and agree to it being laid.

The Legislative Codes Office will co-ordinate the provision of any written Ministerial advice and the SI for the Minister’s signature. Once agreed, and the Legislative Codes Office have registered the SI (see paragraph 4.96 below), LPGU will lay both the SI and EM before the Senedd. At the point the SI is made and published, it has become law.

- 4.63 If the SI is subject to the affirmative procedure the advice must ask the Minister to approve the draft SI and EM and agree that they are laid before the Senedd for approval in Plenary on an agreed date.
- 4.64 Once the Minister has agreed the advice:
- a. the Legislative Codes Office will provide the documents to LPGU who will lay them in draft before the Senedd;
  - b. once laid, the policy team will prepare briefing for the debate – see paragraphs 4.87 – 4.88 below.
- 4.65 If the draft SI is approved in Plenary, it then must be made. A further minute of advice from policy officials is submitted to the Minister providing for their signature. The Legislative Codes Office will co-ordinate the provision of the SI, and arrange its registration once it is made.
- 4.66 If the SI is only required to be laid before the Senedd, the process is similar to that for the negative procedure. An EM will need to be laid alongside the SI.

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<sup>11</sup> Unless the SI is being laid in one language only (see paragraph 4.46 above).

- 4.67 If the SI is not subject to any procedure, the process is again similar to that for the negative procedure (although the SI does not have an EM and the SI is not laid before the Senedd). If the SI is a ‘no procedure commencement order’, LPGU will inform the Legislation, Justice and Constitution Committee (LJC Committee) so they are aware when provisions of primary legislation are coming into force (see paragraph 3.40 above).

### **Other subordinate legislation**

- 4.68 For other kinds of subordinate legislation the process is similar, however the Minister does not normally “make” the legislation. The written submission of advice asks the Minister to approve and issue the document, and EM if required, and to agree that LPGU lay the document or agree to its publication and distribution.
- 4.69 If the subordinate legislation has to be laid before the Senedd **and** has a Senedd procedure attached, then LPGU are responsible for laying it and the EM. If it only has to be laid, the Government Plenary Business team (part of Cabinet, Plenary and Committee Secretariat in Cabinet Division) are responsible for laying it.
- 4.70 The Legislative Codes Office are not normally involved with such subordinate legislation. Therefore, policy officials are responsible for ensuring that it is agreed and provided to LPGU or the Government Plenary Business team for laying, or published by the relevant Group, according to the agreed timetable.

### **SENEDD SCRUTINY**

- 4.71 The level of Senedd scrutiny of an item of subordinate legislation depends on the procedure that applies to it, and its nature and content.

### **Legislation, Justice and Constitution Committee (LJC Committee)**

- 4.72 As noted previously, LJC Committee are required to report on all SIs laid before the Senedd and may decide to report on other items of subordinate legislation. The reports set out whether the Senedd should pay special attention to the item on a number of grounds (sometimes referred to as “reporting points”). These are set out in Standing Orders 21.1 and 21.2 and fall into two categories:
- Technical: for example defective drafting, legislation not being made in English and Welsh, legislation which has retrospective effect;
  - Merits: for example, if it is of political or legal importance, or if LJC Committee believe it inappropriately implements EU legislation.

- 4.73 LJC Committee consider the legislation and the EM, including the RIA where provided. The usual process is for Senedd Commission officials supporting LJC Committee to either confirm there is nothing to report on (a “clear report”) or to provide a draft of the report to be considered by the Members of LJC Committee in public session. This is sent to the drafting lawyers and LPGU.
- 4.74 LPGU will commission a draft response from policy officials, which should be drafted promptly and cleared by Legal Services. LPGU will submit this to the responsible Minister to be cleared and arrange for translation of the response. Once cleared by the Minister, LPGU communicate the response to the Committee.
- 4.75 The aim is to provide the response so that it can be considered by LJC Committee alongside the draft report. As a consequence, officials should ensure arrangements are in place to prepare a response, as the timelines for its drafting, clearing and translating can be very tight, given LJC Committee has 20 calendar days within which to report. LPGU will set out the deadlines when they commission the response.
- 4.76 LJC Committee consider the draft report on every item of legislation during one of its weekly meetings, whether that report is clear or contains reporting points. Members may just note the report or they may discuss any particular matters of concern. They then agree the reports, which are laid before the Senedd, and any other actions they wish to take, such as raising further matters in light of the Government’s response.

### **Other Committees**

- 4.77 The other Committees who may consider subordinate legislation are not under the same obligations to report on specific matters. During their consideration the committee(s) may choose to seek further information, either informally or through formal correspondence with the Minister responsible for the statutory instrument or subordinate legislation. LPGU will liaise with the Committee(s) and commission a response from policy officials. The Committees are however subject to the same 20 day reporting deadline as LJC Committee, so again responses to requests, letters or draft reports must be turned around promptly.
- 4.78 In some circumstances a Committee may wish to invite the Minister to attend the Committee to discuss the item, in which event LPGU would provide further advice, liaise with the Committee and Private Office on the arrangements and commission briefing for the appearance. Given the reporting deadlines an appearance may be required at short notice. It may be helpful to identify whether the item of subordinate legislation may give rise to the possibility of a Committee appearance, and to agree a handling approach with the Minister in advance. This may

involve providing the Committee with advanced warning of the legislation's intended laying date, thereby allowing a longer time to make arrangements. An example of subordinate legislation that may require a Committee appearance would be a key set of regulations to implement a new Act, and which provide details that were of significant interest during the Bill's scrutiny.

### **General interest from Committees**

- 4.79 More generally, Committees may take an interest in the development of specific items of subordinate legislation, for example if a Minister issues a consultation on a draft Code of Practice, and they could seek to engage with the Minister. LPGU will co-ordinate this process.

### **Plenary scrutiny**

- 4.80 Some subordinate legislation is also considered by the Senedd in a Plenary session. The two most common procedures are set out below.
- 4.81 To assist in preparing for a debate in Plenary, officials should take into consideration any points raised in committee reports or key issues regarding the enabling power that featured in the scrutiny of the parent Act.

