

Legislative Procedures for the Newly Constituted Assembly: response to invitation to submit evidence to the Committee on Standing Orders

Introduction

The invitation to submit evidence invited views particularly on ‘the legislative procedures and processes that would facilitate effective scrutiny in respect of:

- Orders in Council
- Assembly Measures
- Subordinate Legislation’.

Each of these is considered in turn below. When referring generally to the Assembly’s legislative output, I have tended to use the term ‘instrument’ as a neutral term to describe any of the different kinds of legislation the Assembly is involved with. (In the past, I would have used ‘measure’ as a neutral term, but this now has a particular legal meaning!)

I approached this exercise by initially trying to ‘think myself into the process’ by examining the provisions of the Government of Wales Act 2006. The tables which follow in this document were produced quite quickly and I do not claim that they are exhaustive or even 100% reliable: but I have left them in the document in case they are of any use to the Committee in terms of raising questions. Unfortunately, I have raised many questions to which I do not know the answers! And where I have suggested answers, I have been very conscious that there may be great difficulties in relation to resources. I also tried to think about different ways of approaching scrutiny in terms of when it might take place and who might conduct it. The general questions and comments which I arrived at are set out first and are then followed by the more specific issues which might arise about each of the three kinds of instrument asked about.

General issues

There are some general matters which may be considered in relation to all instruments, although some may be more relevant to some instruments than others. When approaching this task, it may be useful to think in terms of different types of scrutiny. One may distinguish between technical and political scrutiny, or between scrutiny at different stages eg pre-legislative/ legislative / post-legislative.

Legal /Technical v Political /Policy/ Merits scrutiny

Some scrutiny relates to more legal or technical side of things eg whether the instrument is within the competence of the Assembly or Assembly Government. The concern here is that what is enacted is an instrument which is not outside the competence of its maker, complying with any procedural or substantive requirements eg not incompatible with EC law or the Convention Rights. To the extent that anything can be regarded as politically neutral, at least in a party political sense, this is what is envisaged here. At the other end of the spectrum, there is political scrutiny of the merits of the proposed instrument. Somewhere between the two, one might put the question of the ‘workability’ of the proposed instrument eg whether the policy objective is achieved in the instrument. Some aspects of this might be fairly technical, but as one moves to considering whether another solution might be ‘more workable’ than another, it may be more controversial as to where this lies. The Assembly must decide how it draws these lines itself. It may be sensible to allocate the technical and policy scrutiny roles to different bodies on the basis of their existing expertise and in order to allow specialism to develop.

The competence / legal scrutiny issues will arise in relation to all Assembly Measures and subordinate legislation, and because of this it would make sense for these to be dealt with by the same committee each time. I would recommend that the Assembly establishes a Legislation Committee which would deal with these matters. It would carry out the existing remit of the Legislation Committee plus any additional auditing given to it by Standing Orders and would do this in relation to all instruments where Assembly scrutiny is provided for. I attempt to make a ‘checklist’ of these issues below.

Different stages of scrutiny: Pre-legislative / legislative / post-legislative

Pre-legislative scrutiny involves the publication of a draft before the formal legislative procedure within the legislature begins. This allows for outside bodies to discuss the proposal and for committees to receive evidence which might inform their approach. For very

significant changes to the law, this has merits but it will be a matter for the Assembly Government as to whether it follows this approach when it intends to propose an instrument. In practice such pre-legislative discussions may take place. I am not sure that that this can be built into the Standing Orders as a requirement.

Legislative scrutiny involves the procedures and the machinery of the Assembly to scrutinise instruments. The level of scrutiny required will need to vary depending on the significance of the instrument at issue. The highest level of scrutiny will be needed for proposals for Orders in Council and Assembly Measures. Any wide framework powers which have been left as functions of the Assembly Government will also require a significant level of legislative scrutiny.

Post-legislative scrutiny is provided in relation to Assembly instruments in the form of intervention by the Secretary of State and by the possibility of issues being raised in the Supreme Court and in judicial review more generally. This is provided in the Act and only raises issues as to how the Assembly will react to decisions made to intervene, or refer instruments.

