Llywodraeth Cymru
Welsh Government

Parts 2 and 3 of the Legislation (Wales) Act 2019

Guidance for preparing Welsh legislation

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Introduction

What is this guidance about?

This document gives guidance to drafters of Welsh legislation on the implications of Parts 2 and 3 of the Legislation (Wales) Act 2019 (the 2019 Act). It does not give a full explanation of the purpose or legal effect of the provisions of the 2019 Act: for that, see the Explanatory Notes to the Act[1]. Nor does it give a full account of the Welsh Government's approach to drafting legislation: for guidance on that, see *Writing Laws for Wales: a guide to legislative drafting*[2].

Terminology used in the 2019 Act and in this guidance

Part 2 of the Senedd and Elections (Wales) Act 2020 changes the name of the National Assembly for Wales to Senedd Cymru with effect from 6 May 2020. Schedule 1 to that Act amends the 2019 Act to replace references to Assembly Acts with references to Acts of Senedd Cymru, and to insert a definition of "Act of Senedd Cymru" which includes Acts passed both before and after the name of the legislature was changed.

The same approach is used in this guidance, which uses the term "Acts of Senedd Cymru" wherever the intention is to include Acts that were passed both before and after the name change. However, "Assembly Acts" is used where the intention is to refer only to Acts passed when the legislature was still known as the National Assembly for Wales.

There is separate guidance on the implications of Part 2 of the Senedd and Elections (Wales) Act 2020 for legislative drafting.

[1] Available at: **www.legislation.gov.uk/anaw/2019/4/notes/contents**
[2] Available at: **gov.wales/sites/default/files/publications/2019-11/writing-laws-for-wales-guidance-on-drafting-legislation.pdf**

Part 2 – Contents

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What does Part 2 of the 2019 Act do?

Part 2 of the 2019 Act contains default provisions about the interpretation and operation of Welsh legislation – that is, Acts of Senedd Cymru and subordinate legislation made by the Welsh Ministers and other devolved Welsh authorities.

The default provisions deal with a variety of issues, including the meaning of certain words and phrases when they are used in legislation, the exercise of certain types of statutory power, the effect of legislation which amends or repeals other legislation, and whether legislation applies to the Crown.

Part 2 of the 2019 Act takes the place of the Interpretation Act 1978 (the 1978 Act) for Welsh legislation. Most of the default provisions in Part 2 are based on provisions in the 1978 Act, which previously applied to all Welsh legislation (and will continue to apply to Welsh legislation made before Part 2 was in force). However, the 1978 Act pre-dates devolution, and a number of its provisions are irrelevant to Wales. As a result, Part 2 of the 2019 Act is different in some respects from the 1978 Act.

Part 2 of the 2019 Act does not contain all of the rules that govern the interpretation of Welsh legislation. Some of those rules are found in other statutes; most obviously, the Government of Wales Act 2006 (GoWA 2006) places general limits on the powers of Senedd Cymru and the Welsh Ministers to make legislation, and requires legislation to be interpreted in accordance with those limits.

Further, a range of common law principles of statutory interpretation have also been developed by the courts in considering disputes that involve questions about the meaning of legislation. Part 2 of the Act reverses the common law presumption that Welsh legislation does not bind the Crown, but does not change the effect of any of the other common law principles of interpretation.

Who needs to understand Part 2?

This guidance is mainly relevant to:

- lawyers and officials within Welsh Government who draft Bills and statutory instruments for the Welsh Ministers;
- officials within Welsh Government who prepare subordinate legislation;
- lawyers and other officials who draft subordinate legislation for devolved Welsh authorities (such as byelaws and schemes made by county and county borough councils).

It will also be relevant to those who are involved in the scrutiny of Bills and statutory instruments by Senedd Cymru, and to anyone who needs to understand or apply Welsh legislation.

When did Part 2 of the Act Come Into Force?

The provisions of Part 2 of the 2019 Act that apply to the interpretation and operation of the 2019 Act itself came into force on 11 September 2019. For the purposes of the interpretation and operation of other legislation, the provisions of Part 2 came into force on 1 January 2020 and apply to Welsh legislation enacted on or after that date.

Legislation to which Part 2 applies

With a few minor exceptions, Part 2 of the 2019 Act applies to all legislation made in Wales from 1 January 2020 onwards. Section 3(1) provides that Part 2 applies to the 2019 Act itself, Acts that receive Royal Assent on or after 1 January 2020, and Welsh subordinate instruments that are made on or after 1 January 2020.

The key date is the date of making the instrument. For subordinate legislation, it is the date the instrument is signed by one of the Welsh Ministers, not the date it is laid before the Senedd. The key date for byelaws will be the date when a devolved Welsh authority takes the last step in the required process, generally by applying the common seal of the authority to the document after approving it.

Meaning of a "Welsh subordinate instrument"

Section 3(2) of the 2019 Act sets out the definition of a Welsh subordinate instrument, which captures the following:

Subordinate legislation which is –

i. made on or after 1 January 2020,

ii. made under Acts of Senedd Cymru and Assembly Measures (whenever the Act or Measure received Royal Assent or approval), and

iii. made by the Welsh Ministers or any other person.

The definition also captures:

Subordinate legislation which –

i. is made on or after 1 January 2020,

ii. is made under an Act of the UK Parliament (whenever that Act received Royal Assent) or under retained direct EU legislation,

iii. is made only by the Welsh Ministers or another devolved Welsh authority (not acting with other types of authority), and

iv. applies only in relation to Wales.

Accordingly, Part 2 applies to subordinate legislation made by devolved Welsh authorities, such as county and county borough councils, National Park Authorities, and Natural Resources Wales.[3] So it is important to be aware that Part 2 of the 2019 Act will apply to any byelaws, schemes or orders made by such bodies, whether the powers to make them are contained in Acts of Senedd Cymru, Assembly or Acts of the UK Parliament.

If however the subordinate legislation does not fall within this definition it will not be considered a "Welsh subordinate instrument," and will be subject to the 1978 Act.

For example, an instrument will not be a "Welsh subordinate instrument" if it contains subordinate legislation made under an Act of the UK Parliament or retained direct EU legislation by a person or body that is not a devolved Welsh authority.

This means a "Welsh subordinate instrument" will not include instruments made jointly by the Welsh Ministers and a Secretary of State, or "composite" instruments in which the Welsh Ministers legislate for Wales and the Secretary of State legislates for England.

[3] A definition of devolved Welsh authority is found at section 157A of GoWA 2006, and a list of such bodies is set out in Schedule 9A to GoWA 2006.

Continuing application of the 1978 Act

Part 2 of the 2019 Act does not apply to all of the legislation that is relevant to Wales. There will continue to be legislation applying in Wales that is subject to the 1978 Act.