### **Affirmative procedure**

- 4.82 The Plenary debate on the motion to approve the statutory instrument is normally held on the 21st day after laying, and ends with a vote on the motion. Usually, 15 minutes is allocated to the Plenary debate, although this may vary due to the nature of the statutory instrument. It may be longer if the item is of particular public interest, or is a lengthy instrument covering a lot of detail.
- 4.83 Where a number of items of related statutory instruments have been laid together, the Senedd may agree to discuss them in one debate, but there will still be separate votes to approve each statutory instrument.
- 4.84 LPGU will liaise with policy officials to determine how much time is likely to be needed for the debate and will book a slot on the preferred date, where possible.
- 4.85 The debate follows the normal format for a debate on a motion. The Minister opens by moving the motion and making opening comments, followed by contributions from other Members. The Minister will then close the debate, responding to any points raised if they so choose.

- 4.86 On some occasions, no Members of the Senedd wish to debate the statutory instrument, so it will move straight to a vote once the Minister has moved the motion and made any desired opening remarks.
- 4.87 LPGU will commission policy officials to prepare briefing, opening and closing speeches and lines to take for the Minister to use during the debate. They will inform policy officials how much time the Minister has in total to make opening and closing remarks, as this varies depending on the time allocated for the debate. As an example, if a debate is scheduled for 15 minutes the Minister will have 4 minutes in total to split between opening and closing remarks.
- 4.88 Policy officials should liaise with the Private Office and special adviser to determine the likely level of interest in the debate and the Minister's requirements for briefing.
- 4.89 This procedure will apply in a similar manner to subordinate legislation subject to a "super" or "enhanced" affirmative procedure or one where the parent Act sets out different timelines for approval.

### **Negative procedure**

- 4.90 If an annulment motion is tabled, LPGU will inform policy officials as soon as they are made aware and provide advice on the process. The date the motion is to be debated will not be known until it is agreed by Business Committee, but will take place in non-government time. The last date on which it could be debated will be identifiable, working from the date the annulment period ends.
- 4.91 Usually 15 minutes is allocated for the Plenary debate, although this may vary due to the nature of the statutory instrument. It may be longer if the item is of particular public interest, or is a lengthy instrument covering a lot of detail.
- 4.92 The debate follows the normal format for a debate on a non-Government motion. The Member who tabled the motion opens by moving the motion and making opening comments, followed by contributions from other Members. The Minister is normally called as penultimate speaker and responds to any points raised as they think best. The Member who tabled the motion closes the debate.
- 4.93 LPGU will commission policy officials to prepare briefing, a speech and lines to take for the Minister to use during the debate. Policy officials should liaise with the Private Office and special adviser to determine the Minister's requirements for briefing and any additional information they may be able to provide regarding the reason the Member is seeking to annul the legislation.
- 4.94 The motion is not amendable.



- 4.95 This procedure will apply in a similar manner to subordinate legislation subject to a “super” or “enhanced” negative procedure or one where the parent Act sets out different timelines for annulment.

## **PRINTING AND PUBLICATION**

### **Statutory instruments**

- 4.96 As explained in Chapter 3, paragraph 3.11 above, SIs are subject to statutory requirements regarding their printing and publication. As a consequence, when they are made, all SIs are registered by the Legislative Codes Office with The National Archives who allocate a unique number in the SI series to them. The Legislative Codes Office is required to allow up to 48 hours for registration purposes and a Welsh SI has to be registered and numbered before it can be laid before the Senedd and published. The Legislative Codes Office must therefore be made aware of the proposed development of and timetable for an SI at the earliest opportunity to ensure sufficient time is allowed for this process. Most SIs are printed and published on [www.legislation.gov.uk](http://www.legislation.gov.uk) (but see Chapter 6, paragraph 6.26 onwards below for some exceptions).
- 4.97 All SIs laid before the Senedd will also be published in the laid documents section of the Senedd’s website – this is dealt with by the Senedd Commission.
- 4.98 Policy officials may also decide to publish the SI on their subject area of the Welsh Government website, if this is considered to be helpful to stakeholders and helps provide the full legislative context in a policy area.

### **Other subordinate legislation**

- 4.99 As these items are not statutory instruments they are not subject to the same printing and publication requirements of the Statutory Instruments Act 1946, however they must still be made publically available so that anyone can establish the law that currently applies.
- 4.100 Any subordinate legislation which has to be laid before the Senedd will be published in the laid documents section of their website.
- 4.101 Subordinate legislation not made by SI, such as Directions or Schemes, should be published on the Welsh Government website, to ensure it is accessible to the public.
- 4.102 Prior to publication policy officials need to ask the Legislative Codes Office to provide a “Non-SI number.” Once this has been obtained, the publication of the subordinate legislation can be requested by

contacting [digital@gov.wales](mailto:digital@gov.wales). Policy officials will need to provide a short introductory item of text, for example:

*The Welsh Ministers, in exercise of the powers conferred by section 6 of the Housing (Wales) Measure 2011, issue the following Direction.*

or:

*This scheme makes provision for the Welsh Ministers to pay incentive grants to eligible persons to take a postgraduate teacher training course in Wales in specified subjects.*

- 4.103 Policy Groups are responsible for ensuring all items of subordinate legislation are available to the public for so long as it remains in force or is applicable, no matter how long ago it was approved or by which Government or Minister. The ability of the public to access such subordinate legislation must be taken into account whenever government publications are assessed for their appropriateness to be archived.
- 4.104 In addition, consideration should be given to including information on the subordinate legislation (and perhaps the subordinate legislation itself) on the [Cyfraith Cymru/Law Wales](#) website. The Legislative Codes Office can provide more information on making law accessible to the public through this route.

## CHAPTER 5 – QUESTIONS TO CONSIDER WHEN PLANNING SUBORDINATE LEGISLATION

**Building on the information covered in earlier chapters, this chapter discusses some of the key questions to consider when officials are planning work to develop and deliver subordinate legislation.**

- 5.1 Once policy officials become aware of the possible need to make subordinate legislation to implement a Minister's policy intent into law, they need to prepare a plan for this piece of work. It is vital policy officials discuss their initial approach with their lawyers, appropriate Group Legislation Leads, the Legislative Codes Office, LPGU and the Translation Service as they all have key roles to play. Policy officials need to check their plan can be delivered and make any necessary arrangements, such as booking Plenary slots.
- 5.2 The following section covers some of the considerations policy officials will need to make in order to produce a detailed step by step tailored timetable. Although policy officials may not have all this information at this stage, the information they do have will help to begin the drafting of a meaningful timetable. Proformas are available from LPGU to assist with the task of drawing up a plan for the subordinate legislation. The Legislative Codes Office or LPGU can provide advice on how to use these proformas.