Scrutiny by whom

I would see an enhanced role for the Legislation Committee in relation to the technical scrutiny of all Assembly instruments. Unless the Assembly is setting up a committee with a remit along the lines of the UK Joint Committee on Human Rights, the Legislation Committee would examine the compatibility of the instrument with the Convention rights. It may be considered whether some of the 'workability' issues could be carried out by this committee too eg whether the instrument achieves its policy objectives. This would require some indication of what the policy objectives were; in Scotland a policy memorandum accompanying a proposal provides such information. The Legislation Committee would report, drawing attention to any matters of concern. If time permits, it would be useful if that report could go to the specialist subject committee (if any) carrying out the policy review, in addition to the Assembly.

Political / policy scrutiny would examine the merits of the policy given effect to in the instrument. I would envisage this scrutiny being carried out in debate in plenary and in a committee which has specialist expertise in the subject area. I have been thinking in terms of committees similar to the existing subject committees. It might be that more than one committee would be involved (in which case one would need to be appointed as the lead committee), although if Assembly committees are to be larger and cover wider areas perhaps this would not be so. The committee would be involved in general policy scrutiny as well as in the scrutiny of legislation, involving Ministers in relation to the latter only. It would be useful if there could be some contact between Legislation Committee and specialist subject committee so that the latter could be informed about any particular concerns of the former while the instrument is being considered in detail.

The level of scrutiny

Political scrutiny of the merits of instruments will be most required in relation to bids for Orders in Council, Assembly Measures and any wide framework powers under subordinate legislation which have been left as functions of the Assembly Government. Less significant subordinate legislation will not require such a high level of political debate but it will need to be checked for its compliance with the 'technical checklist'. Powers to make subordinate legislation under existing legislation will indicate the procedure required and thereby the level of scrutiny required in the Assembly. When powers to make subordinate legislation are created in an Assembly Measure, it will be necessary for the Assembly to determine the procedure for making the subordinate legislation and the role it will play in scrutinising it. The latter is a matter which might be within the remit of the Legislation Committee to consider and report on during the passage of an Assembly Measure.

Legal scrutiny – a possible checklist

does the instrument cover matters which are allowed by the GWA or, in the case of subordinate legislation, the parent legislation? The existing remit of the Legislation Committee: (i) if there appears to be doubt whether the subordinate legislation is within the Assembly's powers or it appears to make unusual or unexpected use of the powers under which it is made. This would apply in relation to all instruments.

o For Orders in Council – see s95 GWA

o For Assembly Measures – see s93 GWA, it a 'matter within Schedule 5, Part 1? See also schedule 5 parts 2 and 3

o For subordinate legislation, the terms of the parent Act

Compatible with European Community law?

Compatible with the Convention Rights protected by the Human Rights Act (but in relation to subordinate legislation, note s6 Human Rights Act)?

Existing remit of Legislation Committee: (ii) if the Act of Parliament or other instrument which gives the Assembly the power to make the subordinate legislation contains specific provisions excluding it from challenge in the courts. This would become a matter to consider in relation to subordinate legislation but also in relation to whether such provision is being created in an Assembly Measure.

Existing remit of Legislation Committee: (iii) if it appears to have retrospective effect where the Act of Parliament or other authorising instrument does not give express authority for this. This would apply to scrutiny of subordinate legislation but it would also be a matter for the Legislation Committee to report on if authorisation for retrospective subordinate legislation were being created in an Assembly Measure.

Existing remit of Legislation Committee: (iv) if for any particular reason its form or meaning needs further explanation. This would apply in relation to all legislation.

Existing remit of Legislation Committee: (v) if its drafting appears to be defective or the instrument fails to fulfil statutory or other legal requirements. This would apply in relation to all legislation.

Existing remit of Legislation Committee: (vi) if there appear to be inconsistencies between the English and Welsh texts. This would apply in relation to all legislation.

Existing remit of Legislation Committee: (vii) that the subordinate legislation uses gender specific language. (This would apply in relation to all legislation.

Existing remit of Legislation Committee: (viii) that the subordinate legislation is not to be made in both English and Welsh. This would apply in relation to all legislation.

Compatible with the UN Convention on the Rights of the Child? – see below for explanation of this criterion*

Allow consideration of whether any issue arises which might prompt Secretary of State to intervene? (ss 101-Measures and s82-subordinate legislation)

Any additional criteria?

Any consideration of whether policy goals achieved by the instrument?