Part 2 of the 2019 Act does not apply to:

a. any legislation enacted before 1 January 2020;
b. any legislation made by a body that is not a devolved Welsh authority (even if it is also made partly by a devolved Welsh authority), or
c. any legislation that applies otherwise than in relation to Wales (even if it also applies in relation to Wales or part of Wales).

The 1978 Act will therefore continue to apply to legislation of the following kinds:

a. Assembly Acts[4] which received Royal Assent before 1 January 2020;
b. all Assembly Measures;
c. all subordinate legislation made before 1 January 2020 which was made under an Assembly Act or Measure, or made under an Act of the UK Parliament by a devolved Welsh authority;
d. Acts of the UK Parliament;
e. subordinate legislation made by Ministers of the Crown and other reserved authorities;
f. joint and composite instruments made under an Act of the UK Parliament or retained direct EU legislation by the Welsh Ministers or a devolved Welsh authority acting with another authority (for example, a Minister of the Crown).

Part 2 of the 2019 Act will also not apply to any EU legislation, even if that legislation is retained in UK law following withdrawal from the EU.

Considering the 1978 Act when drafting Welsh legislation

There will still be many cases where it is necessary to consider the 1978 Act when drafting and interpreting new Welsh legislation, in particular when the Welsh legislation is subordinate legislation.

For the foreseeable future, most Welsh subordinate instruments will be made under Acts of the UK Parliament, under Assembly Measures, or under Assembly Acts enacted before 2020. In these cases:

- the 1978 Act will apply to the parent Act or Measure, but
- Part 2 of the 2019 Act will apply to the Welsh subordinate instrument.

Welsh legislation may also need to amend legislation to which Part 2 of the 2019 Act does not apply (such as an Act of the UK Parliament, UK subordinate legislation, or any Welsh legislation enacted before 2020). In that case:

- Part 2 of the 2019 Act will apply to the provisions of the amending legislation, but
- the 1978 Act will apply to any material that is inserted into the other legislation.

[4] The expression "Assembly Act" is used here because the reference is only to Acts that were enacted before the change in the name of the legislature, which were all Acts of the National Assembly for Wales rather than Acts of Senedd Cymru. Likewise, all Assembly Measures were enacted long before the name change.

Conversely, if an Act of the UK Parliament or UK subordinate legislation is amending any Welsh legislation to which Part 2 of the 2019 Act applies (i.e. Welsh legislation enacted from 1 January 2020), then:

- the 1978 Act will apply to provisions of the amending Act or instrument, but
- Part 2 of the 2019 Act will apply to material inserted into the Welsh legislation.

Although it will be necessary consider both the 1978 Act and the 2019 Act in these cases, most of the provisions of the two Acts have the same effect.

Which interpretation provisions apply if Welsh legislation is amending other legislation?

Welsh legislation to which Part 2 of the 2019 Act applies will sometimes amend other legislation by inserting new provisions or replacing existing ones. Material that is inserted into existing legislation is normally interpreted on the basis that it forms part of that existing legislation, and this position is confirmed in section 32 of the 2019 Act.

Where an Act or instrument to which Part 2 applies amends another Act or instrument to which Part 2 applies, there should be no difficulties because Part 2 will apply equally to both pieces of legislation.

Where an Act of Senedd Cymru or Welsh subordinate instrument is amending legislation to which Part 2 does not apply – such as an Act of the UK Parliament, a piece of UK subordinate legislation, or any pre-2020 Welsh legislation – the position is slightly more complicated. Part 2 of the 2019 Act will not apply to the legislation that is being amended. That legislation will instead be subject to the 1978 Act, and to the common law presumption that legislation does not bind the Crown.

Material that is inserted into an Act of the UK Parliament or a piece of UK subordinate legislation will need to be drafted by reference to the rules that apply to that legislation rather than Part 2 of the 2019 Act. This will also be true where an Act or instrument to which Part 2 of the 2019 Act applies is amending an Assembly Act that received Royal Assent before January 2020, an Assembly Measure, or a Welsh subordinate instrument made before January 2020. Welsh legislation enacted before January 2020 remains subject to the rules of interpretation that applied when it was enacted, including the 1978 Act, and material inserted into that legislation should be drafted by reference to those rules.

So when drafting amendments to other legislation, it is important to check which interpretation provisions apply to the legislation being amended, and to draft any inserted text in accordance with those rules. That may mean that an inserted provision needs to use different words from those that would have been used in a free-standing provision appearing in the amending Act or instrument. But in most cases this won't be necessary as the two sets of interpretation provisions have the same effect.

The position may be more complicated when drafting a non-textual modification of an enactment to which Part 2 of the 2019 Act does not apply, and the correct approach may depend on the way in which the non-textual modification is drafted. The more closely the modification resembles a textual amendment, the more likely that it should be drafted on the basis that it forms part of the enactment being modified. For example, if the modification requires an existing enactment to be read as if an alternative version of subsection (1) were substituted for the existing subsection (1), the intention will normally be that the alternative version should read as if it formed part of the existing enactment. It should therefore normally be drafted by reference to the terms used in the existing enactment. On the other hand, if the modification simply requires subsection (1) to be read as if references to an existing concept were references to an alternative concept, it may be more appropriate to define that alternative concept in the legislation that makes the modification.

Effect of provisions in Part 2

Part 2 of the 2019 Act contains a set of default provisions that will govern aspects of the interpretation and operation of Welsh legislation in the absence of any intention to the contrary. But those default provisions do not limit the powers under which legislation is made, and therefore they do not prevent individual pieces of legislation adopting different rules where that is within the relevant powers. If a different rule is intended, that will generally displace the provisions in Part 2.

Section 4 of the 2019 Act provides that nearly all of the provisions of Part 2 have effect except so far as an express provision is made to the contrary or the context requires otherwise. This reflects the position under the 1978 Act where nearly every section of that Act provides that it applies "unless the contrary intention appears". Section 4 of the 2019 Act simply deals with the issue in one place, and identifies the two ways in which a contrary intention may be found (i.e. from a specific provision to the contrary, or by implication from the context).

An express provision to the contrary will be a provision setting out a different position from the one provided for in Part 2. For example, section 15(1) of the 2019 Act provides that statutory powers may be exercised more than once; but if that is not the policy for a particular power, the legislation conferring the power can state that it may be exercised only once. (This is likely to be clearer and more helpful than stating that section 15(1) of the 2019 Act does not apply to the power.)

It can be appropriate to rely on the context where a contrary intention is completely clear. For example, if the nature of a power means that there is no way that the power could be exercised more than once, it may be appropriate to rely on the context to displace section 15(1) of the 2019 Act.