### **What is the working title of the subordinate legislation?**

- 5.3 Policy officials may have had discussions with lawyers about what the title could be. At this point this will be a title in draft only, but it will help to easily identify the particular piece of legislation, for example when booking plenary slots for SIs subject to the affirmative procedure.

### **What is the intended effect of the legislation?**

- 5.4 This is the rough outline of what is intended and will help determine a number of factors which will influence the timetable, such as:
- the time required to develop the policy;
  - the length of consultation likely to be required;
  - how much time to allow for post consultation assessment;
  - whether the plan needs to include the preparation of an RIA;
  - the potential size of the subordinate legislation;
  - the time required for drafting and translating the subordinate legislation and supporting documents.

## **What are the enabling powers and the recommended procedure?**

- 5.5. Policy officials should identify the powers that enable the Minister to make the subordinate legislation and that it has come into force as well as the likely procedure required to make it. The enabling Act will usually determine the procedure,<sup>12</sup> which lawyers will be able to confirm.
- 5.6. The procedure will have a major impact on the timetable, in particular when the legislation is able to be made. For example any SI subject to the affirmative procedure can only be approved when the Senedd is sitting.
- 5.7. In the case of any SI subject to the negative procedure, consideration should be given to the risks of an annulment motion being tabled when determining the timing of laying the instrument and its coming into force. Factors which need to be taken into account include:
- whether the subordinate legislation is controversial in nature;
  - if a Member may wish for a specific aspect to be debated; and
  - the likelihood of an annulment motion being successful, if tabled.
- 5.8. When considering the enabling power, policy officials should also consider the information that was provided during Bill scrutiny, for example in Chapter 5 of the Explanatory Memorandum on delegated powers and any Statement of Policy Intent or draft subordinate legislation.

## **What is the proposed Coming into Force date?**

- 5.9. This is when the Welsh Government needs or wishes the policy to come into effect. This will impact on how much time to allocate each task and how much slippage can be built into the timetable – or how little time there is.
- 5.10. Policy officials should also consider if there are any implications (e.g. legally and/or politically) if the intended Coming into Force date were not to be met. For example, must the legislation be in place by a certain time to avoid legal difficulties, or has the Minister given a public undertaking that something will be done by a certain date?
- 5.11. In the case of any SI subject to the negative procedure, policy officials should consider the impact of the statutory instrument being annulled after it has come into force. Where there is sufficient time in the planning schedule it may be prudent, in some circumstances, to allow

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<sup>12</sup> See also section 40 of the Legislation (Wales) Act 2019, and paragraph 3.18 above and paragraphs 6.41 – 6.44 below.

the full annulment period to expire before the legislation comes into force rather than simply complying with the 21-day convention.

**Does the legislation have particular aspects which might impact on its timing?**

- 5.12. Sometimes there are specific features of the legislation which will dictate the timelines in the plans. These could arise from:
- the nature of the legislation – for example being subject to the requirements of the EU Services Directive;
  - how much time there is to make the legislation, which can include the need to legislate for events taking place at a fixed time;
  - requirements in the parent Act, such as an extended laying period of 60 calendar days before coming into force;
  - time limitations placed on the powers, such as sunset clauses in the parent act which cause enabling powers to expire.
- 5.13. See also Chapter 6, paragraph 6.33 onwards, for more on a number of such characteristics.

**Is there an intention to consult?**

- 5.14. If policy officials intend or are required to consult, they must consider the options for the approach to consulting and the length of the consultation period to identify the differences in timing for each approach, and timetabling different options for consideration.
- 5.15. It is good practice to include in the consultation any draft regulatory impact assessment that is intended to accompany the SI, but if not the consultation should give an indication of the estimated costs and benefits. The consultation may also be used to gather information to complete a RIA, for example by asking how much it costs an organisation to implement the current law and how much they estimate it would cost to implement the proposals. It is also good practice to consult on other relevant draft impact assessments for the same purpose.
- 5.16. Policy officials may also have specific factors to consider around the timing of the consultation. For example if the proposed subordinate legislation involves schools, consulting over summer holidays may not be appropriate. Policy officials can also consider upcoming festivals or significant periods of time for different faiths, and other ongoing consultations. They must also consider who should be consulted and how (for example if the subordinate legislation impacts on children it may be necessary to think about providing easy read versions of the consultation). Policy officials will need to discuss these factors with Legal Services.

- 5.17. See also above, Chapter 4, paragraphs 4.34-4.37, and the Welsh Government guidance on consultation, accessible via the intranet.

### **How complex is the policy and subordinate legislation?**

- 5.18. The precise timescales for making subordinate legislation can depend on the complexity of the policy, and the likely level of public interest in the policy. Policy officials may need to build in additional time for consultation and engagement before the subordinate legislation is made and/or before it comes in, for analysing a significant quantity of consultation responses, or to prepare detailed briefing to support the Minister in a debate.

### **Is the subordinate legislation part of a wider package?**

- 5.19. Sometimes a number of items of subordinate legislation are required to deliver a policy change or implement an Act, for example a number of SIs, some subject to the affirmative procedure and some to the negative, supported by a Code of Practice which must be laid before the Senedd.
- 5.20. Sometimes provisions of an Act must be brought into force by a commencement order before the subordinate legislation can be made. In such cases it is advisable to plan these items as a package to ensure their individual timings are properly choreographed and aligned. Where they are the responsibility of a number of officials, it would be advisable to ensure one person has overall oversight of their planning and delivery.
- 5.21. When planning a package of subordinate legislation, policy officials should consider a number of other factors, such as:
- whether there are sufficient resources to support the delivery of the package – for example the Legal Services team and LTU may have a number of other demands which have a higher priority;
  - the impact on stakeholders of a package of subordinate legislation, such as:
    - if implementing an Act, whether it would be preferable to bring it into force in stages, bringing forward a number of tranches of subordinate legislation, or in one go;
    - What other changes are ongoing in the sector – and what the cumulative impact of changes in policy is;
  - whether the package requires a lot of input from the Minister, e.g. several plenary debates, taking into account what else will they be dealing with at that time – for example, taking a Bill through the Senedd.

## CHAPTER 6 – SPECIAL TYPES OF SUBORDINATE LEGISLATION AND ISSUES THAT MIGHT ARISE

**This chapter highlights specific types of subordinate legislation which have particular issues related to them, or unusual circumstances that may arise in the development of some subordinate legislation. It should be read in conjunction with the previous chapters, and further advice can be sought from LPGU and Legal Services.**

### SPECIAL TYPES

#### **Subordinate legislation made by the UK Government only which affects Wales**

- 6.1 The guidance in this Handbook does not apply to such legislation – CAPL can provide further advice and support.

