

# Committee on Standing Orders

## Legislative Procedures for the newly constituted Assembly

**Professor David Miers**

**18 September 2006**

The points made below address the question of the scrutiny of Orders in Council, Assembly Measures and subordinate legislation, as set out in the Clerk's letter to me of 25 July. I do not rehearse here the background to the Government of Wales Act 2006, nor the issues that have been raised concerning the potential scope for legislative action that now beckons, save as that is relevant to the Assembly's capacity, via its Orders, properly to scrutinise such action. No doubt these matters may emerge in discussion. I begin with some general remarks.

### **1 Introductory Remarks**

#### **1.1 Authority for legislation**

It may be useful, first, to identify the range of authority under which legislation for Wales may be made. The first seven currently exist under the 1998 Act:

- Wales only Acts
- Welsh provisions of EW Acts (pre 1998 by TFO)
- EW provisions of EW Acts (pre 1998 by TFO)
- EU Regulations
- Assembly subordinate legislation
- Whitehall subordinate legislation for Wales only
- Whitehall subordinate legislation for EW
- Assembly Measures made under Orders in Council
- WAG subordinate legislation under Acts
- WAG subordinate legislation under Measures

Note that subordinate legislation will continue to include:

- General and local statutory instruments
- Non-SI legislation: orders, codes, directions, schemes

#### **1.2 Legislative authority: process**

There will be, broadly speaking, four main ways in which the UK Parliament may devolve legislative

power to Wales.

1 Where a policy to be pursued by the Assembly / WAG requires legislative authority which does not currently exist, request SSW to promote a government Bill (W only, or EW) to give effect to the policy or to give power to Assembly (as now) or WAG Ministers (GOWA 2006, section 58) to make subordinate legislation; or

2 Where a policy to be pursued by the Assembly / WAG requires legislative authority which does not currently exist, request SSW to make an OiC conferring power to make Assembly Measures in a Schedule 5 'matter'.

3 Where a policy to be pursued by the Assembly / WAG requires legislative authority which does currently exist but which is not devolved: request SSW to confer authority or seek a TFO conferring authority on Ministers.

Where a policy to be pursued by the Assembly / WAG requires legislative authority which does currently exist and which is devolved: it is for the Assembly and Ministers to agree whether powers formerly exercised by NAW will henceforth be exercised by Ministers, or retained by the Assembly.

### **1.3 Matters for scrutiny**

the introduction of the OiC procedure means that the Assembly will be conducting a scrutiny function that is, given the potential scope of the Measures to be authorised by the Order, equivalent in substance to Bill procedure in UKP

the introduction of Assembly Measures means that the Assembly will be conducting a scrutiny function in respect of any Measure that is to be made, equivalent in substance to Bill procedure in UKP

unlike 1998, not all statutory instruments will be made by the Assembly, and only some of those made by Ministers will require its approval; those requiring its approval may be by affirmative or negative resolution procedure, and the opportunity now arises for the Assembly to undertake not only a consideration of the SI's legal competence, as under current SO 11.7, but also of its merits

Ministers will continue to make much other non-SI subordinate legislation that will not require any Assembly involvement

## **2 Orders in Council**

### **2.1 General**

Orders in Council will give the Assembly authority to make Measures, which by section 94(1) may be functionally equivalent to an Act of Parliament. These may be made in respect of the 20 'matters' in Part 1 of Schedule 5. By section 95 these matters may in due course be themselves amended, save that no new field may be added where at the time the OiC is made, Ministers exercise no functions within it. But an OiC may make retrospective provision.

Orders in Council are of immense immediate and future legislative potential, even if the Measures

made under them remain in law a species of secondary legislation. However substantively important an Assembly Measure may be, it is not primary legislation (if for no other reason than that that power is conferred by Part 4 of the 2006 Act), and is therefore subject to legal challenge and to being found invalid.

Orders in Council are power conferring. If one were looking for an analogy to Westminster procedures, Orders resemble Regulatory Reform Orders, which likewise give Ministers power to confer, impose, modify or remove functions (section 94(4)(b)), including H8 powers. These are subject to scrutiny by the House of Lords Delegated Powers and Regulatory Reform Committee, whose criteria offer some useful guides for the Assembly.