However, section 4(2) does not allow Welsh legislation to displace the rule in section 5 of the 2019 Act which establishes the equal status of the two language texts of bilingual legislation.

Further section 4(3) provides that context cannot disapply the effect of the following provisions of Part 2 (so that only an express provision to the contrary is sufficient):

a) section 10 (references to time of day are to GMT or BST);
b) section 28 (Welsh legislation binds the Crown);
c) section 33 (repeals and revocations do not revive law previously repealed, revoked or abolished).

Definitions of terms used in Welsh legislation

Part 2 of the 2019 Act will affect the way in which definitions are used in Welsh legislation. For general guidance on the use of definitions, see chapter 4 of *Writing Laws for Wales*. Paragraphs 4.10 to 4.12 are particularly relevant to the issues arising from Part 2 of the 2019 Act, and they take account of the changes made by the 2019 Act.

General definitions of terms: Section 6 and Schedule 1

Schedule 1 to the 2019 Act contains standard definitions of terms that are likely to be used in Welsh legislation. Section 6 of the Act provides that the words and expressions listed in Schedule 1 have the meaning given in that Schedule where they are used in Acts and Welsh subordinate legislation to which Part 2 of the 2019 Act applies.

Although Schedule 1 gives the listed terms the meanings they are usually intended to have in Welsh legislation, those terms may be given different meanings where that is necessary or appropriate. The definitions in Schedule 1 may be excluded or modified by any express provision made to the contrary, or if the context requires a different effect. However, if you are proposing to give a common

term a different meaning from the one that it would usually have, that may be a sign that you should consider using a different term.

Many of the definitions in Schedule 1 are the same as the corresponding definitions in Schedule 1 to the 1978 Act, including the definitions of "land," "month," "person" and "writing" as well as definitions relating to UK institutions. Some definitions are worded differently from definitions in the 1978 Act but are intended to have the same effect as those in the 1978 Act, including the definitions relating to criminal offences and some definitions relating to exiting the EU.

Schedule 1 lists some words and expressions that do not appear in Schedule 1 to the 1978 Act but that are likely to be relevant to Welsh legislation. These include a standard definition of "working day" as well as the names of various devolved bodies, which are defined by reference to the legislation establishing or naming the body.

Some of the definitions in Schedule 1 authorise the use of shorthand versions of the statutory names of public authorities. For example, there are definitions which mean that Welsh legislation may refer to "Natural Resources Wales" rather than using its statutory name (the Natural Resources Body for Wales), and to the "Charity Commission" rather than the Charity Commission for England and Wales.

There are in addition certain definitions that appear in Schedule 1 to the 2019 Act that differ from the definitions provided in Schedule 1 to the 1978 Act:

- The definitions of various courts in the 2019 Act include only the courts that operate within the jurisdiction of England and Wales, whereas the definitions in the 1978 Act also include the equivalent courts in Northern Ireland. If for any reason Welsh legislation needs to refer to a court in Northern Ireland, it will need to include wording to make that clear (e.g. "the High Court in Northern Ireland").
- "Financial year" is defined for all purposes in the 2019 Act, whereas the definition is limited to circumstances relating to public money in the 1978 Act.
- The definition of 'Wales' in the 2019 Act reproduces the effect of the definition in section 158(1) of GoWA 2006. This means the definition is broader than that contained in the 1978 Act, which includes only the council areas in Wales. The default definition of "Wales" now includes *"the sea adjacent to Wales out as far as the seaward boundary of the territorial sea."* If you do not want your definition of 'Wales' to include the sea out as far as the seaward boundary of the territorial sea, a definition of 'Wales' limited to the land boundary may need to be inserted into your Bill or Instrument. However, this may not be necessary if the other provisions of the legislation make clear that it applies only to things that happen on land or within a certain distance of the shore.
- Schedule 1 to the 2019 Act contains a comprehensive definition of "enactment" which is intended to cover all of the types of legislation that are relevant to Wales. This means that there should generally be no need to define an "enactment" in Welsh legislation (although provision may still be needed where references to an enactment are intended to cover future enactments which become law after the Welsh legislation containing the reference).
- Schedule 1 to the 2019 Act defines "subordinate legislation" for the purposes of all Welsh legislation, whereas the 1978 Act gives a definition which applies only to the 1978 Act itself. This means it will no longer be necessary to define "subordinate legislation" by reference to the definition in the 1978 Act.

Some definitions in the 1978 Act have not been replicated in Schedule 1 to the 2019 Act, for example, 'British overseas territory' and 'London Borough' as these terms are unlikely to be used in a Welsh context. Should you wish to include such terms in your legislation, think about whether they need to be defined on the face of your legislation.

Schedule 1 to the Senedd and Elections (Wales) Act 2020 contains a number of amendments to Schedule 1 to the 2019 Act, to reflect the renaming of the National Assembly for Wales and related changes of terminology (which came into force on 6 May 2020). There are also amendments

to Schedule 1 relating to the UK's withdrawal from the European Union in the European Union (Withdrawal Agreement) Act 2020 and the Direct Payments to Farmers (Legislative Continuity) Act 2020.

Section 6(2)(a)-(c) of the 2019 Act also provides Welsh Ministers with the power to insert new definitions of words or expressions, remove definitions of words or expressions, or amend definitions of words or expressions contained in Schedule 1.

Relationship between the meaning of terms in primary and subordinate legislation

The 2019 Act contains no equivalent to section 11 of the 1978 Act. That section provides that words and expressions used in subordinate legislation have the same meaning as in the Act under which the subordinate legislation was made. It means that subordinate legislation may use terms defined in the parent legislation without needing to define those terms or identify the relevant definition, but it may be a trap for readers of the subordinate legislation who are unaware of section 11.

Because the 2019 Act does not contain a provision like section 11 of the 1978 Act, drafters of Welsh subordinate instruments will need to consider how best to ensure that words used in their instrument have the same meaning as in the primary legislation (where that is the intention).

In doing so, drafters should consider what will be most helpful to the reader of the subordinate legislation. If all that is needed is to apply a definition in the parent Act or Measure, the most helpful approach will generally be to copy out the definition in the subordinate legislation. This will mean that the reader does not have to refer to the Act or Measure to understand the instrument, and in the case of subordinate legislation made under Acts of the UK Parliament, it will also mean that the definition will be available in Welsh as well as English.

If you are repeating definitions from the parent Act, check whether any of those definitions need to be amended (for example, so as to relate only to Wales if the parent Act is a UK Act) and whether they use other terms that are defined in the Act; if so, it may be necessary to repeat those other definitions as well. Also bear in mind that if the definitions in the parent Act are amended in the future, it may be necessary to make corresponding amendments to the definitions in the subordinate legislation.