***Point regarding the UN Convention on the Rights of the Child**

On this point I must declare my membership of an NGO group, the UN Convention on the Rights of the Child Monitoring Group. This group seeks to work constructively with government and statutory bodies to promote implementation of the Convention on the Rights of the Child, at the same time as monitoring progress on implementation, in Wales. The group comprises representatives of non-governmental children's organisations in Wales, academics in law and medicine from the University of Wales and observers from the Welsh Assembly Government and the office of the Children's Commissioner for Wales. The group is working towards the preparation of the Welsh non-governmental organisations' report to the UN Committee on the Rights of the Child in the current UK reporting round. My point regarding the UN CRC is both my individual view and also one which the Monitoring Group seeks to put forward. I understand that a separate letter regarding this point is being sent to the Committee by that group.

The suggestion is that a policy of routine 'UNCRC proofing' of relevant Assembly legislation could be built into the new Standing Orders. It is a suggestion which seeks to build on the very positive approach towards the UN CRC which has been taken to date by the Assembly and the Assembly Government in developing policy in relation to children. It would follow on from the adoption of the UN CRC by the Assembly in 2004 as its policy framework for the development of all policy in relation to children, and it would address criticisms which the UN Committee on the Rights of the Child has made in previous reports on the UK about the lack of any formal process for ensuring that new legislation complies with the UN CRC. The exercise to be undertaken in relation to proposed legislation would be similar to that which assesses whether proposed legislation is compatible with the Convention Rights guaranteed by the Human Rights Act.

Specific points on the different instruments

Orders in Council

These require a high level of political scrutiny since they determine the areas on which the Assembly will be able to make significant legislative changes in the future. Two issues arise: there is the scrutiny of individual proposals for Orders in Council and there is the

matter of the Assembly keeping an overall watching brief on the development of its legislative powers.

As to the latter, ideally, specialist subject committees should be keeping under review areas where Assembly legislation might be desirable but where powers are lacking. An opportunity, at least annually, for committees and private members to propose bids for powers and to hear and scrutinise the Assembly Government's programme of priorities for bidding for additional powers is needed. The closest equivalent at present is the making of bids for bills or provisions in Westminster legislation and there must be at least as high a level of discussion as exists on those.

As to the process for approving a draft of the instrument containing the Order in Council, I would envisage something along the lines of:

- formal introduction of the proposal and referral to the relevant specialist subject committee and Legislation Committee
- specialist subject committee reports to plenary on general principles and Legislation Committee reports on any issues raised
- debate and vote in plenary
- further detailed considered by the specialist subject committee and Legislation Committee (although I am unsure of this since I am not sure how detailed such draft instruments will be) and further report to plenary
- debate and vote in plenary with scope for amendments.

More specific questions are raised in the table:

Orders in Council: What the GWA requires/ permits:	Implications for Assembly Standing Orders – basic requirements flowing from GWA	Other matters to be considered in order to achieve appropriate scrutiny
<p>-indicates what may be covered in an Order in Council (s95(1), (2), (3), (4))</p>	<p>§1 must be system for ensuring that draft is within competence:</p> <ul style="list-style-type: none"> o Who is responsible for checking that the draft Order is within competence? Eg require statement by proposer? Review by the Legislation committee? Review by Presiding Officer? <p>§2 At what point is competence checked – on initial proposal, following any amendments etc?</p>	<p>§3 Technical review of competence appropriate for Legislation Committee?</p>

<p>-draft of statutory instrument containing the Order in Council must be approved by a resolution of the Assembly (s95(5))</p>	<p>§1 In relation to each individual instrument, must cover proposal, general debate, vote</p>	<p>§2 Technical review of competence appropriate for Legislation Committee?</p> <p>§3 Closest existing equivalent is a bid for a Wales-only Bill or Wales-only provisions – at least as much general scrutiny on policy grounds should be provided for as exists in relation to legislative bids at present.</p> <p>§4 Place WAG under obligation to present its priorities to the Assembly in relation to bids for powers on an annual basis?</p> <p>§5 Provide for annual debate in Assembly on the WAG’s programme for making bids for powers?</p> <p>§6 Allow bids to come from private members and from committees of the Assembly?</p>
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<p>-after approval by resolution of Assembly, First Minister must ensure notice in writing of the resolution and a copy of the draft are sent to the Secretary of State (s95 (6))</p>	<p>§1 Need to write into SOs the requirement for the First Minister to send notice to Secretary of State? Provided for in the Act itself – is it desired that SOs will present the entire procedure?</p>	

