

# Constitutional Affairs Committee

CA(3)-07-11

## CA553: : The Animal By-Products (Enforcement) (Wales) Regulations 2011

### Procedure: Negative

These Regulations enforce, in Wales, Regulation (EC) No. 1069/2009 of the European Parliament and of the Council on laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No. 1774/2002 ("the EU Control Regulation"). These Regulations also enforce, in Wales, Regulation No. 142/2011 implementing Regulation (EC) No. 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and implementing Council Directive 97/78/EC as regards certain samples and items exempt from veterinary checks at the border under that Directive ("the EU Implementing Regulation") that provides technical supplementation of those requirements of the EU Control Regulation.

### Technical Scrutiny

Under Standing Orders 15.2 the Assembly is invited to pay special attention to the following instrument:-

1. Regulation 24 (Powers of entry and additional powers) provides for an authorised person to enter premises at all reasonable hours for the purpose of ensuring the compliance of the EU Control Regulation, the EU Implementing Regulation and these Regulations. "Premises" are defined within these Regulations as including "any domestic premises". Regulation 24 does not state either expressly or by way of implication that a warrant pursuant to regulation 25 must be applied for before the power of entry is exercised under regulation 24. Consequently, an authorised person appears to have the power to enter domestic premises without applying for a warrant under regulation 25.

1.1 The absence of a safeguard to apply for a warrant before an authorised person may enter domestic premises may constitute an infringement of Article 8 of the European Convention of Human Rights ("ECHR") which provides for the right to respect for private and family life, and home and correspondence and section 81 of the Government of Wales Act 2006 ("GOWA"), which states that Welsh Ministers have no power to make subordinate legislation which is incompatible with any of the Convention Rights.

These Regulations raise issues similar to those reported by the Committee in relation to the Eggs and Chicks (Wales) Regulations 2010 ("the Eggs Regulations"), regarding the possibility of entry without a warrant. These Regulations and the Eggs Regulations can be compared with the Eggs and Chicks (Wales) Regulations 2009 which contained no similar provision, as the 2009 Regulations relied on the power of entry contained in section 32 of the Food Safety Act 1990, which contained the safeguard of a requirement to obtain a warrant from a magistrate who had to be satisfied of certain requirements before the power of entry could be exercised. It is not apparent why the power of entry provision in these Regulations has no equivalent safeguard, and why the omission of such a safeguard has occurred

Standing Order 15.2 (i) that there appears to be doubt as to whether it is *intra vires*). .

See further reporting point 1 under Standing Order 15.3 which deals with merits reporting points.

(Alternatively, regulation 25 may have been intended to provide such a safeguard, but the absence of a clear explanation on the face of the Regulations would constitute defective drafting reportable under Standing Order 15.2 (vi).

2. Paragraph 60 of Schedule 2 (Consequential Amendments) seeks to amend the Waste (England and Wales) Regulations 2011 ("the 2011 Regulations"). The 2011 Regulations are currently in draft form and have not yet been laid before Parliament or the National Assembly for Wales under section 2 (8) and (9) (d) and (e) of the Pollution Prevention and Control Act 1999, para 2 (2) of Schedule 2 to the European Communities Act 1972 and section 59 (3) of the Government of Wales Act 2006 for approval by resolution, and consequently have not yet been made as a UK draft statutory instrument.

2.1 Section 14 of the Interpretation Act 1978 states that where an Act confers power to make subordinate legislation, it implies unless the contrary intention appears, a power to...amend any instrument made under the power. However as 2011 Regulations are in draft form only, and have yet to be laid or made, it is doubtful whether such a power could be implied in this case, and consequently that the 2011 Regulations can be amended before properly being laid and made as a statutory instrument.

(Standing Order 15.2 (i) and (ii) that there appears to be doubt as to whether it is *intra vires*; and that it appears to make unusual or unexpected use of the powers conferred by the enactment under which it is made or to be made).

3. These Regulations are provided in English only.

(Standing Order 15.2 (ix) that it is not made or to be made in both English and Welsh).

4. It is unclear from regulation 8 (Collection centres for feeding in relation to Article 18 (1) of the EU Control Regulation), due to the lack of clarity of missing text, whether "a processing plant for Category 2 material is authorised as a collection centre for Category 2 material" for "the purposes of Article 18 (1) of the EU Control Regulation..."

(Standing Order 15.2 (vi) that its drafting appears to be defective or it fails to fulfil statutory requirements).

5. Paragraph (a) of Regulation 12 (Notifications of competent authority in respect of registration), does not read correctly and consequently lacks clarity, failing to confirm effective notification provisions concerning the operator.

6. Paragraph 1 of regulation 16 (Appeals procedure), erroneously refers to a "notification" being made in regulation 15 (2), as opposed to a "decision".