Repeating definitions from the parent Act will not always be appropriate, for example if it would result in a disproportionate increase in the size of the instrument or draw disproportionate attention to a technical definition that may only be relevant in limited circumstances. Another option is for the subordinate legislation to provide that a term has the meaning given in the parent Act. If you adopt this approach, try to identify the provision in the parent Act that defines the term, so that the reference is as helpful as possible. This approach will mean that future amendments to the definition in the parent Act also apply to the subordinate legislation, unless there is provision to the contrary or the context requires otherwise (see section 25 of the 2019 Act).

Where instruments are made under Acts of the UK Parliament or retained direct EU legislation, the parent legislation will not contain Welsh language versions of terms. In this case the Welsh language text should provide that expressions used in the instrument have the same meaning as the corresponding English language expressions in the parent legislation.

It will not always be practicable to repeat or even refer to specific definitions in the parent Act. In those cases, drafters may consider adding words to the instrument reproducing the effect of section 11 of the 1978 Act. This may also be appropriate if the intention is not just to apply definitions in the parent Act but also to rely on other ways in which terms in that parent Act have acquired meanings, such as through the common law.

Paragraphs 4.11 and 4.12 of *Writing Laws for Wales* contain examples of how provisions adopting each of these approaches may be drafted.

Application of definitions to related terms

Section 9 of the 2019 Act is a new provision. It makes clear that where an Act or instrument defines a word or expression, parts of speech relating to the word or expression also carry the definition.

For example, if the word 'walk' is defined, then the parts of speech relating to 'walk', such as 'walking' and 'walker', are to be interpreted in the light of that definition.

Further, section 9 puts beyond doubt that a definition of a word or expression applies despite any variation of that word or expression arising due to the operation of grammatical rules. In relation to Welsh language text of legislation, this section will make it clear that a definition or meaning applies regardless of any mutations, or variations of an expression arising as a result of word order and sentence structure.

Section 9 means that it is generally unnecessary for Welsh legislation that defines a word or expression to provide that "cognate expressions are to be read accordingly". However, you should always consider whether section 9 gives the right result, and whether it will provide a sufficiently clear and precise meaning for a related term.

Service of documents by post and electronically

Sections 13 and 14 of the 2019 Act contain basic provisions about the service of documents by post and electronically. They do not themselves authorise or require any type of document to be served using postal services or electronic communications. They apply only where an Act or instrument provides for service by either or both of those methods. It is for individual Acts and instruments to determine whether those methods of service, or any others, are permitted in particular contexts.

When drafting, you can choose to say nothing about how service is to be carried out, and adopt the provisions in the 2019 Act. But that will often be insufficient. If you wish to deviate from the provisions of the 2019 Act, or include further detail, you should include bespoke service provisions on the face of the Bill or Welsh subordinate instrument.

Service of documents by post

Section 13(1) provides that if the person who is to serve the document properly addresses, pre-pays and posts a letter containing the document to the recipient, the person will be regarded as having served the document.

Properly addressing the letter containing the document is intended to mean that the postal address of the intended recipient appears correctly on the letter. If it is necessary to specify which of a recipient's addresses can be used, for example in relation to a company with multiple offices, it will be for the relevant Act or instrument to make provision about that issue.

Section 14 provides that a document which is served by post is treated as being served 'on the day on which the letter containing the documents would arrive in the ordinary course of post'. The time of deemed service by post will therefore depend on the postal service used, which may include first or second class post, or some other means of expedited postal delivery. In each case, when post is used, the sender can determine the day on which service is deemed to take place by reference to normal delivery times for the service chosen. This presumption can be rebutted by evidence to the contrary.

Service of documents electronically

Section 13(2) takes a similar approach to subsection (1), but in relation to service of documents using methods of electronic communication. The sender must properly address and send to the recipient an electronic communication consisting of, or containing the document, or to which the document is attached; and must send the document in an electronic form which is capable of being accessed and retained by the recipient.

Subsection (2) will only apply where an Act or instrument provides that a document may or must be sent electronically. This will include sending documents by email, fax or any other method of electronic communication. Subsection (2) does not of itself allow electronic communications.

Properly addressing an electronic communication as required by subsection (2)(a) means the sender must make sure the email, fax or other communication is sent to an email address, fax number or other electronic address that is valid and which the recipient can be reasonably expected to access, and that the address has been entered accurately. If additional requirements are wanted in particular cases, such as prior consent for service by electronic communications, they will need to be set out in the relevant Act or instrument.

Further, subsection (2) is not intended to allow service to be effected electronically by sending a link to a document hosted on the internet, which the recipient must then take further steps to access.

Section 14 also deals with the deemed date of service of documents served using electronic communications. In order to reflect the near instantaneous nature of most electronic communication, the document is deemed to be served on the day it is sent. This presumption can be rebutted by evidence to the contrary.

Exercising powers and duties under Welsh legislation before it comes into force

Subsections (1) and (2) of section 16 provide that powers and duties under provisions of Acts of Senedd Cymru and Welsh subordinate instruments may be exercised before those provisions come into force. This power may be required where it is necessary to bring the provisions into force, or for giving full effect to the provisions at or after the time when they come into force.

By virtue of subsection (1)(a), the section applies to provisions of Acts if they come into force at a time which is specified in the Act and is more than one day after the day of Royal Assent (but not to provisions which come into force sooner or are brought into force by order or regulations).

Section 16(3) sets out the purposes for which the power or duty can be exercised before the relevant provision comes into force.

Section 16(4) and (5) ensure that the power or duty operates in the same way as it would when the relevant provision was in force. They allow for reliance on other provisions which are not in force but which are incidental or supplementary to the power or duty. They also make clear that any limitations or conditions which would apply to the exercise of the power or discharge of the duty if the Act or instrument were fully in force, also apply when the power or duty is exercised in reliance on section 16.

This section is equivalent to section 13 of the 1978 Act, but it is narrower in its application. In particular, section 16 does not apply where a power or duty is to be brought into force by order or regulations; it makes clear exactly when it enables the power or duty to be exercised; and it provides that the power or duty is to be exercised in the same way as if the provisions conferring or imposing it were in force.

Section 13 of the 1978 Act will continue to apply to powers and duties conferred or imposed by Acts that receive Royal Assent before Part 2 of this Act comes into force, and by subordinate legislation made before then, even if these powers are exercised to make subordinate legislation after Part 2 has come into force.