#### **Subordinate legislation made by the Welsh Ministers in conjunction with the UK Government and/or other devolved administrations**

- 6.2 On some occasions subordinate legislation is made or issued by the Welsh Ministers alongside one or more Ministers of the UK Government or of another devolved administration. There are two different categories – joint and composite, explained below – and both have specific issues to be considered through the planning and development phases in addition to the guidance set out in earlier chapters.

#### **Joint legislation**

- 6.3 There are occasions where the parent Act **requires** the Welsh Ministers to make statutory instruments, or approve and issue other subordinate legislation, jointly with other UK administrations. This means that the relevant Ministers **all must** approve and sign, as appropriate, the legislation.

#### **Composite legislation**

- 6.4 There may also be occasions where the Welsh Ministers **choose** to exercise their powers compositely with Ministers from other UK administrations. Composite subordinate legislation is where one item of legislation is approved or made by more than one administration, with each making it only in respect of their own areas of responsibility and powers. Each could make their part of the legislation on their own, but have **chosen** to act together.

- 6.5 In some cases it is possible to combine the use of powers for the UK Government to legislate in Wales with powers for the Welsh Ministers to do so. For example, a set of Regulations made compositely could include regulations made by a Secretary of State which apply in England and by a Welsh Minister in Wales, along with further connected regulations made by that Secretary of State which apply in both England and Wales, as those particular powers are not devolved to Wales.
- 6.6 Making composite subordinate legislation could be considered for various reasons, such as:
- reasons of convenience for the reader– for example, where the requirements for the relevant industry are the same in each area of responsibility;
  - where the Welsh Ministers do not have the vires to make full provision because of the way powers have been devolved; or
  - ensuring consistency in approach where there are significant cross-border operational overlaps.
- 6.7 Previous examples include:
- the Diseases of Swine Regulations 2014, an instrument which set out the control procedures to be used in England, Wales and Scotland during an outbreak of an infectious disease among pigs (swine). Consistent policy and implementation dates and enforcement coordination achieved by a composite statutory instrument were seen as desirable for all three administrations and for those affected by the legislation who might otherwise have had to consult several pieces of legislation, including the delivery and enforcement agents;
  - the Education (Student Loans) (Repayment) (Amendment) Regulations 2018, which amended Regulations from 2009. As some areas that needed to be included in the legislation were not within the vires of Welsh Ministers, it was considered to be beneficial to take forward legislation on a composite basis;
  - the Invasive Alien Species (Enforcement and Permitting) Order 2019 – as the policy approach to controlling invasive alien species in Wales and England was aligned, a composite instrument, applying simultaneously throughout Wales and England, was seen to assist with a consistent enforcement approach, and accessibility and understanding for members of the public and others affected by the legislation.

### **Ministerial agreement for joint or composite legislation**

- 6.8 As with all subordinate legislation, Ministerial agreement must be sought for officials to prepare the subordinate legislation, by way of a



written submission of Ministerial advice, which must discuss the joint or composite nature of the legislation.

- 6.9 Policy officials should be aware that the Welsh Government's position is normally that where powers to make subordinate legislation have been delegated to the Welsh Ministers they should be exercised by the Welsh Ministers acting alone through the Senedd. There must be strong reasons to take an alternative approach, such as a composite instrument, particularly when doing so on an England and Wales basis (that is, without Scotland and/or Northern Ireland). Policy officials will need to make an overwhelming case in favour of taking a composite approach, and the fact that it might be easier and less resource-intensive is not – in general – sufficient.<sup>13</sup>
- 6.10 When seeking Ministerial agreement to a joint or composite approach, the following points need to be considered when preparing the advice:
- For Joint SIs: the Ministerial advice must clearly explain that the powers are required to be exercised jointly, with the UK Government and/or others;
  - For Composite SIs: it is the Minister who will be using their powers to make the legislation on a composite basis, and thus **the Minister must be asked in a written submission of Ministerial advice to agree this approach**. The advice should set out a case for this approach that outlines reasons of the types set out above.

### **Development of joint or composite subordinate legislation**

- 6.11 This will require close working and co-operation with counterparts in the UK Government and/or other devolved administrations, with clear agreement on roles and responsibilities. The administrative basis of joint working is set out in Chapter 2, paragraphs 2.41-2.43 above. It should be understood that the delivery is a partnership, and there should be recognition that all sides will have their own policy position and priorities, and that no one partner should dictate the content or timetable.
- 6.12 The Welsh Ministers may be invited to join in a piece of legislation at a late stage of its development, or the project could start as a joint project (for example, by way of administrations jointly issuing a policy consultation on changes to a Code of Practice). However, differing policy approaches or priorities may mean that ultimately, taking forward

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<sup>13</sup> The Welsh Government's position on working with the UK Government in respect of corrections to deficiencies in EU-derived domestic law and directly applicable EU legislation using powers under the European Union (Withdrawal) Act 2018 specifically is different to this and policy officials working on these corrections should consult the specific guidance for this work and contact the European Transition Team for further guidance.

composite subordinate legislation will not be possible. Again, this will be a decision for a Minister from each of the administrations to make.

- 6.13 Legal Services will be involved in drafting, or checking drafts of, a joint or composite statutory instrument, and will need to consider other such subordinate legislation. Statutory instruments that are to be laid before other legislatures as well as the Senedd are not normally made bilingually, as the Welsh language version could not be laid before the other legislatures, and approved or annulled by them (see also paragraph 6.15 onwards below regarding Senedd scrutiny). However, in some circumstances an instrument may contain Welsh text, where it makes amendments to legislation previously made in both English and Welsh. LTU can assist with the preparation of the Welsh text, but this needs to be discussed and agreed with LTU at the outset of the project.
- 6.14 Where an EM is required, the Welsh Government's template should be used. Whilst it may be appropriate to ensure consistency between the EMs laid before different legislatures, the content must reflect the Welsh context, for example setting out how the powers to make the instrument rest with the Welsh Ministers. Similarly any RIA provided should set out costs with specific reference to Wales.