<p>-if refusal by Secretary of State to lay draft before Parliament etc, First Minister to lay copy of the Secretary of State's notice before the Assembly and obligation on the Assembly to ensure that the notice is published (s95(8))</p>	<p>§2 Need to write into SOs the requirement for notice to be laid before Assembly and for Assembly to publish it? Again, provided for in Act.</p>	<p>§3 Provision in SOs for debate on any refusal of Secretary of State to lay draft before Parliament?</p>
<p>Counsel General (or Attorney General) may refer issue to Supreme Court regarding whether proposed Order in Council relates to field in Part 1, Schedule 5 (s96)</p>	<p>§1 If such reference made while Assembly discussing the measure, do SOs need to make provision?</p>	

Assembly Measures

These have the scope to be very significant legislative measures and accordingly a high level of scrutiny is required. The GWA makes certain requirements which need to be provided for in the Standing Orders. There are other questions raised below. In the light of the consideration of the GWA below, the following might be the basic structure of the procedure:

- formal introduction with any relevant documentation
- refer to Legislation Committee for legal scrutiny
- refer to relevant specialist subject committee for consideration of general principles
- Legislation Committee and specialist subject Committee report to plenary
- Debate in plenary on the general principles on the proposed Measure
- Vote in plenary – proposal falls or proceeds to next stage where detailed examination takes place
- Following vote agreeing to the proposal's general principles, proposal is referred to the relevant specialist subject committee for consideration of the details of the proposed measure OR could be resolution to do the detailed scrutiny in plenary session (exceptional)
- Legislation committee is permitted/required (?) to keep proposal under review and report (to committee or to plenary??)
- specialist subject committee considers proposed measure in detail, amendments may be made
- amendments reported to the Legislation Committee for it to consider in relation to its remit?
- specialist subject committee and legislation committee report to plenary with amended proposal
- proposal as amended in committee is debated in plenary, scope for amendments to be voted upon
- final vote to pass or reject the measure is taken

More specific questions are raised below:

<p>Assembly Measures: What the GWA requires/permits:</p>	<p>Implications for Assembly Standing Orders – basic requirements flowing from GWA</p>	<p>Other matters to be considered in order to achieve appropriate scrutiny</p>

Details of what will be within the Assembly's legislative competence (s94 (3),(4),(5), (6))

Other restrictions in Schedule 5, part 2 –

-no change to functions of Minister of Crown (except with consent of Secretary of State, Sched. 5, Part 3, para 7)

-regarding creation of criminal offences

-no modification of provisions listed in Table (other than restatement of law or repealing or revoking spent enactments, or provision on for procedure to which legislation made under such power is to be exercised Sched. 5, part 3))

-no modification of other Acts of Parliament relating to charging of sums on Welsh Consolidated Fund

-no modifications

o must be system for ensuring that draft is within competence – dealt with in section 97 of GWA, see below.

§4 Technical review of competence appropriate for Legislation Committee? List of matters in s94 and Schedule 5, Part 2.

§5 Will the Assembly have a human rights committee which would report on the human rights compatibility of the proposal –compatibility with the Convention rights – or would this be a matter for the Legislation Committee?

§6 Does Assembly wish to add other criteria to be examined at this point? Eg gender-neutral language, clear and accessible language (see suggestion by Legislation Committee), compatibility with UN Convention on the Rights of the Child?

<p>of functions of Comptroller and Auditor General (except with consent of Secretary of State, Sched. 5, Part 3, para 8)</p>		
<p>Subject to SOs, proposed Assembly Measure may be introduced by First Minister, any Welsh Minister, any Deputy Welsh Minister or the Counsel General, or any Assembly member (s97 (1))</p>	<p>§1 Indication of who may introduce measure</p> <p>§2</p>	<p>§3 How much opportunity will there be for private members / committees to make proposals? Circumstances in which private members / committees may introduce measures</p> <p>§4 Any restriction on the right of Counsel General to introduce proposal</p>
<p>Person in charge of proposed Assembly Measure must, on or before the introduction of the measure state that in that person's view the provisions would be within the Assembly's competence (s97(2))</p>	<p>§1 Repeat in SOs?– is it wished to present the entire procedure in the SOs even if it means some duplication with the Act?</p>	<p>§1 Will require appropriate legal advice to be available in relation to private members' measures</p> <p>§2 Will there be any further scrutiny of whether measure is still within competence after it has been amended etc? review of amendments proposed, with regard to competence?</p>