It is necessary to consider the possible impact section 16 of the 2019 Act both when drafting the "coming into force" section of a Bill or Welsh subordinate instrument, and when considering the exercise of commencement powers and other powers and duties before provisions come into force. The fact that section 16 does not apply where provisions of an Act are to be brought into force by order may affect decisions about which provisions should be brought into force by commencement order, and may affect how many commencement orders are needed to bring powers into force. For example, a Part of an Act may contain powers to make subordinate legislation which will need to be exercised before

the substantive provisions to which they relate are brought into force. If the Act provides for all of that Part to be brought into force by order, there may need to be more than one commencement order. If that is considered undesirable, an alternative could be for the Act to provide that the powers to make subordinate legislation come into force shortly after Royal Assent.

References to other legislation which is amended

Section 25 of the 2019 Act addresses the situation where an Act or instrument refers to other legislation, and that other legislation is amended, whether before or after the Act or instrument is enacted.

Section 25 is equivalent to section 20(2) of the 1978 Act, but it seeks to clarify the extent to which its effect is "ambulatory" (i.e. the extent to which it applies to a reference to legislation which is later amended). It makes clear that a reference to an enactment includes later amendments to it, including amendments made after the Act or instrument containing the reference is enacted.

Section 25 applies to any reference to an enactment. An "enactment" is defined in Schedule 1 to the 2019 Act to include various types of primary and secondary legislation, and is also to include retained direct EU legislation. Section 25 therefore applies to references to direct EU legislation retained in domestic law on and after the implementation period completion day.

This means that from the end of the implementation period onwards a reference in an Act or instrument to a piece of direct EU legislation as it has been retained in domestic law will include any amendments made to that legislation in domestic law, whether before or after the Act or instrument was enacted.

This section extends the definition of "enactment" given in Schedule 1, meaning that it will also apply to references in Acts of Senedd Cymru and Welsh subordinate instruments to Scottish and Northern Ireland legislation, and therefore covers the full range of legislation existing across the United Kingdom.

Application to the Crown

The question of whether an Act or subordinate legislation binds the Crown (that is, whether or not the Crown is subject to any duty or burden imposed by an Act) can be problematic. The common law rule is that Acts and subordinate legislation do not bind the Crown unless:

a. the Act expressly provides that it binds the Crown,
b. the Crown is bound by necessary implication (though what amounts to a "necessary implication" for the purposes of the rule is not totally clear), or
c. other exceptions to the rule apply (for example where the Crown is a litigant in civil proceedings, it follows from the Crown Proceedings Act 1947 that the Crown will be bound by all relevant statutes relating to civil proceedings).

This means that in the absence of an express provision binding the Crown, the question of whether an Act binds the Crown needs to be considered by looking at the rule and its limits, and then determining whether the nature, context and content of the Act in question mean that the UK Parliament or Senedd Cymru must have meant for the Crown to be bound. The Supreme Court gave guidance on the operation of the rule in *R (Black) v Secretary of State for Justice* [2017] UKSC 81.

Section 28(1) of the 2019 Act replaces the common law rule with a statutory rule. In relation to Acts to which Part 2 applies, it reverses the common law position so that the rule is that an Act does bind the Crown.

In accordance with section 4(3) of the 2019 Act, this default rule has effect except so far as legislation expressly provides otherwise (for example, by stating that provisions in a particular Act do not bind the Crown). The context of a particular Act in and of itself will not be sufficient to rebut this presumption.

The situation is more complex in relation to subordinate legislation. Section 28(2) provides that a Welsh

subordinate instrument to which Part 2 applies binds the Crown if it is made under an enactment which binds the Crown or which confers a power to bind the Crown. So the rule for Welsh subordinate instruments is that they bind the Crown wherever it is possible for them to do so. However, by virtue of section 4(3) the operation of this default rule is still subject to any express provision that is made to the contrary.

To understand the effect of section 28(2), it is necessary to determine whether the legislation under which a Welsh subordinate instrument is made binds the Crown or confers a power to bind the Crown. If the parent legislation is an Act to which Part 2 of the 2019 Act applies, this will be determined by section 28(1) of the 2019 Act (subject to any express provision to the contrary). Where a Welsh subordinate instrument is made under legislation to which Part 2 of the 2019 Act does not apply (such as an Act of the UK Parliament), determining the effect of section 28(2) will involve considering of the application of the common law rule to the parent legislation.

Where legislation provides that it binds the Crown, it usually also includes provision making clear that it does not make the Crown criminally liable, though this does not prevent persons in the service of the Crown being criminally liable. Section 28(3) makes general provision to this effect in relation to Acts of Senedd Cymru and Welsh subordinate instruments (again, subject to any express provision to the contrary). Further provisions about the Crown may be needed in some cases. These may include an express statement that the Act will not affect the Queen in her private capacity, or that a power of entry may not be exercised in relation to Crown land without permission.

For further information on Crown application, see paragraph 10.4 of *Writing laws for Wales*.

Equal status of the Welsh and English language texts

Section 5 of the 2019 Act restates section 156(1) of the Government of Wales Act 2006. It provides that, where an Act of Senedd Cymru or a Welsh subordinate instrument is enacted in both Welsh and English, the two language texts have equal status for all purposes. This means that the full expression of the law is contained in both texts, not merely one.

If there is any doubt about the meaning of Welsh legislation, it will be necessary to take both language versions into account to determine what the legislation means. This is something that affects all those concerned with the making, implementation, administration and interpretation of Welsh legislation.

Section 156(1) of GoWA 2006 will continue to apply to Assembly Measures, Assembly Acts enacted before 1 January 2020, and Welsh subordinate legislation to which Part 2 of the 2019 Act will not apply.

Annex

Part 2 compared to the 1978 Act

The table below outlines the similarities and differences between Part 2 of the 2019 Act and the 1978 Act. For a more detailed explanation and comparison, see the Explanatory Notes to the 2019 Act.

2019 Act	Commentary
Section 7 Words in the singular include the plural and vice versa	Equivalent to section 6(c) of the 1978 Act.
Section 8 Words denoting a gender are not limited to that gender	Equivalent to section 6(a) and (b) of the 1978 Act, but it does not refer expressly to the male and female genders and therefore has a wider scope.
Section 9 Variations of a word or expression due to grammar etc.	No equivalent in the 1978 Act.
Section 10 References to time of day	Equivalent to section 9 of the 1978 Act.
Section 11 References to the Sovereign	Equivalent to section 10 of the 1978 Act.
Section 12 Measurement of distance	Equivalent to section 8 of the 1978 Act.
Section 13 Service of documents by post or electronically	Corresponds to section 7 of the 1978 Act but also covers electronic service.
Section 14 Day on which service is deemed to be effected	Corresponds to section 7 of the 1978 Act but also covers electronic service.
Section 15 Continuity of powers and duties	Equivalent to section 12 of the 1978 Act.
Section 16 Exercise of a power or duty that is not in force	Corresponds to section 13 of the 1978 Act, but it contains a number of differences intended to clarify its scope (which is in some respects narrower) and its effect.
Section 17 Inclusion of sunset provisions and review provisions in subordinate legislation	Equivalent to section 14A of the 1978 Act.
Section 18 Revoking, amending and re-enacting subordinate legislation	Equivalent to section 14 of the 1978 Act, but applies to a slightly wider range of subordinate legislation.