### **Senedd scrutiny of joint or composite legislation**

- 6.15 The enabling Act will specify what procedure applies, and this procedure is required to be undertaken by **all** the relevant legislatures. Thus for example a joint or composite instrument subject to the affirmative procedure made by a Secretary of State of the UK Government and a Welsh Minister must be laid before both the Senedd and the UK Parliament, and approved by the Senedd in Plenary and both Houses of Parliament.
- 6.16 As a joint or composite statutory instrument is normally made only in English, Standing Order 21.2(ix) requires the Legislation, Justice and Constitution Committee (LJC Committee) to issue a technical report noting that it is not bilingual. Officials should liaise with LPGU regarding how to address the monolingual nature of the instrument in their EM and respond to the LJC Committee report.
- 6.17 Where composite subordinate legislation is subject to the annulment or approval of legislatures, the decision of one legislature to annul, or not to approve, applies to the entire item of legislation. For example, a resolution of the Senedd could annul provisions made by the Secretary of State even so far as they apply to England or a resolution of either House of Parliament could annul provision made by the Welsh Ministers only in relation to Wales. This is one reason why some have expressed concern about composite subordinate legislation.

## **Planning and timetabling joint or composite subordinate legislation**

6.18 This is a vital part of the process. The timetable for the legislation must be agreed with all administrations involved, and LS and LPGU and the Legislative Codes Office (and LTU if the joint or composite subordinate legislation includes Welsh text, e.g. where amending a Wales-only SI) must be involved in establishing the timetable, as the involvement of a number of administrations and legislatures can give rise to considerable practical complications. For example, statutory instruments should be laid in all relevant legislatures on the same day in order to respect the rights of all legislatures, and the appropriate date will be determined by factors such as internal administrative issues, other statutory requirements or the operating procedures of the legislatures. All partners should be aware and considerate of the restrictions their partners are operating within. Examples include:

- Internal clearance processes;
- The Welsh Government being required to produce a consultation document bilingually, and publish the Welsh and English versions simultaneously;
- Ministerial availability;
- Legislatures being in recess on different dates or in dissolution;
- Forthcoming local or parliamentary elections and any pre-election periods affecting the Welsh Government;
- Debates on affirmative instruments normally being held during Government time (e.g. usually only on Tuesday afternoons in the Senedd).

## **Subordinate legislation which is the responsibility of other bodies and which is subject to a Senedd procedure or is required to be laid before the Senedd**

6.19 As noted in Chapter 3, paragraph 3.7 above, some other bodies have powers or duties to make subordinate legislation that affects Wales. For example, section 30 of the Higher Education (Wales) Act 2015 requires the Higher Education Council for Wales (“HEFCW”) to issue a Financial Code. The Welsh Ministers must approve a draft of the Code and then HEFCW must not publish the Code until after it has lain before the Senedd for 40 days and the Senedd does not resolve to annul it during that period.

6.20 As these items are the responsibility of other bodies, the approach to their translation will be in line with their own policies and duties under the Welsh Language Standards.

6.21 In addition some external organisations have responsibilities for the policy which gives rise to subordinate legislation, although the powers to make or issue the legislation remain with the Welsh Ministers. For example, the Food Standards Agency in Wales leads on the

development of regulations relating to food hygiene and food safety which are made by the Welsh Ministers.

- 6.22 Policy officials may find themselves involved in providing assistance to such bodies. The nature of this assistance will depend on the item of legislation, the nature of the powers and the local arrangements with the bodies involved. It could range from assistance in arranging for Ministerial advice to be submitted to Ministers, to providing policy input, drafting instruments or arranging the printing and publication of an SI. Advice can be sought from LPGU and the Legislative Codes Office.
- 6.23 Where the power to make or issue the legislation lies with another body, the Welsh Ministers may provide assistance by laying the document before the Senedd. Policy officials should be aware that if a committee reports on the subordinate legislation the expectation will be that the Welsh Ministers respond. It may be found, for example, that policy officials have to explain the policies and duties of that outside organisation under the Welsh Language Standards.

### **Instruments made by Welsh Government officials under the Carltona principle**

- 6.24 In some cases Ministers have agreed that their powers to make certain subordinate legislation may be exercised by officials on their behalf, in line with what is known as “the Carltona principle”. The principle is derived from case law and allows the exercise of functions by Welsh Government civil servants on behalf of the First Minister, the Welsh Ministers, and the Counsel General. This may be used to enable officials to make instruments which deliver standard administrative decisions, for example an Order under the Highways Act 1980 authorising the Welsh Ministers to stop up highways or to close highways temporarily.
- 6.25 In such instances, the policy Group should have guidance regarding the powers which may be exercised in this way, by whom and how they are to be published. If policy officials need further advice on exercising powers in this way, they should seek advice from Legal Services.

### **Local SIs**

- 6.26 An SI can be referred to as general or local according to its subject matter. An SI is usually local if its nature is personal, local or private, and general if its nature is public and general, unless there are special reasons to the contrary – see Regulation 4 of the Statutory Instruments Regulations 1947 (SI 1948/1).
- 6.27 The classification as either local or general determines whether an SI must be printed and put on sale. Local SIs are not usually printed but they are made available on the [www.legislation.gov.uk](http://www.legislation.gov.uk) website.

- 6.28 The classification of the SI as local or general does not depend on the classification of the parent Act. Many instruments made under public general Acts are classified as local. The fact that an SI amends an Act or SI of general application does not mean it should be classified as general. If the amendment relates to a local area it should be classed as local. Nor does the fact that a local SI is likely to be of general interest or attract wider publicity mean that it should be classified as general.
- 6.29 If in doubt about classification as local or general, in the first instance policy officials should consult lawyers in Legal Services. In some cases it may then be necessary to seek advice from the Legislative Codes Office.

## **ISSUES THAT MIGHT ARISE**

### **Technical issues in subordinate legislation**

- 6.30 It is important to ensure that errors are avoided in subordinate legislation: check final drafts thoroughly to ensure there are no mistakes such as typographical errors, inconsistencies between the Welsh and English texts, or problems with formatting or layout.
- 6.31 Occasionally, however, technical issues are identified in an item of subordinate legislation, for example during committee scrutiny or some time after they have been made. If such an issue is drawn to the attention of policy officials, they should seek legal advice regarding the impact of the technical issue on the legal effect of the legislation, how quickly it needs to be resolved, and the most appropriate approach to addressing the issue, if required. These could include the following:
- If the technical issue is in a draft instrument which is subject to the affirmative procedure and has been laid before the Senedd, but the motion to approve it has yet to be debated, it may be withdrawn under Standing Order 27.11 and a revised version brought forward for consideration. Policy officials will need to consider whether the timescales will allow this, as the scrutiny period will start again from the beginning, on the day the revised instrument is laid;
  - A request may be made to The National Archives to issue a correction slip;
  - Amending regulations may be made specifically for the purpose of addressing the technical issue (requiring a new process of developing and laying the new regulations);
  - The issue may be addressed in due course as part of a related item of primary or secondary legislation;
  - The issue may be addressed in due course when the legislation is next revised.