		<p>§3 Whether any other documents should accompany the proposal? For example Scottish Standing Orders require explanatory notes, a policy memorandum setting out the objectives and whether alternative ways of achieving those objectives were considered etc</p>
<p>Presiding Officer must, on or before introduction of the proposed measure, make statement as to whether in his/her view the measure would be within the Assembly's competence (s97(3))</p>	<p>Repeat in SOs – as with previous provision?</p>	<p>§1 As with previous provision, will Presiding Officer have any further role in examining whether measure remains within competence as it progresses?</p> <p>§2 Any discussion if the Presiding Officer states that not within competence – Act does not refer to giving reasons.</p> <p>§3 Could / would SOs place bar on the further progress of a measure that the Presiding Officer has decided is not within legislative</p>

		<p>competence?</p> <p>§4 Some provision on what happens if the Presiding Officer states that the proposed measure is outside legislative competence.</p>
<p>Statements regarding legislative competence to be in English and Welsh and otherwise form and manner of statement to be dealt with by SOs (s97(4))</p>	<p>SOs to set out form of statement on legislative competence and the manner in which it is to be made</p>	
<p>SOs may provide for a statement regarding legislative competence to be published (if they do it is to be in English and Welsh) (s97(5))</p>	<p>Discretion as to whether SOs make provision</p>	
<p>SOs must include provision</p> <ul style="list-style-type: none"> -for general debate on proposed measure with opportunity for AMs to vote on general principles -consideration of, and vote on, details of Measure -final stage where Measure 	<p>Requirement for SOs to provide for 3 stages with votes on –</p> <ul style="list-style-type: none"> -general principles -detailed consideration of provisions -pass / reject measure <p>When would expedited proceedings be appropriate?</p> <p>Different procedures allowed for</p>	<p>§1 Build in scope for pre-legislative scrutiny?</p> <p>Publication of draft measure – engage with groups outside the Assembly? Refer draft to relevant subject committee? Its report, if any, might inform general debate within plenary? But matter for the WAG and not</p>

may be passed or rejected (s98 (1))

-restatement of the law

-repeal spent law

-private Assembly Measures

But SOs may make provision to allow Assembly to expedite proceedings in relation to a particular proposed Assembly Measure (s98 (2))

SOs may make different provision for measures restating the law, repealing spent law or private Assembly Measures

something which can be built into the Standing Orders.

§2 General debate in plenary

§3 Technical scrutiny by Legislation Committee / Human Rights Committee – report on matters which require attention

§4 Detailed policy scrutiny by relevant committee – with scope for amendments

§5 Report by Legislation committee/ other relevant committee to the Assembly

§6 Debate within the plenary with scope for amendment

§7 Legislation committee to draw attention to any issues of legislative competence which may have arisen following amendments – redress in plenary if necessary?

§8 Final stage where the only issue is pass or reject

§9 Role for

		<p>Legislation Committee in scrutiny regarding restatements / repeal of spent enactments – certify / report to Assembly that measures do not go beyond this remit</p> <p>§10 Appropriate scrutiny for private Assembly Measures?</p>
<p>SOs must include provision for securing no passage of measure which would require consent of Her Majesty or Duke of Cornwall unless consent signified in accordance with SOs (s98 (4))</p>	<p>Requirement for provision</p>	
<p>Requirement of bilingual legislation unless SOs have specified circumstances in which not required (s98 (5))</p>	<p>Requirement to have SO</p>	<p>§1 In what circumstances will bilingual legislation not be required? Exceptional?</p>

<p>Requirement to have opportunity for reconsideration of proposed measure after its passing – if and only if –</p> <p>-Supreme Court decides in reference under s99 that not within legislative competence</p> <p>-a reference made under s99 is withdrawn following request for withdrawal under section 100(2)(b)</p> <p>-an order by Secretary of State under section 101 (s98(6))</p>	<p>Requirement to have SO</p> <p>See below regarding s100(2)(b)</p>	<p>§2 Who is responsible for putting the matter of reconsideration before the Assembly?</p> <p>§3 Need for debate to reconsider the measure</p> <p>§4 Further technical scrutiny and report by Legislation Committee?</p>
<p>Any proposed Assembly Measure amended on reconsideration must be subject to final stage at which it can be approved or rejected (s98 (7))</p>	<p>Requirement to have SO</p>	<p>§1 Requirement for final stage on which vote to pass or reject the amended and reconsidered measure</p>
<p>Counsel General (or Attorney General) may refer question of whether measure within legislative competence</p>	<p>If such reference made while Assembly discussing the measure, do SOs need to make provision?</p>	<p>Need for Counsel General to make statement to the Assembly if makes reference?</p>