2019 Act	Commentary
Section 19 Amendment of subordinate legislation by an Act of Senedd Cymru	No equivalent in the 1978 Act.
Section 20 Varying and withdrawing directions	No equivalent in the 1978 Act.
Section 21 References to portions of enactments, instruments and documents	Equivalent to section 20(1) of the 1978 Act, but applies to references to a wider range of instruments and documents.
Section 22 Edition of Act of Senedd Cymru or Assembly Measure referred to	Equivalent to section 19(1) of the 1978 Act (when read with section 23B of that Act) but with updated drafting.
Section 23 Edition of Act of the Parliament of the United Kingdom referred to	Equivalent to section 19(1) of the 1978 Act, but the citations to which it applies are described in more general terms.
Section 25 References to enactments are to enactments as amended	Equivalent to section 20(2) of the 1978 Act, but makes clear that references to other legislation are “ambulatory” (i.e. cover legislation which is later amended).
Section 26 References to EU instruments	Equivalent to section 20A of the 1978 Act.
Section 27 Duplicated offences	Equivalent to section 18 of the 1978 Act, so far as it relates to duplication of offences in different pieces of Welsh legislation.
Section 28 Application of Welsh legislation to the Crown	No equivalent in the 1978 Act.
Section 29 Time when Welsh legislation comes into force	Equivalent to section 4(a) of the 1978 Act.
Section 30 Day on which an Act of Senedd Cymru comes into force	Corresponds to section 4(b) of the 1978 Act, but changes the default day on which an Act comes into force from the day on which it receives Royal Assent to the day after the day on which the Act receives Royal Assent.
Section 31 Orders and regulations bringing Acts of Senedd Cymru into force	No equivalent in the 1978 Act.

2019 Act	Commentary
Section 32 Amendments made to or by Welsh legislation	No equivalent in the 1978 Act.
Section 33 Repeals and revocations do not revive law previously repealed, revoked or abolished	Equivalent to section 15 of the 1978 Act, but extended to apply to the repeal of legislation which abolished a common law rule.
Section 34 General savings in connection with repeals and revocations	Equivalent to section 16 of the 1978 Act, but does not apply to the repeal of an enactment which previously abolished a rule of common law (dealt with at section 33 of the 2019 Act).
Section 35 Effect of re-enactment	Equivalent to section 17(2) of the 1978 Act, but extended to apply where the repeal and re-enactment are provided for in different Acts or instruments.
Section 36 Referring to an Act of Senedd Cymru by its short title after repeal	Equivalent to section 19(2) of the 1978 Act.

In addition, note that section 11 of the 1978 Act (which provides for the construction of subordinate legislation) is not replicated in the 2019 Act. This is dealt with above under the heading *Relationship between the meaning of terms in primary and subordinate legislation*.

Part 3 – Contents

What does Part 3 of the Legislation (Wales) Act 2019 do?

Part 3 of the Act gives the Welsh Ministers a power to amend legislation to replace descriptions of dates with references to the actual dates once they are known, and it contains provisions which make it easier for the Welsh Ministers to combine subordinate legislation made under different powers in a single statutory instrument.

Who needs to understand Part 3?

Part 3 is mainly relevant to lawyers and officials in the Welsh Government who draft statutory instruments for the Welsh Ministers. It will also be relevant to those who are involved in the scrutiny of statutory instruments by Senedd Cymru and to other readers of Welsh statutory instruments.

For guidance on the drafting of Welsh statutory instruments, see also the Welsh Government's legislative drafting guidance, *Writing Laws for Wales: A Guide to Legislative Drafting*.

When did Part 3 come into force?

Part 3 came into force on 11 September 2019. The provisions in Part 3 may be relied upon in statutory instruments that the Welsh Ministers make from that date onwards (or that they lay before the Senedd in draft on or after that date, in the case of instruments subject to affirmative procedure).

Section 38: Power to replace descriptions of dates and times in Welsh legislation

What does section 38 of the Act enable the Welsh Ministers to do?

The power in section 38 is a free-standing power to make regulations that replace a description of a date in legislation (e.g. "the day on which Part 2 of this Act comes fully into force") with a reference to the actual date once it is known (e.g. "1 January 2020"). Its purpose is to make legislation more accessible and easier to understand. It can be used to amend Acts of Senedd Cymru and Assembly Measures, subordinate legislation made under devolved powers, and provisions that devolved legislation has inserted into any other legislation. It does not matter when the legislation in question was enacted.

The Explanatory Notes to the Act contain a more detailed account of section 38.

When should the power in section 38 to insert actual dates be used?

The most common situation in which the power is likely to be used is when making a commencement order to bring provisions of an Act into force. At the same time as the provisions are brought into force, any legislation that refers to the date on which those provisions come into force can be amended to refer to the actual commencement date that is set by the order. (These amendments can be included in the order by virtue of section 39 of the Act, which allows regulation-making powers to be used to make orders.)

When drafting a commencement order, consider whether there are any amendments of this kind that could be included in the order. Amendments of this kind should be made wherever they would help readers of the legislation by removing the need for them to search for commencement orders to understand the meaning of provisions.

It may not be helpful for a commencement order to include amendments under section 38 if the coming into force of a provision is particularly complicated (for example, if it comes into force on a number of different days for different purposes).

The power in section 38 could also be used in any other statutory instrument where the opportunity arises, or even in a free-standing instrument that only makes amendments under section 38.

What drafting considerations may arise when making amendments under section 38?

If a commencement order or other statutory instrument includes amendments to other legislation under section 38, it will need to make provision about when those amendments come into force.

Section 38 can be used both to replace a description of a date with the actual date, and to add an explanation of that date to the amended legislation. This may make it easier for people to see the significance of the date that is mentioned.

For example, section 38 could be used to replace a reference to things done "before the date on which section X of the Y Act comes into force" with a simple reference to things done "before 1 April 2019" (or whatever the actual date was). However, the reader of the amended legislation might then wonder what happened on 1 April 2019 or might need to find out what the legal position was from 1 April 2019 onwards. Drafters should therefore consider whether it would be helpful to include an explanation such as "1 April 2019 (the day on which section X of the Y Act came into force)".

If section 38 is used to make amendments to primary legislation, those amendments will need to be cleared by the Office of the Legislative Counsel in the usual way.

How will including amendments under section 38 affect the form of a statutory instrument or the procedure for making it?