- 6.32 The choice between these options is influenced by a number of factors, including the legal significance of the issue, the urgency with which it needs to be addressed, its priority in relation to other planned legislation, and the availability of an appropriate legislative vehicle by which to make the amendments. For example, some statutory instruments are updated on a regular basis, thus affording a ready-made opportunity for non-urgent amendments, whilst others may not be due for review for some years, in which case another approach would be appropriate to ensure the statute book is corrected.

## **Dissolution**

- 6.33 The interaction between the last sitting dates of a Senedd prior to its dissolution before elections, and the various requirements in Standing Orders and legislation that govern the affirmative and negative procedures for subordinate legislation, give rise to a number of practical issues which policy officials must bear in mind when developing plans for legislation around that period. These are magnified if there is also a recess period immediately before dissolution for an election. In particular it should be noted that although the annulment period does not run during dissolution, it recommences after the new Senedd is established, so it is possible for an item of subordinate legislation to be made during one Senedd, but considered for annulment by the following Senedd. For items subject to the affirmative procedure the normal presumption is that they should be laid before the Senedd in time for a resolution in Plenary to be programmed before dissolution takes place.
- 6.34 The usual practice has been that the Welsh Ministers can still make subordinate legislation during dissolution, within the limits of the decisions allowed during the pre-election period as set out in any pre-election guidance. However it will not be possible for it to be laid before, or scrutinised by, the Senedd.
- 6.35 Early planning is vital, and consideration should also be given to the cumulative impact on stakeholders, such as local government, of making and bringing into force a number of instruments at once because of compressed timescales resulting from an election.
- 6.36 It will ultimately be a matter of political judgment on a case by case basis whether subordinate legislation should be made during or immediately prior to the pre-election period. While essential business must be carried on, it is customary for Ministers to observe discretion in initiating any new action of a continuing or long-term character. Decisions on matters of policy, on which a new Government might be expected to want the opportunity to take a different view from the present Government, should be postponed until after an election, provided that such postponement would not be detrimental to the

national or public interest, or wasteful of public money. So in practice items which are not postponed should be limited to emergencies or minor, technical and uncontroversial items.

- 6.37 LPGU and the Legislative Codes Office will issue specific guidance on timescales once the dates of recess, dissolution and the first meetings of the next Senedd are known.

### **Choice of procedure**

- 6.38 Some parent Acts do not specify the Senedd procedure that applies to a subordinate legislation power, instead providing that the Welsh Ministers may apply the procedure of their choice. The most common power used where a choice is available has been under section 2(2) of the European Communities Act 1972, now saved by section 1A of the European Union (Withdrawal) Act 2018 throughout the transition period, which relates to the implementation of EU obligations.<sup>14</sup>
- 6.39 The choice of procedure is for the Minister, and thus their agreement must be sought by means of a written submission of Ministerial advice. [Guidelines](#) have been issued regarding the factors to be taken into account by the Welsh Government when determining whether the legislation should be subject to the draft affirmative or the negative Senedd procedure. These guidelines should be used as the basis of the advice and recommendation of the procedure to use in each case.
- 6.40 As there is a choice of procedure, a justification of the choice made in each instance should be included in the EM, under a section entitled “Matters of special interest to the Legislation, Justice and Constitution Committee”. Policy officials should be aware that LJC Committee may take a different view on which procedure is appropriate and issue a merits report accordingly.

### **Combining subordinate legislation subject to different procedures**

- 6.41 It is also worth noting that under section 40 of the Legislation (Wales) Act 2019 subordinate legislation subject to different Senedd procedures can be combined in a single statutory instrument that is subject only to the stricter of those procedures. For example, if an instrument contains some provisions that would attract affirmative procedure and others that would attract negative procedure, the whole instrument is subject only to affirmative procedure.
- 6.42 Section 40 also applies where an instrument contains some provisions that would be subject to a Senedd procedure and others that would be

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<sup>14</sup> Ministers also have the choice regarding the procedure to be used when making some SIs under the European Union (Withdrawal) Act 2018, although this decision is subject to certain restrictions and in some circumstances a recommendation by the LJC Committee; separate guidance is available on this from the European Transition Team.

subject to no procedure. For example, if an instrument contains some provisions that would attract negative procedure and others that would not be subject to any Senedd procedure, the whole instrument is subject to negative procedure.

6.43 Section 40 applies to any statutory instrument made by the Welsh Ministers, containing any form of subordinate legislation, and regardless of how or when the power or duty to make the instrument was created. It applies to powers and duties under both devolved and UK legislation, and under legislation enacted both before and after the Legislation (Wales) Act 2019 – although this is subject to limits which can be explained further by Legal Services and/or OLC.

6.44 Section 40 may be used together with section 39, which enables the Welsh Ministers to make subordinate legislation in different forms (e.g. by using an order-making power to make a set of regulations). For example, if the Welsh Ministers have a power to make an order subject to affirmative procedure, and a power to make regulations subject to negative procedure, sections 39 and 40 enable them to combine the powers in one statutory instrument (which may be an order or regulations) that will be subject to affirmative procedure.

### **Fees for services – HM Treasury consent**

6.45 The subordinate legislation may make use of a power in legislation to set a fee for a service the Welsh Government may provide. Exercise of the power to make a charge may require approval of HM Treasury, depending upon how the power has been vested in the Welsh Ministers. Compatibility with the EU Services Directive (see below) will also require consideration. Lawyers can provide advice on such a power.

### **EU Technical Standards Directive and World Trade Organisation Technical Barriers to Trade Agreement**

6.46 The Technical Standards Directive helps to underpin the EU single market by laying down procedures to be followed when Member States wish to enact “technical regulations” which would have an effect on intra-EU trade. There is a general requirement to notify such regulations, in draft, to the Commission, so that their compatibility with the EU Treaty rules on free movement of goods can be scrutinised before they take effect. Members of the World Trade Organisation (WTO) must comply with the Technical Barriers to Trade Agreement, which tries to ensure that regulations, standards, testing and certification procedures do not create unnecessary obstacles to trade.