<p>When a reference to Supreme Court may be made (s99(2),(3),(4))</p>	<p>How much, if any of this, to repeat in SOs – depends on how much SOs are to present the entire procedure</p>	
<p>If Assembly wishes to reconsider measure when a reference has been made under s99 and the Supreme Court has made reference to the European Court of Justice regarding that s99 reference and neither of those references (ie by SC or ECJ) has been disposed of –</p> <p>If Assembly resolves that it wishes to reconsider measure, person who made reference under s99 must request withdrawal of reference. (s100)</p> <p>This applies only where ECJ reference has been made.</p>	<p>SOs need to provide procedure for resolution on requesting withdrawal of the reference which has been made under section 99.</p>	<p>Need to debate?</p>
<p>Submission of proposed measure by Clerk for approval by HM in Council, but not while reference under s99 or order under s101 could be</p>	<p>How much of this to include in SOs given that set out in Act?</p>	<p>Where is the Order in Council published by the clerk?</p>

<p>made or while reference before Supreme Court; or if ruling by SC that not within legislative competence, or if request for withdrawal of reference in order for Assembly to reconsider measure</p> <p>Requirement that date of approval by HM in Council be shown on Measure and be part of Measure; requirement that Clerk publish the Order in Council by which Assembly Measure is approved (s102 (1),(2),(3),(5), (6))</p>		
<p>SOs must provide for notification by Clerk to Assembly of date of approval of Assembly Measure by HM in Council</p>	<p>Requirement to have SO</p>	

Subordinate legislation

This will be a power of the Welsh Assembly Government and the extent to which the Assembly plays a role in scrutiny of individual measures is determined by the UK Parent Act or the Assembly Parent Measure which created the power to make the subordinate legislation. (The Assembly must also consider the appropriateness of the form of scrutiny when it creates any powers to make subordinate legislation in Assembly Measures – but this relates to the making of Measures.)

Some very wide powers may remain with the Assembly Government and under these the relevant parent Act is likely to have required the most demanding scrutiny. The GWA largely provides that the parliamentary procedures for subordinate legislation will be taken over to the Assembly, so that if an affirmative procedure was required in Parliament in the past, it will be required in the Assembly in the future and so on. The Assembly must determine exactly how the equivalent Parliamentary procedures will operate in the Assembly. What is needed in terms of Assembly procedure when it is required that an instrument should be laid before the Assembly

or subject to annulment or subject to approval by the Assembly. While some instruments will be more significant than others, I would recommend that in all cases they be referred to the legislation Committee and the relevant specialist subject committee. Where the only requirement is that an instrument is laid before the Assembly, the role for these committees would be to report on any issues which arise or to indicate that none arise. Where the instrument requires Assembly approval or is subject to annulment, the Legislation Committee would report any issues and the specialist subject committee would report and recommend acceptance or rejection. The proposed instrument would then be debated briefly and voted on in plenary if permitted or required by the parent instrument. I have pondered upon the question of whether there should be any scope for amending the proposed instrument in cases where it is subject to annulment or needs approval. I cannot see amendments being acceptable but I do wonder whether there can be any scope for a Minister to agree to revise a measure in light of any reporting that has taken place, particularly if the issue was one on which a majority of Assembly Members were agreed. Of course, the original draft could be withdrawn and a revised one proposed as a new proposal: but is there a way to achieve this more speedily? Is this likely to be an issue in practice?

Subordinate legislation: What the GWA requires/ permits:	Implications for Assembly Standing Orders – basic requirements flowing from GWA	Other matters to be considered in order to achieve appropriate scrutiny
<p>Section 58 – transfer of executive functions to Welsh Ministers by Order in Council – draft of the SI containing the Order must be agreed to by the Welsh Ministers as well as being approved by each House of Parliament</p> <p>Schedule 3, Part 2, para 8: An Order in Council under s58 may make provision for function to be exercisable by Welsh Ministers, FM or CG only with authorisation of, or after consultation with, the Assembly or the Assembly Commission. (see also schedule 11, para.31(3))</p> <p>Order under s58 may require laying of report before Assembly or sending of documents to Clerk.</p> <p>See also generally Schedule 11 on transitional provisions.</p> <p>Schedule 11, Table 1 – lists functions exercise of which in SI require approval by resolution of Assembly; Table 2 – lists functions exercise of which in SI will be subject to annulment by Assembly (unless there has been approval by resolution of Assembly)</p> <p>Where prior to Order in Council power exercisable by Minister of the Crown, references to Parliament or House of Parliament is taken to be a reference to the Assembly where there is reference to laying before Parliament, requirement for annulment or approval of instrument, prohibition on making instrument without</p>	<p>Role of Assembly depends on the terms of the Order in Council under section 58.</p> <p>Previous Parliamentary procedure of laying, annulment, approval becomes the applicable equivalent Assembly procedure</p>	