(Standing Order 15.2 (vi) that its drafting appears to be defective or it fails to fulfil statutory requirements).

7. Sub-paragraph (b) paragraph (1) of regulation 21 (Enforcement authority), refers to "the 1984 Act" (which is only referred to once) and without being defined until paragraph (6), which appears on the subsequent page. Consequently, given that the 1984 Act is only referred to once and is defined on the subsequent page, the reference to the Act as "the 1984 Act" is superfluous and the definition could be provided the first time it appears in order to provide clarity to the reader.

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirements).

8. Schedule 1 (Animal By-Product Requirements), paragraphs 9 and 10, refer to "Registration of operators, establishments and plants" and "Approval of establishments and plants" respectively, when the provisions should refer to "Registration of operators, establishments or plants" and "Approval of establishments or plants" respectively in order properly to reflect the titles of Articles 23 and 24 of the EU Control Regulation.

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirements).

9. Schedule 1 (Animal By-Products Requirements), paragraph 11 refers to "General hygiene conditions" when the correct title of Article 25 of the EU Control Regulation to which it refers is "General hygiene requirements".

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirements).

10. Column 3 of Paragraph 23 (Controls for dispatch) of Schedule 1 (Animal By-Product Requirements), erroneously refers to the EC Control Regulation when the Articles to which column 3 refers (Articles 11, 12 and 31 respectively) actually pertain to the EC Implementing Regulation.

11. Paragraph 17 (b) of Schedule 2 (Animal By-Products Requirements) which makes amendments to the Products of Animal Origin (Import and Export) Regulations 1996 ("the Animal 1996 Regulations"), refers to paragraph 15 being the requisite paragraph which deals with wild game, when the title of the paragraph within the 1996 Regulations that deals with wild game is 13. The paragraph within Schedule 3 of the 1996 Regulations which deals with wild game is incorrectly numbered 13 when it should already be numbered 15, so in the first instance the paragraph needs amendment so that it is correctly numbered 15 before the current amendment proposed by regulation 17 (b) in the current Regulations will operate effectively.

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirement).

12. Paragraph 19 of Schedule 2 of these Regulations which amends the Foot and Mouth Disease (Wales) Order 2006 ("the 2006 Order"), refers to an insertion within article 2 (1) (interpretation) of the 2006 Order, when the correct article within the 2006 Order which deals with the interpretation provisions is article 3.

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirement).

13. The form of wording which paragraph 20 of Schedule 2 to these Regulations states is required to be substituted by a new form of wording within article 26 (slaughter; control of faecal material) of the 2006 Order does not already exist in its entirety within article 26. Paragraph 20 states that "point 5 of Section II in Part A of Chapter III of Annex VIII to Regulation (EC) No. 1774/2002 of the European Parliament and of the Council laying down health rules concerning animal by-products not intended for human consumption, as amended" is the current form of wording within article 26 when the correct form of wording reads as "point 5 of Section II in Part A of Chapter III of Annex VIII to Regulation (EC) No. 1774/2002 and under the authority of a licence granted by the National Assembly of Wales."

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirement).

14. Paragraphs 21 to 23 of Schedule 2 to these Regulations which substitute a form of wording for a new form of wording within the 2006 Order refers to the form of wording to be substituted "as amended". For example paragraph 21 substitutes "Regulations (EC) No. 1774/2002, as amended" when the words "as amended" do not exist within article 27 (2) (c) (slaughter: isolation of things liable to spread disease). Consequently, the aims to be achieved by the substitution will not be met. Regulation (EU) No. 1069/2009 which substitutes EC No. 1774/2002 when inserted will not be inserted "as amended".

Substitutions of this nature occur on nine occasions within the 2006 Order and due to the inaccuracy will fail on each occasion.

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirement).

15. Paragraph 27 of Schedule 2 to these Regulations which amends the Animals and Animal Products (Import and Export) (Wales) Regulation 2006 ("Animal Import and Export Regulations 2006") substitutes a new provision for paragraph 7 (Animal waste) within Part 1 of Schedule 3 of the Animal Import and Export Regulations 2006. The new provision to be substituted is erroneously numbered

paragraph 8, when as it is substituting paragraph 7 it should also be numbered 7.

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirement).

16. Paragraph 41 of Schedule 2 to these Regulations refers to sub-paragraph (1) within paragraph (2) of article 14 of the Avian Influenza (H5N1 in Poultry) (Wales) Order 2006 ("Avian 2006 Order") which is to be substituted for the exiting paragraph 2 of article 14. Sub-paragraph 2 states that a veterinary inspector or an inspector acting under the direction of a veterinary inspector may not grant or direct the grant of a licence under sub-paragraph (1)...". Sub-paragraph (1) of paragraph (2) of article 14, does not refer to the granting or the directing of the granting of licences, and so the reference to sub-paragraph (1) is incorrect.