## **2.2 Assembly Procedure and Scrutiny**

Orders in Council should be considered first in plenary (a Second Reading equivalent) in which the Minister presents the case for the powers sought. This will be a matter of policy related to one of the matters.

The proposed Order is then committed to a Committee (institutional arrangements are discussed in part 5 below) (one of) whose broad scrutiny function(s) is to ensure its legal competence.

Primary criteria of competence are provided expressly or by implication in sections 93-94 of the Act – that it does not (s 94(6)):

- Deal with a matter or field falling outside or prohibited by Schedule 5 (Part 2 general restrictions)
- Purport to give powers to make Measures applicable outside Wales
- Purport to give powers to make Measures that breach ECHR or Community law

In addition to these, the Committee could examine

- the potential ambit and impact of the Measures that would be authorised by the Order;
- the possibility of significant conflict between personal freedoms and securing the policy objectives;
- the extent to which individuals are likely to be prevented from continuing to exercise a right or freedom that they might reasonably be expected to continue to exercise;
- the likelihood that significant charges could be imposed under an authorised Measure;
- the nature of any criminal offences (Schedule 5 Part 2)
- the possibility that Measures could be given retrospective effect;
- the extent to which the Order authorises the repeal or amendment of existing statutory provisions (i.e. Henry VIII powers);
- where the Henry VIII powers are to have prospective effect, the kinds of matters or cases for which their future use that could now reasonably be expected.

The Committee should proceed by way of calling for the Minister to present the Order to it with supporting Explanatory Memoranda that clearly state its legal competence (like the EC or a s 19 HRA statement, or a section 97(5)(a) statement) at an evidence session.

There is also the question of subject matter scrutiny. Clearly, this is highly political. If this is conducted by the same Committee, then at the very least, it would need to be satisfied that the Minister has conducted adequate public consultation on the Order, with documentary evidence as to that effect (this mirrors DPRR and the Commons' equivalent RR Committee). Should the Committee also wish to invite written and oral evidence from the public and the potentially affected groups is a major question whose resource implications will be substantial.

Where subject matter scrutiny is conducted by a separate Committee there may be a saving of time (they can work in parallel) but there will be potential for duplication of work as well as of political disagreements.

Taken as a whole, these twin scrutiny events seek to assure the Assembly that the Order and its accompanying papers:

- define and justify the policy area or 'matter'
- identify and demarcate any aspects of the policy that might touch on UK Ministers' responsibilities
- identify the UK legislation that might / are to be modified, and the exact nature of that modification (where now known)
- identify how the Assembly might propose to make use of its powers in the immediate future
- identify any aspects of the 'matter' which, if Parliament were in future to enact legislation, the Assembly would wish power to modify
- meet and anticipate any issues concerning the criteria that will be applied by Parliamentary Committees

Assuming the Committee is satisfied on both the substance and the legal competence of the Order (possibly by subsequent correspondence), it reports such to the Assembly in plenary, which approves it (section 95(6)).

### **3 Assembly Measures**

The Act makes some provision for the way in which the Assembly is to deal with Measures (sections 97-99). These expressly envisage plenary debate that embraces the subject matter / policy to which the Measure gives effect (section 98(1)).

The Act also makes provision for different kinds of procedure where the Measure is, broadly speaking, of a legal technical nature (section 98(3)(a) and (b)). The Westminster analogy is the Joint Committee on Consolidation Bills. Private Measure procedure is also envisaged (section 98(3)): I have no comments on this other than to note the issues to which Private Bill procedure gives rise; primarily that is adversarial as between those promoting and opposing it, but that it may give rise to procedural issues (hybridity).

So far as substantive 'public' Measures are concerned, there are statutory provisions concerning references (sections 99-100) that need not be rehearsed here, as they require S Orders to make provision.