<p>such approval → read Assembly where says Parliament Schedule 3, part 2, para 9</p> <p>Where power exercised prior to Order in Council under s 58 was subject to confirmation of the order by Act of Parliament or was subject to special parliamentary procedure, then exercise by Welsh Ministers, Fm, CG is subject to the procedure in the Assembly specified by the Standing Orders – Schedule 3, part 2, para. 4</p>	<p>– SOs will need to set out what is involved in each of these</p> <p>Standing Orders will need to prescribe a procedure to be appropriate for instances set out to provide equivalent special procedure</p>	
<p>Section 59 - Welsh Ministers may be designated under s2(2) EC Act 1972 (for implementation of EC obligations)</p> <p>Power to be exercised subject to any restrictions or conditions specified in the Order in Council designating the Welsh Ministers</p> <p>If instrument is made without draft having been approved by the Assembly, it is subject to annulment in pursuance of a resolution of the Assembly (s59(3))</p>	<p>Ensuring any restrictions or conditions specified in Order have been complied with?</p> <p>Provision for laying draft before Assembly; provision for debate; provision for vote.</p> <p>This will be covered by general procedures dealt with above</p>	
<p>Disapplication of UK Parliamentary procedure unless SI made by Minister of the Crown (whether or not jointly with Welsh Minister), relates to an English border area or relates to a cross-border body (s59(4))</p>	<p>Providing for procedure where measure is made jointly with Minister of Crown or otherwise subject to Parliamentary Procedure?</p>	
<p>SI made by Welsh Ministers in exercise of power under s59(5) under s56 Finance Act 1973 etc is subject to annulment by resolution of the Assembly (s59(6))</p>	<p>Provision for resolution regarding annulment of SI made under s56 finance Act 1973</p> <p>Covered by earlier material?</p>	
<p>Disapplication of Parliamentary procedure in relation to action under s56 Finance Act unless SI made by Minister of the Crown (whether or not jointly with Welsh Minister), relates to an English border area or relates to a cross-border body</p>	<p>Providing for procedure where measure is made jointly with Minister of Crown or otherwise subject to Parliamentary Procedure?</p>	

<p>An order of the Welsh Ministers specifying an authority as a 'local authority' under section 72(5)(e) is subject to annulment by resolution of the Assembly</p>	<p>Order under s72(5)(e) falls under annulment procedure of the Assembly</p> <p>Covered by earlier material</p>	
<p>Obligation on Welsh Ministers to make and publish code of practice on regulatory impact assessments (s76). Code is laid before Assembly</p>		<p>Who sees the regulatory impact assessment in relation to any piece of subordinate legislation? Matter for the Code of Practice? Should the Legislation Committee have any role in confirming whether assessment has taken place? Or whether Code of Practice has been complied with?</p>
<p>No power to Welsh Ministers to make subordinate legislation which is incompatible with Community law (s80 (8))</p>	<p>General limit on power to make subordinate legislation</p>	<p>Technical scrutiny by the Legislation Committee? Report to the Assembly?</p>
<p>No power to Welsh Ministers to make subordinate legislation which is incompatible with the Convention rights (unless not unlawful under s6 HRA) (s81)</p>	<p>General limit on power to make subordinate legislation</p>	<p>Technical scrutiny by the Legislation Committee? Human Rights committee? Report to the Assembly?</p>
<p>Power of Secretary of State to intervene if proposed action by Welsh Ministers would be incompatible with 'any international obligation' (s82)</p>		<p>Allow Legislation Committee to report to Assembly if it considers subordinate legislation raises a question of compatibility with 'any international obligation'??</p>
<p>Procedures (some of this already covered above)</p> <p>Schedule 10, para 3 – new section 11A is added to the Statutory Instruments Act 1946 – includes provision that reference to Parliament includes reference to Assembly, provision where failure to lay copy of instrument (subject to annulment) before Assembly at least 21 days before the instrument comes into operation</p>		