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirement).

17. Schedule 3, column 1 of these Regulations refers to the Animal By-Products (Wales) Regulations 200" to be revoked. Consequently it is not known what Regulations it is intended are to be revoked.

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirement).

18. The Products of Animal Origin (Third Country Imports) (Wales) Regulations 2006 (S.I. 2006/376"), are not in existence or/and the title and the S.I. reference is inaccurate. S.I. 2006/376 refers to the Penalty Charges (Exemption from Criminal Proceedings) Regulations (Northern Ireland) 2006, and the Stirling (Electoral Arrangements) Order 2006 respectively. Consequently it is not certain what Regulations the provision is intended to revoke.

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirement).

## **Merits Scrutiny**

Under Standing Order 15.3 the Assembly is invited to pay special attention to the following instrument:-

### **1. Power of entry:-Human Rights Implications**

This reporting point is based on the assumption that regulations 24 and 25 were intended to be drafted as they appear. If the intention was to make regulation 24 subject to regulation 25, the problem lies with the drafting rather than the intention, and the drafting should be corrected before the power is misused.

The carrying out of a search on a private dwelling house without a warrant pursuant to regulation 24 of these Regulations must be legitimate in order to secure the aim to be achieved. The power of entry within regulation 24 does not make the entry conditional upon a warrant being applied for within regulation 25, and does not require notice to be given to an occupier of a dwelling-house beforehand either. This provision can be compared with the Eggs and Chicks (Wales) Regulations 2010 where at least a notice period of 24 hours must be given to the occupier, however even in that scenario if the occupier was not present at the premises when notice was served, then it was possible that no notice may be received by the occupier prior to an entry being carried out, which would be tantamount to a power of entry demanded as of right, as in these Regulations.

1.2. Is the entry and intrusion of privacy proportionate to the legitimate aim being pursued? The legitimate aim being pursued would be ensuring compliance with the Regulations, and therefore the prevention of a crime. A person guilty of contravening regulation 17 (1) (Offence in respect of EU Control Regulation) and 18 (Offence of obstruction) under regulation 20 would be liable on summary conviction to a fine not exceeding the statutory maximum or to imprisonment not exceeding three months or both; or on conviction on indictment, to a fine or to imprisonment for a term not exceeding two years, or both.

1.3 Consequently is a power of entry into a dwelling house without a warrant and without notice proportionate to the severity of the crime, for example the obstruction of an authorised person? Compare, for example the situation where Police can only enter premises without a warrant if a serious or dangerous incident has taken place, such as a breach of the peace or prevention thereof, enforcing an arrest warrant, arresting a person in connection with certain offences, recapturing someone who has escaped from custody and save life or prevent serious damage to property.

1.4. The Committee may wish to consider the following:-

The Code of Practice under the Powers of Entry Bill which applied to private premises as well as business premises stated that "Any exercise of a power of entry to private property is likely to involve a conflict with the right to private life guaranteed by Article 8 of the ECHR." A power of entry without consent should only be used when it is necessary to achieve its purpose, and the way in which the power is used must be proportionate to that purpose. The Bill has not become law, but it was intended that the Bill provide for the regulation of the power of entry in respect of both specified primary and secondary legislation within the Bill.

1.5 The European Court of Human Rights takes a robust approach to powers of entry, search and seizure. These powers are invasive and must be accompanied by clear justification in order to meet the requirements of Article 8(2) ECHR that any interference with the right to respect for private life and the home is necessary. The legislative framework for these powers must afford adequate and effective safeguards against abuse in practice. Whether the safeguards in the Bill are adequate to meet the requirements of Article 8(2) ECHR will depend on the nature, scope and duration of the proposed powers of entry, search and seizure, the circumstances in which they will be authorised, the identity of the individuals authorised to conduct them, and the remedies provided by national law. An individual adversely affected by the exercise of these powers must have access to an effective remedy for any alleged breach of their Convention rights as guaranteed by Article 13 ECHR.

1.6 The Joint Committee on considering the Tribunals Courts and Enforcement then Bill found that the Bill proposed that, in certain circumstances, a certified enforcement agent would be able to enter any "relevant premises" without a warrant. Relevant premises are any premises where an enforcement agent "reasonably believes" that the debtor "usually lives" or carries on a trade or business (including third party premises). If powers of entry without a warrant are intended to be limited to the premises identified by the information in the relevant judgment, warrant or writ, then the Committee considered that this should be clearly expressed on the face of the Bill. The Committee recommended that the Bill be amended accordingly and stated that it is important to ensure that these new statutory powers are not misunderstood, or misrepresented, in order to protect the rights of debtors' families and third parties against unnecessary or disproportionate invasions of their right to respect for their private life.