If a statutory instrument includes amendments under section 38, the preamble will need to cite section 38 of the Legislation (Wales) Act 2019 as one of its enabling powers.

Where amendments under section 38 are included in a commencement order, the preamble should not cite the power in section 39 of the Act (which allows regulation-making powers to be used to make orders). However, the footnote accompanying the reference to section 38 should include an explanation of the effect of section 39. The following wording is suggested for the footnote:

> 2019 anaw 4. The power to make regulations under section 38 of the Legislation (Wales) Act 2019 may be exercised to make an order by virtue of section 39 of that Act.

Including amendments under section 38 in a commencement order or other statutory instrument will not affect the procedure for the instrument. The power in section 38 is not subject to any Senedd procedure.

Section 39: Power to make subordinate legislation in different forms

What does section 39 of the Act enable the Welsh Ministers to do?

Section 39 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 Act for a fuller account.

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 are discussed below.

When should the power in section 39 to make subordinate legislation in different forms be used?

The power in section 39 may be used when making a statutory instrument containing subordinate legislation under different powers, or when making a set of related statutory instruments. It means that decisions about how to organise the material will not be dictated by the often arbitrary distinction between regulations, rules and orders. Drafters will therefore have greater freedom to decide whether material belongs together in the same instrument or should be put into separate instruments.

The power in section 39 should be used wherever it seems appropriate to do so. Whether it is appropriate to combine provisions made under different powers in the same instrument can depend on a variety of factors, such as their subject-matter, audience or legal effect. Generally, our intention should be to organise the subordinate legislation in a way that is logical and accessible to the user of the legislation Section 39 should also be considered with section 40, which deals with the combination in one statutory instrument of provisions that attract different Senedd procedures.

Are there any limits on the use of the power in section 39?

The power in section 39 can be used in any statutory instrument made under any Act of Senedd Cymru or Assembly Measure. However, there are some additional points to consider when making subordinate legislation under an Act of the UK Parliament (or in future under any powers inserted into retained direct EU legislation).

a. **Geographical application.** Section 39 is not available when making subordinate legislation that applies otherwise than in relation to Wales. Most of the Welsh Ministers' functions under Acts of the UK Parliament are exercisable only in relation to Wales, but they do have some powers to make subordinate legislation in relation to the "Welsh zone" (which includes the sea beyond the seaward boundary of Wales) and "cross-border areas" (which include parts of England adjacent to the border). Section 39 does not apply to subordinate legislation of these kinds.

b. **Extent.** Section 39 extends only to England and Wales, but some powers of the Welsh Ministers under Acts of the UK Parliament also extend to Scotland or Northern Ireland (even if their practical application is limited to Wales). Section 39 will not apply to a power to make subordinate legislation insofar as it forms part of the law of Scotland or Northern Ireland.

   If subordinate legislation made under such a power needs to extend beyond the jurisdiction of England and Wales, section 39 should not be relied on when making the subordinate legislation.

   In some cases, it may be possible to use a power that extends beyond England and Wales to make an instrument that extends only to England and Wales. If so, that may be achieved by including a provision in the instrument limiting its extent, and it should then be possible to use section 39. However, even if it is possible to limit the extent of the instrument, it may not be appropriate to do so, for example if things done under the instrument need to be recognised in the law of every part of the UK. It will be necessary to consider whether there could be any adverse effects.

   To determine whether these issues arise, it will be necessary to check the extent provisions in the Act of the UK Parliament that confers the power to make subordinate legislation (which are normally found near the end of the Act) and consider what extent is appropriate for the instrument.

Can section 39 be used in a joint or composite instrument?

Section 39 applies only to subordinate legislation made by the Welsh Ministers, but Ministers of the Crown have a corresponding power to make subordinate legislation in different forms under section 105 of the Deregulation Act 2015.

In principle, section 39 could be used when the Welsh Ministers make a statutory instrument jointly with a Minister of the Crown, or when they make a "composite" instrument containing subordinate legislation made by the Welsh Ministers in relation to Wales, and by a Minister of the Crown in relation to England or in relation to matters that are not devolved. But in practice, issues about geographical application and extent may cause difficulties.

It is unlikely that section 39 could be used in a joint instrument, because a joint instrument is likely to contain provision made by both the Welsh Ministers and UK Ministers in relation to an area that reaches beyond Wales. The issues relating to legal extent discussed above may also be relevant.

In a composite instrument, the Welsh Ministers will generally be making provision only in relation to Wales, so there may not be any problem about geographical application. But it will still be necessary to consider whether there are any difficulties relating to the legal extent of the instrument.

Should an instrument that relies on section 39 be called an order or rules or regulations?

Section 39 simply provides that a power to make regulations, rules or an order can be used to make subordinate legislation in any other of those forms; it does not create a presumption that a combined instrument should be made in a particular form.

Drafters will need to consider in each case whether it is more appropriate for an instrument to be an order, a set of rules or a set of regulations. It may be relevant to consider how much of the instrument will be made under powers to make each form of subordinate legislation, and the titles of any existing instruments in the relevant policy area.

Since 2014, both UK and devolved Acts have generally conferred powers to make subordinate legislation in the form of regulations. If other considerations do not point clearly towards making a combined instrument in a particular form, the default should be to make regulations.

The form and title of the subordinate legislation should normally correspond to at least one of the powers under which it is made. For example, if all of the provisions in an instrument are made under powers to make orders and rules, it will probably not be a good idea to call the instrument regulations.

How will relying on section 39 affect the content of an instrument or the supporting documents?

If a statutory instrument contains provisions that are made in a different form from that specified in the enabling legislation (for example, if a set of regulations contains provisions made under an order-making power), the preamble to the instrument should not cite the power in section 39. However, the footnote accompanying the reference to the relevant enabling power should explain that the power is being used to make subordinate legislation in a different form by virtue of section 39. The following form of words may be used, with appropriate adaptations:

> The power to make [an order] under section [x] of the [Y] Act may be exercised to make [regulations] by virtue of section 39 of the Legislation (Wales) Act 2019 (anaw 4).

Relying on section 39 will mean that an instrument contains provisions that would otherwise have been made in a different form. The section of the Explanatory Memorandum to the instrument dealing with matters of special interest to the Legislation, Justice and Constitution Committee should explain briefly why this is considered appropriate.

The legislative background section of the Explanatory Memorandum should, in addition to identifying the powers to make rules, regulations or orders under which the instrument is made, mention that section 39 enables those powers to be used to make provision in a different form.

Will using section 39 affect the procedure for making an instrument?

The fact that provisions are made in a different form under section 39 does not, in itself, affect the Senedd procedure for making those provisions: see section 39(2) of the Act. For example, if an order-making power is used to make regulations, the regulations will still be subject to the Senedd procedure that applies to the order-making power.