6.47 If the Directive applies, policy officials will have to allow at least an extra 3 months before it can be brought into force. If the Directive applies and the proper procedure is not followed, the legislation will be



unenforceable. If the World Trade Organisation Agreement applies you will have to allow at least an extra 6 months before you can bring it into force. If both apply, the two periods run in parallel (i.e. you do not have to wait 3 months under EU rules and another 6 months under WTO rules).

- 6.48 It is therefore essential to check if either the Technical Standards Directive or the World Trade Organisation Technical Barriers to Trade Agreement applies, and if uncertain seek advice from Legal Services.

### **EU Services Directive**

- 6.49 The EU Services Directive aims to break down barriers to cross-border trade in services between Member States, making it easier for service providers to set up businesses and offer their services elsewhere within the European Economic Area.
- 6.50 Any requirements affecting access to, or the exercise of, a “service activity” (including e.g. licence conditions and fees) will need to be justified as being non-discriminatory, necessary and proportionate or these requirements may be in breach of the Services Directive or EU Treaty rules on freedom of establishment and free movement of services.
- 6.51 Any proposal to introduce such a requirement may be required to be notified to the UK Government’s Department for Business, Enterprise and Industrial Strategy (BEIS). If uncertain, policy officials should consult their line manager or seek advice from a lawyer.

### **Implementation of EU legislation – Transposition notes**

- 6.52 One of the areas set out in Standing Order 21.3 which LJC Committee may consider in a merits report is whether the legislation being considered inappropriately implements EU law.
- 6.53 One tool they have identified would assist in considering this is a transposition note, which is a document that illustrates how all of the main elements of the EU Directive, which the legislation under consideration is transposing, have been or will be transposed into UK law.
- 6.54 The Welsh Government does not **require** transposition notes to be produced. However it has committed to providing copies of transposition notes where available; either where Welsh Government officials have created a note as part of their work, or where, in the case of joint or composite legislation, they have been provided a note by the lead administration.

- 6.55 Where a transposition note is available, please ensure LPGU have a copy which they can share with LJC Committee when the legislation is laid.

## APPENDIX 1 – LIST OF ABBREVIATIONS

CAPL	Constitutional Affairs and Parliamentary Legislation [team]
DGN	Devolution Guidance Note[s]
EM	Explanatory Memorandum
EU	European Union
KAS	Knowledge and Analytical Services
LJC Committee	Legislation, Justice and Constitution Committee [one of the Senedd's committees]
LPGU	Legislative Programme and Governance Unit
LS	Legal Services
LTU	Legislative Translation Unit
MOU	Memorandum of Understanding
OLC	Office of the Legislative Counsel
RIA	Regulatory impact assessment
RPI	Retail Price Index
SI	Statutory instrument
Senedd	Senedd Cymru or the Welsh Parliament
SOs	Standing Orders
UK	United Kingdom

## APPENDIX 2 – STATUTORY INSTRUMENTS AMENDING PRIMARY LEGISLATION – GUIDANCE FOR LAWYERS AND POLICY OFFICIALS

### Background

1. Since the establishment of the Office of the Legislative Counsel (“OLC”) in 2007, Welsh Government statutory instruments that amend primary legislation have required the approval of OLC instead of the Office of the Parliamentary Counsel in London. This note is intended to assist lawyers drafting statutory instruments by setting out OLC’s role in the approval process and the practical arrangements for securing approval.
2. References in this document to Welsh primary legislation include Acts of Senedd Cymru (including Acts which received Royal Assent before it was re-named) and Assembly Measures. And references to primary legislation include Welsh primary legislation and Acts of the UK Parliament.

### What SIs require OLC approval?

#### *Principles*

3. OLC’s role is to promote the clarity, consistency and accessibility of primary legislation—
  - a. made or amended by Welsh primary legislation, and
  - b. amended or modified by subordinate legislation made by the Welsh Government.
4. Welsh Government secondary legislation that amends primary legislation needs OLC approval.
5. OLC’s role in relation to SIs has been described as “vetting” or “clearing”. These come down to the same thing, namely that, as a matter of internal Welsh Government procedure, the SI may not be made without OLC’s approval (at least without the Counsel General and the relevant Minister being aware that OLC have not approved the drafting).

#### *Textual amendments*

6. OLC must approve all SIs which textually amend primary legislation, however trivial the amendment may be; the one exception to this being SIs that make RPI-linked changes to a figure.

*Non-textual modifications*

7. OLC also needs to approve SIs which make significant non-textual modifications to primary legislation.
8. For these purposes, a “modification” is—
  - a. a change in the effect of primary legislation in relation to a case to which it already purports to apply (and a modification could be causing the provision to cease to have effect), or
  - b. the application of a provision in primary legislation to a new case, with or without further modifications.
9. A modification is “non-textual” if it modifies an enactment in a way that is not intended to result in a change to the text of the modified enactment when the enactment is next published in its up-to-date form.

*Examples of non-textual modifications in SIs*

- 1 *Section 10 of the Animals Act 2040 (licences for cats) does not apply to lions and tigers after 31 December 2030.*
- 1
  - (1) *Section 10 of the Animals Act 2040 is to apply to dogs.*
  - (2) *In its application to dogs, section 10 is to be read **as if**—*
    - (a) *the references to a cat were to a dog, and*
    - (b) *subsections (2) and (5) were omitted.*
- 1
  - (1) *Section 10 of the Animals Act 2040 is to apply to dogs.*
  - (2) *In its application to dogs, section 10 is to be read **as if**—*
    - (a) *for “cat”, in each place where it appears, there were substituted “dog”, and*
    - (b) *after subsection (5) there were inserted the following subsection—*  
*“(6) In this section, references to a “dog” include a wolf.”*
10. Clearly there is room for judgement as to what a “significant” non-textual modification is, so officials are encouraged to ask the OLC SI team whether OLC clearance is necessary.
11. In considering whether a non-textual modification is significant OLC would take account of the following factors—
  - a. the permanence of the modification;
  - b. whether the modification would apply to all cases to which the provision to be modified currently applies;
  - c. if the modification would apply to one or more cases to which the provision to be modified currently applies but not all cases, the significance of the case or cases and the extent to which the current primary legislation needs modification to deal with the new case or cases;

- d. if the modification is the application of a statutory provision to a new case, the significance of the new case and the extent to which the current primary legislation needs modification to deal with the new case.

