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Llywodraeth Cymru  
Welsh Government

Rosemary Butler AM  
Presiding Officer  
National Assembly for Wales  
Cardiff Bay  
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24 January 2012

Dear Rosemary,

**PUBLICATION OF WELSH GOVERNMENT GUIDELINES ON CHOICE OF  
AFFIRMATIVE OR NEGATIVE PROCEDURE IN SUBORDINATE LEGISLATION**

I would like to draw your attention to the publication of Welsh Government Guidelines on the choice of affirmative or negative procedure in subordinate legislation. A copy of those Guidelines is attached, and another has been laid in the Assembly Library.

Coinciding with the work of the (then) Constitutional Affairs Committee in respect of their report on the Inquiry into the Drafting of Welsh Government Measures: Lessons from the first three years, the former Counsel General, John Griffiths AM, conducted review of the experience of the Welsh Government relating to legislation processes during the third Assembly and what improvements could be made. This was achieved via co-operation with Ministers, Members, Committees, officials and external interested parties.

A significant issue which arose from that review was a lack of clarity amongst Assembly Members and scrutiny committees as to exactly how the choice of Assembly procedure used in relation to statutory instruments made by virtue of powers conferred by Assembly Measures (now Assembly Acts of course) was actually arrived at.

These Guidelines set out the criteria that the Welsh Government applies in determining the procedure to be adhered to in relation to such Welsh subordinate legislation.

It is envisaged that the publication of these Guidelines will constitute a vital enhancement to the fundamental values of clarity and transparency in the Welsh Government's legislative process.

I am sending a similar letter to David Melding AM, the Chair of the Constitutional and Legislative Affairs Committee.

Yours sincerely

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## Welsh Government Guidelines

### Subordinate Legislation

#### Draft Affirmative or Negative Assembly Procedure

##### When do these guidelines apply?

These guidelines apply when considering the choice between draft affirmative and negative Assembly procedure:

- (i) when Bills for Assembly Acts that confer powers to make statutory instruments are being prepared;
- (ii) when the Welsh Ministers seek provisions in Bills for UK Parliament Acts that confer powers in devolved areas to make statutory instruments; and
- (iii) when legislation provides for a choice to be made between those types of procedure when making statutory instruments in devolved areas.

##### Background

Powers to make subordinate legislation about devolved matters are conferred on, for example Welsh Ministers, by virtue of Assembly Acts<sup>1</sup> or by UK Parliament Bills. In such cases consideration is given to what form of Assembly procedure should be applied to an instrument made under that power.

The two most commonly used procedures are set out here for ease of reference. Draft affirmative procedure is where the instrument cannot be made unless a draft of it is laid before and approved by a resolution of the Assembly. It must be made in the form of the draft laid and therefore cannot be amended. Negative procedure is where the instrument can be made (and come into force) but must be laid before the Assembly and can be ‘negated’ or ‘annulled’ by a resolution of the Assembly is sometimes called “annulment” procedure. It is, however, referred to in this note as “negative procedure”.

##### Application of Guidelines

This paper sets out guidelines to be taken into account by the Welsh Government in determining (e.g. when preparing Assembly Bills that confer power to make statutory instruments) whether such an instrument should be subject to that *usual* form of draft affirmative or negative Assembly procedure<sup>2</sup>.

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<sup>1</sup> Or in or under Assembly Measures that remain in force following Part 3 of GOWA 2006 ceasing to have effect.

<sup>2</sup> These are not, however, the only forms of ‘affirmative’ or ‘negative’ procedure – see Statutory Instruments Practice - <http://www.opsi.gov.uk/si/statutory-instrument-practice>.

The guidelines recognise that in each case there is a balance to be struck between:

- scrutiny by the Assembly;
- consumption of Assembly (or committee) time;
- the significance of the provisions in question; and
- the making of legislation in the most efficacious manner.

Some factors that are to be taken into account are set out below but these are not exhaustive lists. It is not, therefore, practicable to give a set of precise criteria to be applied rigidly in every case.

The guidelines apply to subordinate legislation in respect of a devolved matter that takes the form of a statutory instrument.

Whilst the intention of the Welsh Government is that these guidelines will apply equally in cases where such powers are being sought in a UK Parliament Bill it is recognised that, ultimately, neither the Welsh Government nor the Assembly has control over that process.

There are some factors that may, to a greater or lesser extent depending on the context:

- (a) tend to suggest the application of the “draft affirmative” procedure; or
- (b) require particular justification if a procedure other than “draft affirmative” procedure is applied.

The factors referred to above are:

- 1) powers that enable provision to be made that may substantially affect provisions of Acts of Parliament, Assembly Measures or Acts of the Assembly<sup>3</sup>;
- 2) powers, the main purpose of which is, to enable the Welsh Ministers, First Minister or Counsel General to confer further significant powers on themselves;
- 3) powers to apply in Wales provisions of, for example, Acts of Parliament that in England, Scotland or Northern Ireland are contained in the Act itself (whether with or without modifications);
- 4) powers to impose or increase taxation or other significant financial burdens on the public;
- 5) provision involving substantial government expenditure;
- 6) powers to create unusual criminal provisions or unusual civil penalties;
- 7) powers to confer unusual powers of entry, examination or inspection, or provide for collection of information under powers of compulsion;

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<sup>3</sup> E.g. Henry VIII powers if wider than necessary for purely consequential amendments as a result of the Act or Measure.

- 8) powers that impose onerous duties on the public (e.g. a requirement to lodge sums by way of security, or very short time limits to comply with an obligation).
- 9) powers involving considerations of special importance not falling under the heads above (e.g. where only the purpose is fixed by the enabling Act and the principal substance of the legislative scheme will be set out in subordinate legislation made in exercise of the power).

Factors that may reasonably tend to suggest the application of the “negative” procedure include, in particular:

- 1) where the subject-matter of the subordinate legislation is relatively minor detail in an overall legislative scheme or is technical;
- 2) where it may be appropriate to update the subject-matter of the subordinate legislation on a regular basis;
- 3) where it may be appropriate to legislate swiftly (e.g. to avoid infraction proceedings or for the protection of human or animal health or of the environment)<sup>4</sup>;
- 4) where the discretion of the Welsh Government over the content of the subordinate legislation is limited (e.g. legislation that gives effect to some provisions of EU law);
- 5) where it would be appropriate to combine provision to be made under the power with provision that can be made under another power where the latter may be subject to negative procedure.

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<sup>4</sup> In some cases subordinate legislation made for these purposes is not subject to any procedure due to the recognised need to legislate urgently.