1.7 The Committee welcomed the Government's amendment to clarify that the use of force to gain re-entry to premises used to carry out a trade or business without a warrant did not extend to the use of force to enter a dwelling or to do anything in a dwelling. The Committee considered that this amendment would ensure that reasonable force is not used by any certified enforcement agent to access any premises used in whole, or in part, as a residential property, without prior judicial authorisation, and that the amendment would provide a valuable safeguard for the rights of debtors and third parties to respect for private life and home, as guaranteed by Article 8 ECHR.

1.8 With the above in mind the carrying out of a search on a private dwelling house without a warrant pursuant to regulation 25 of these Regulations, may not be proportionate to secure a legitimate aim under these Regulations, and consequently may be disproportionate to the legitimate aim pursued and breach Article 8 of the ECHR.

## **2. Delay, Breach of 21 day rule and providing the Regulations in English only**

The European Regulation that these Regulations seek to enforce date back to February 2009, and consequently at least two years have elapsed within which legislation could have been enacted in order to give effect to the purposes of the 2009 EC Regulation ("the Control Regulation"). Despite, these Regulations have breached the 21 day rule. The Minister's response to this was provided in a letter to the Presiding Officer dated 3<sup>rd</sup> March 2011 which states that "the requirement to breach the 21 day rule arises primarily because of delays in finalising the Implementing Regulations at an EU level, combined with further delays in finalising the legal text of the draft Statutory Instrument." Both the EU Control Regulation and the EC Implementing Regulation came into force on 4 March 2011. However knowing that both Regulations were coming into force on this date, it is not clear why these Regulations were not prepared and laid at an earlier date so as not to breach the 21 day rule.

2.1 Statutory Instrument Practice (4<sup>th</sup> edition November 2006) at paragraph 4.13.2 states that the 21 day period is to be treated as a minimum period in advance of an instrument coming into force. The Explanatory Memorandum states that "due to the public and animal health risks associated with a prolonged enforcement gap, it is necessary to breach the 21 day rule and produce the S.I. in English only in this instance."

2.2 On the other hand, when an instrument creates offences, as in this case, the 21 day rule is particularly important as it provides some assurance that members of the public can become aware of their legal duties before they come into force. In this case the Regulations were made on the 2<sup>nd</sup> March and came into force two days later. As this draft report is being prepared on the 14<sup>th</sup> March, these Regulations have still not been published, so individuals have no way of knowing that their conduct may be illegal.

## **3. Disproportionality of penalty**

Regulation 20 (Penalties) of these Regulations does not limit the penalties to any of the offences. So a person found guilty of a summary only offence under regulation 18 (a) (Offence of obstruction) could potentially be fined an amount not exceeding the statutory maximum (which is £5,000) or to imprisonment not exceeding three months or both. As a comparison, a person found guilty of a summary offence of wilfully obstructing a police officer provided under section 89 of the Police Act 1996, as well as having a term of imprisonment imposed (previously one month but now 51 weeks as amended by the Criminal Justice Act 2003) could also be subject to a fine not exceeding level 3 which equates to £1,000. There is a substantial discrepancy in the amount of the fines that can be imposed for similar offences. Is the penalty disproportionate to the offence being committed?

**Legal Advisers  
Constitutional Affairs Committee  
March 2011**

**The Government has responded as follows**

### **The Animal By-Products (Enforcement) (Wales) Regulations 2011**

"The Regulations were made urgently on the specific instructions of the Office of the Chief Veterinary Officer to ensure that there was no enforcement gap between the revocation of EC Regulation 1774/2002 (regarding animal by-products issues) and the coming into force of its successor, EC Regulation 1069/2009, on 4th March 2011. Had there been an enforcement gap, certain activities that were subject to criminal penalties under the EC Regulation 1069/2009 from 4th March 2011, would have evaded prosecution. In addition, an enforcement gap would have put the Welsh Ministers at risk of infraction proceedings by the Commission.

The government's intention was to make the Regulations urgently in English only and in breach of the 21 day rule to ensure that there was no enforcement gap. It has always been intended that these English only Regulations would be a temporary short-term measure, to be followed at the earliest opportunity by bilingual Regulations which would revoke the English only Regulations. The bilingual

Regulations will largely mirror the Defra Regulations (when they come into force in England) to ensure a commonality of enforcement provisions across the Member State as a whole. It is not known when the Defra Regulations will come into force, but as a result of their late implementation, there is currently an enforcement gap in England.

The government wishes to stress that ensuring no enforcement gap by bringing the Regulations into force on 4th March 2011 was essential to ensure that any risks to animal and human health from animal by-product issues were reduced to a minimum. Such risks could have been severe and without implementing legislation, breaches of the European legislation could have been unenforceable."