### *What OLC does in giving approval*

#### *Overview*

12. The process of giving approval will involve OLC in—
  - checking that the words which give effect to the amendment or modification work in technical terms, and
  - checking that the primary legislation as amended or modified is—
    - clear in its effect,
    - accessible to users, and
    - consistent, so far as possible, with other primary legislation.
13. It does not for the most part involve considering the policy or other parts of the SI.

#### *Amending words*

14. The amending words need to make clear what changes are being made to the primary legislation. So OLC will comment if, for example—
  - it is not clear whether something is meant to operate textually or non-textually;
  - a global amendment is unhelpful generally or unclear in its application in any given place.
15. OLC will also check that inserted provisions are inserted in the best place, or that the right words or provisions are being substituted or repealed.
16. OLC is mainly concerned with ensuring that the amending words secure the right result in a clear manner. OLC will not comment on matters of drafting style as far as the amending words are concerned, unless the text is significantly out of step with recommendations in the Welsh Government legislative drafting guidelines.<sup>15</sup>

#### *Primary legislation as amended*

17. OLC's role is to ensure that any provisions or words inserted or substituted, and the totality of the primary legislation as amended, are clear in their effect.

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<sup>15</sup> [Writing Laws for Wales: A guide to legislative drafting](#) (October 2019)

18. For clarity and consistency OLC will also consider whether the text as amended conforms with the Welsh Government legislative drafting guidelines.
19. OLC drafters may suggest changes that they think are improvements, even if they are not strictly necessary. But OLC won't ask for a change without a good reason - so not, for example, merely because OLC would have drafted the provisions differently.
20. OLC will mention typographical errors in text to be inserted in primary legislation.
21. It is not the job of OLC to check that nothing is missing. So, for example, OLC do not search for provisions which might need consequential amendment. But if OLC drafters notice that something is missing they will of course say so.

*Extent, application and coming into force etc.*

22. Ensuring that an amendment is clear in its effect includes looking at the provisions of the SI which govern its effect, including in particular extent and application. So OLC might for example question provisions which purport to apply amendments "in relation to Wales".
23. However, OLC will not normally comment on provisions about coming into force (just as OLC do not look at commencement orders for Welsh Acts). But OLC drafters are happy to give advice on such provisions, as they would for commencement of primary legislation.

*Policy*

24. OLC's role does not include checking that the amendments give effect to the policy.
25. This clearly requires some flexibility in practice. If an amendment produces an obviously odd or puzzling effect, or one that doesn't seem to give effect to what OLC know the policy to be, OLC will want to mention that (and it may be that the puzzling effect is the result of lack of clarity). Equally, if something is on its face ambiguous or unclear, OLC will need to say so (the expectation then being that the department will revise the draft to give effect to the policy more clearly).

*Legal powers to make provision amending primary legislation*

26. OLC is not responsible for taking a final legal view on whether the legal power to make provision amending primary legislation exists. Primarily, it is the responsibility of the instructing LS lawyer to advise on powers. OLC will be happy to give a view about legal powers if asked and if

OLC have a doubt about whether there is power to make the provision OLC will raise it without being asked.

#### *Transitional provision*

27. This section of the guidance is about transitional provision relating to the coming into force of textual amendments to primary legislation made by an SI; and also about “transitional regulations” – i.e. regulations making provision about the coming into force of an Act.
28. Where transitional provision modifies the effect of primary legislation or amendments to primary legislation for an interim period, it should be dealt with like any other non-textual modification. So it is only a matter for OLC if the effect is significant.
29. Where transitional provision does not directly affect the operation of primary legislation or amendments to it then it is not a matter for OLC. An example here might be arrangements for one body to stand in the shoes of another for the purposes of legal proceedings following a transfer of functions.

#### *Welsh language text*

30. OLC is responsible for the Welsh language text of primary legislation as well as the English language text. Remember that OLC will also need to clear the Welsh language text of amendments to Welsh primary legislation.

#### *SIs made jointly or together with UK Ministers*

31. SIs amending primary legislation that are made jointly by the Welsh Ministers and UK Ministers (by choice or for legal powers reasons) will usually be subject to clearance by the Office of the Parliamentary Counsel in Whitehall (see the OPC guidance for departments). This kind of instrument does not need to be cleared by OLC unless it amends provision in Welsh primary legislation.
32. Welsh primary legislation is usually enacted in English and Welsh and any amendments to it will need to amend both versions of the text given that each text has equal legal standing.

#### *Things OLC don't do*

33. It is not OLC's role to consider provisions of an SI to the extent that these do not have a bearing on amendments or non-textual modifications to primary legislation.



34. So OLC will not normally consider or comment on—
- the preamble;
  - the footnotes;
  - the explanatory memorandum;
  - free-standing provision, unless it directly governs textual amendments or non-textual modifications of primary legislation (see above);
  - textual amendments to secondary legislation;
  - citation;
  - the structure or order of provisions in the SI (so not, for example, the order in which amendments are made or how they are structured in paragraphs);
  - layout and headings.

### *Drafting SIs*

35. In some cases it may well save time if the textual amendments are drafted by OLC on instructions, particularly if the amendments are long and complex.
36. Resources do not permit OLC to do this all the time, but LS lawyers and OLC should continue to be free to suggest it as an alternative way of working in appropriate circumstances. In doing so LS and OLC should aim to reduce duplication of effort so far as possible.

### *Procedure and contacts*

37. Requests for approval or instructions to draft should be sent to the OLC mailbox: [LegislativeCounsel@gov.wales](mailto:LegislativeCounsel@gov.wales) . A phone call to the OLC SI team may also be helpful, especially in urgent cases.
38. Each LS team leader should keep the OLC SI team informed about upcoming SIs that will require clearance well in advance of the envisaged window for OLC clearance or drafting.
39. The timetable for an SI needs to allow **at least 4 weeks** for OLC approval of an SI, unless there is a genuine emergency. Even a very short instrument or straightforward instrument may require this time, as the instructing lawyer and the policy officials will need to consider the drafting and engage with queries raised by OLC and consider further drafts. More than 4 weeks may be needed for a long or complex instrument.
40. Additional time for OLC clearance should be allowed where the primary legislation being amended is enacted in English and Welsh, unless the initial request for clearance includes the Welsh text as well as the English text. If the request for clearance includes only the English text, OLC will need to clear the Welsh text once produced to ensure the

equivalence of both language versions. LS teams must allow **at least** one week for an equivalence check once the Welsh text is available.

41. The timetable should be agreed as early as possible between the LS team and the OLC SI team.