However, combining provisions under different powers in the same statutory instrument may affect the Senedd procedure for some of those provisions by virtue of section 40 of the Act.

Section 40: Combining subordinate legislation subject to different Senedd procedures

What does section 40 do?

Section 40 applies where a statutory instrument made by the Welsh Ministers contains subordinate legislation that would be subject to more than one type of Senedd procedure. It ensures that the instrument is only subject 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.

Section 40 also applies where an instrument contains some provisions that would be subject to an Senedd procedure and others that would be 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.

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 discussed below.

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.

Are there any limits on the use of the power in section 40?

Section 40 will apply to any statutory instrument made under an Act of Senedd Cymru or Assembly Measure.

However, there are some limits on its application when making an instrument under an Act of the UK Parliament (or in future under any powers inserted into retained direct EU legislation).

a. **Geographical application.** Section 40 does not apply to an instrument containing any subordinate legislation that applies otherwise than in relation to Wales. Most of the Welsh Ministers' functions under UK Acts are exercisable only in relation to Wales, but they do have some powers to make subordinate legislation in relation to the "Welsh zone" (which includes the sea beyond the seaward boundary of Wales) and "cross-border areas" (which include parts of England adjacent to the border). Section 40 does not apply to an instrument containing subordinate legislation of these kinds.

b. **Extent.** Section 40 extends only to England and Wales, but some powers of the Welsh Ministers under Acts of the UK Parliament also extend to Scotland or Northern Ireland (even if their practical application is limited to Wales). Section 40 will not apply to a statutory instrument insofar as it forms part of the law of Scotland or Northern Ireland.

   If subordinate legislation made by the Welsh Ministers needs to extend beyond the jurisdiction of England and Wales, section 40 should not be relied on when making the subordinate legislation.

In some cases, it may be possible to use a power that extends beyond England and Wales to make an instrument that extends only to England and Wales. If so, that may be achieved by including a provision in the instrument limiting its extent, and it should then be possible to use section 40. However, even if it is possible to limit the extent of the instrument, it will be important to ensure that doing so will not have any adverse effects.

To determine whether these issues arise, it will be necessary to check the extent provisions in the Act of the UK Parliament that confers the power to make subordinate legislation (which are normally found near the end of the Act) and consider what extent is appropriate for the instrument.

Can section 40 be used in a joint or composite instrument?

Section 40 applies only to instruments containing subordinate legislation made by the Welsh Ministers, and only affects procedure in Senedd Cymru. There is no general provision of this kind applying to instruments containing subordinate legislation made by Ministers of the Crown, although there are similar provisions about subordinate legislation made under particular Acts. These include subordinate legislation made under the wide powers in the European Communities Act 1972 and the European Union (Withdrawal) Act 2018.

In principle, section 40 could be used when the Welsh Ministers make a joint or composite instrument with a Minister of the Crown. But in practice, issues about geographical application and extent may cause difficulties.

It is unlikely that section 40 could be relied on in a joint instrument, because a joint instrument is likely to contain provision made by both the Welsh Ministers and UK Ministers in relation to an area that extends beyond Wales. The issues relating to legal extent discussed above may also be relevant.

In a composite instrument, the Welsh Ministers will generally be making provision only in relation to Wales, so there may not be any problem about geographical application. But it will still be necessary to consider whether there are any difficulties relating to the legal extent of the instrument.

Relying on other provisions similar to section 40

Some UK Acts contain provisions similar to section 40, dealing with cases where more than one Senedd procedure would apply to an instrument made by the Welsh Ministers and applying the "higher" procedure. They include the European Communities Act 1972[5] and the European Union (Withdrawal) Act 2018[6].

Where those other provisions apply, it may be preferable to rely on them instead of section 40 in order to avoid the difficulties relating to geographical application and extent mentioned above.

How does relying on section 40 affect the contents of an instrument or the supporting documents?

The italic date information in a statutory instrument will need to reflect the procedural requirements that apply to the instrument (e.g. a negative instrument must include a "laid" date). Where section 40 applies to an instrument, the information should reflect the procedure that applies by virtue of section 40.

In an instrument subject to negative procedure, the provision of the parent Act that applies the negative procedure is not normally cited anywhere in the instrument, so there is no need to cite section 40 in either the preamble to the instrument or a footnote.

[5] See paragraph 2A of Schedule 2 to the 1972 Act, as applied to the Welsh Ministers by paragraph 35A of Schedule 11 to the Government of Wales Act 2006.

[6] See paragraph 38 of Schedule 7 and paragraph 4 of Schedule 8.

In an instrument subject to affirmative procedure, the preamble will recite that the instrument has been approved by resolution of Senedd Cymru in accordance with the provision imposing that procedure. Where an affirmative instrument contains provisions that would not otherwise attract the affirmative procedure, the reference to the procedural provision in the preamble should include a footnote explaining that section 40 applies[7]. For example:

> See also section 40 of the Legislation (Wales) Act 2019 (anaw 4) for provision about the procedure that applies to this instrument.

The application of section 40 will mean that an instrument contains provisions which could have been made in an instrument subject to a "less strict" Senedd procedure. (For example, an affirmative instrument will contain provisions that could have been made in a negative instrument.) The section of the Explanatory Memorandum to the instrument dealing with matters of special interest to the Legislation, Justice and Constitution Committee should explain briefly why this is considered appropriate.

The legislative background section of the Explanatory Memorandum should, in addition to identifying the procedure under which the instrument is made, state that it includes provisions that would otherwise be subject to a different procedure and explain the effect of section 40.

Does section 40 affect consultation requirements and "enhanced" Senedd procedures?

Section 40 deals only with the Senedd procedures that would otherwise apply to different provisions contained in a statutory instrument. It does not affect any requirements for the Welsh Ministers to undertake consultation or have regard to views or advice before making subordinate legislation. And for instruments subject to "enhanced" or "super-affirmative" procedures, section 40 does not affect any steps that must be taken before the final version of an instrument is laid before the Senedd.

If an instrument contains provisions made under a number of different powers, only some of which are subject to consultation requirements, those consultation requirements will continue to apply in the same way as before. That may mean that the Welsh Ministers are required to consult on some of the provisions they propose to include in the instrument, but not others.

In practice, it might not be easy to differentiate between the provisions that required consultation and those that did not. It might therefore make most sense to carry out a consultation on all of the provisions to be included in the instrument. And the Welsh Ministers might wish to consult on all of the provisions anyway.

[7] The same approach would be appropriate if for any reason any instrument (including a negative instrument) to which section 40 applied were to cite the provision applying the scrutiny procedure.