Assembly Measures are based on the authority of the Order in Council, and may be of potentially wide scope (both in the immediate and longer-term future) within the Schedule 5 'matters' (equivalence to an Act: section 94(1)). Once again, therefore, there are issues concerning the subject matter / policy as well as issues of legal competence. Bearing in mind that the lapse of time between the Order and the exercise of a power authorised by it may be some years, the questions to be answered are

Is the Measure within the scope of the policy envisaged by the Order in Council (questions on this will no doubt refer back to assurances / undertakings given by Ministers at the time of the Order, which may also have to take account of changed circumstances)

Is the Measure an acceptable exercise of the power authorised by the Order

Is the Measure legally competent.

As to legislative competence, section 94 specifies a number of fundamental considerations that will form the core of the scrutiny process. These considerations also appear in Schedule 5, Part 2. There are also obligations under 2006 on WAG (ss 72-78) that will need to be checked; so,

if the Measure seeks to give powers to Ministers 'to do anything' to promote well being' (section 60), how does it, and is the exercise of that power proportionate, say

is cross border consultation required before M can exercise power under the Measure (section 63)

does it affect a LG, voluntary sector or business scheme (sections 73 -75)

does it affect regulatory impact or sustainable development schemes (sections 76, 78)

does it impact on equality of opportunity (section 77)

In addition, the kinds of questions that the Committee scrutinising the Order asked may well be relevant here:

does the Measure have retrospective effect;

the extent to which the Measure repeals or amends existing statutory provisions (i.e. Henry VIII powers); in these cases there will need to be very clear statements of the competence and effect of those amendments.

## **Assembly scrutiny and control of its exercise**

Even if it were not itself secondary legislation, the Measure can also be scrutinised on the appropriately amended criteria that apply to statutory instruments under SO 11.7

The first two questions are matters of policy rather than law. Section 98(1(b) provides that the S Orders must include provision for the consideration etc of the detail. That is probably best accomplished in committee rather than plenary, and raises the same kinds of resource and procedural / institutional issues that attach to the consideration of the Order; for example, taking evidence from the Minister and the affected groups. Again, bearing in mind that political parties and interests, as well as circumstances change over time, the scrutiny of what the Measure seeks to achieve in substance may be a lengthy, complex and divisive affair.

## **Further Thoughts**

As with Orders, procedures should require an EM from WAG that

Gives assurances about legal competence and  
Identifies any matters that are of potential legal concern

The Assembly Committee could develop a checklist concerning legal competence that the EM should address. For example, it could address the duties specified in the Act (above, sections 63, 72-79), the requirements of sections 80-82, as well as what might be regarded as constitutional principles, so that the Measure is scrutinised against:

Inclusion, substance and non retroactivity of penal provisions  
provision for access to a court or tribunal to appeal against certain decisions  
protection of state held databases against abuse  
placing new tribunals under the supervision of the Council on Tribunals  
the delegation of power to amend primary legislation  
the delegation of powers to Ministers to make subordinate legislation

A checklist could also deal with more detailed matters of drafting, such as the European Council's drafting guidelines as a statement of good drafting practice (Resolution (OJ 1993 C166/1), suitably adapted:

the wording of the Measure should be clear, simple, concise and unambiguous; and excessively long sentences should be avoided;  
imprecise references to other texts should be avoided as should too many cross-references which make the text difficult to understand;  
the various provisions of the Measure should be consistent with each other; the same term should be used throughout to express a given concept;  
the rights and obligations of those to whom the Measure is to apply should be clearly defined;  
the Measure should be laid out according to a standard structure (chapters, sections, articles, paragraphs);  
the preamble should justify the enacting provisions in simple terms;  
provisions without legislative character should be avoided (e.g. wishes, political statements);  
Any amendment, extension or repeal of an Act should be clearly set out;  
the date of entry into force of the Act and any transitional provisions which might be necessary should be clearly stated.

A checklist would be useful in giving focus to the work to be conducted at the Measure Committee stage, as well as alerting government to the fact that these questions will be asked in an evidence session. They may also trigger evidence from the public, or from expert groups could be taken, on the assumption that the Committee will have public evidence sessions.

'Advance' proofing of this kind might well improve the product when it comes to be implemented.

## **4 Subordinate Legislation**

Resource constraints mean that there will be some subordinate legislation that will never be scrutinised by the Assembly. This is non-SI legislation made by Ministers. This is also the reason why local, and SIs made under EU legislation are unlikely to be dealt with.

So far as general SIs are concerned, the 2006 Act brings some changes. SIs will be made by Ministers to whom functions are transferred (section 58 2006), not necessarily by the Assembly. Schedule 3 para 9 provides that WAG's SIs will be subject to approval on the same terms as SIs made under Acts (affirmative and negative procedure); not all of these will be considered by the Assembly (unless AM motion). Some procedures are specified by the Act (section 72(7)).

Not all SIs could or need be debated in plenary, but as is presently the case, there must be some mechanism for drawing its attention to legally flawed proposals (current SO 11.7)

- (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;
- (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;
- (iii) if it appears to have retrospective effect where the Act of Parliament or other authorising instrument does not give express authority for this;
- (iv) if for any particular reason its form or meaning needs further explanation;
- (v) if its drafting appears to be defective or the instrument fails to fulfil statutory or other legal requirements; or
- (vi) if there appear to be inconsistencies between the English and Welsh texts.
- (vii) that the subordinate legislation uses gender specific language; or
- (viii) that the subordinate legislation is not to be made in both English and Welsh.

There are the additional points concerning specific powers (s 60) and duties on WAG under 2006 mentioned above under Measures (sections 63, 72-78, and 79-81). So, as with Measures, the Committee could formulate a checklist that WAG would have to address in the EM. This would allow the Committee to ask itself the question, 'are we satisfied with the accuracy and detail of the RIA and of any statement concerning sustainability?' Or it could ask 'are we (whatever the government says) satisfied that this Measure is compatible with human rights, community law and other international obligations on WAG? (sections 80-82)' If not, what reasons has the government produced to justify the incompatibility?

Ministers make hundreds of SIs a year: it is unlikely that these could all be considered by a single Committee; but it may be able to carry out a 'sifting' function, as the Legislation Committee is now at liberty to undertake a 'merits' review, as at Westminster. (Not constrained by section 58 1998). It may be worth noting that in its Special Report for 2005/05 the Merits Committee was considering over 80 instruments a week throughout the session, and a peak of 120 (17<sup>th</sup> Report, The Work of the Committee in Session 2004-05). It reviewed 620 instruments (89A, 531N) of which 6A and 34N were drawn to the attention of the House. It comments also on the difficulties of managing to peaks and troughs in the flow of instruments – a matter that could also affect the Assembly.

The Merits criteria are

Politically or legally important / issue of public policy  
Inappropriate in changed circumstances  
Imperfectly achieves policy objectives,  
which could be linked with the SO 11.7 criteria.

The Committee noted that it has shifted to reporting matters that it feels HL should know about, not necessarily that it raised public policy concerns.

## **5 Institutional Arrangements**

The scrutiny functions described contemplate a variety of possible institutional arrangements.

‘Technical’ (section 98(3)(a) and (b)) Measures could be assigned to a Committee whose primary function is to scrutinise the legal competence of Assembly legislation of whatever kind (such as that which follows, to be called a Legislation Committee for present purposes)

Ministerial or Assembly statutory instruments that require affirmative resolution could be scrutinised by the Legislation Committee, which could also have a ‘merits’ function

Assembly Measures could be assigned, for the purpose of scrutinising their legal competence, to the Legislation Committee, and for the purpose of scrutinising their subject matter, to another committee, called here an Assembly Measures Committee

Or, both the scrutiny of the legal competence and the subject matter competence could be assigned to a single Committee (also called the Assembly Measures Committee)

These last arrangements could also be made for the scrutiny of any Order, and it might be possible to appoint the Assembly Measures Committee to consider both the Order and its subsequent Measures, so as to achieve continuity / institutional memory and expertise.

The disadvantage of Order – Measure is that it takes no account of delay between the making of the Order and of the Measure, and the advantage of a single Legislation Committee that only looks at the legal competence of any legislation is that it develops expertise.

Whatever arrangements are made must also take account of resources (especially and crucially, legal advice), officials’ and AMs’ time.