

Constitutional and Legislative Affairs Committee

Meeting Venue:
Committee Room 2 – Senedd

Meeting date:
5 November 2012

Meeting time:
14:30

Cynulliad
Cenedlaethol
Cymru

National
Assembly for
Wales



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Agenda

- 1. Introduction, apologies, substitutions and declarations of interest**
- 2. Instruments that raise no reporting issues under Standing Order 21.2 or 21.3**

Negative Resolution Instruments

CLA185 – The Collaboration Between Education Bodies (Wales) Regulations 2012

Negative Procedure. Date made 22 October 2012. Date laid 23 October 2012.
Coming into force date 16 November 2012

Affirmative Resolution Instruments

None

- 3. Instruments that raise issues to be reported to the Assembly under Standing Order 21.2 or 21.3**

Negative Resolution Instruments

None

Affirmative Resolution Instruments

None

Super Affirmative Resolution Instruments

CLA184 – The Public Bodies (Water Supply and Water Quality) (Inspection Fees) Order 2012 (Pages 1 – 42)

Super Affirmative Procedure. Date made not stated Date laid not stated. Coming into force date in accordance with article 1

4. Enterprise and Regulatory Reform Bill: Supplementary Legislative Consent Motion (Pages 43 – 49)

Papers:

CLA(4)-22-12(p1) – Legislative Consent Memorandum

Enterprise And Regulatory Reform Bill – Powers To Include Sunset And Review Provisions In Subordinate Legislation

CLA(4)-22-12(p2) – Legal Advisers Report

5. Item 5: Public Service Pensions Bill: Legislative Consent Memorandum (Pages 50 – 64)

Papers:

CLA(4)-21-12(p1) – Legislative Consent Memorandum: Public Service Pensions Bill – Clauses Relating To Restrictions To Be Applied To New Schemes

CLA(4)-21-12(p2) – Legal Advisers Report

CLA(4)-22-12(p3) – Letter from the Chair to the Minister dated 24 October 2012

CLA(4)-22-12(p4) – The Minister’s response

6. Item 6: Committee Correspondence

Item 6.1: CLA178 – The Bluetongue (Wales) (Amendment) Regulations 2012 (Pages 65 – 68)

Papers:

CLA(4)-22-12(p5) – Letter from the Chair to the Minister dated 11 October 2012

CLA(4)-22-11(p6) – The Minister’s response dated 24 October 2012

CLA(4)-22-11(p7) – CLA178 – Report

7. Item 7 Date of Next Meeting

12 November 2012

Paper to Note

CLA(4)-21-12 - Report of the Meeting 22 October 2012

Transcript

View the [meeting transcript](#).

Agenda Item 3.1

Draft Order laid before the National Assembly for Wales under section 19 of the Public Bodies Act 2011, for approval by resolution of the National Assembly for Wales.

DRAFT WELSH STATUTORY
INSTRUMENTS

2012 No. (W.)

PUBLIC BODIES

**WATER INDUSTRY, ENGLAND AND
WALES**

**FEES AND CHARGES, ENGLAND AND
WALES**

**The Public Bodies (Water Supply
and Water Quality) (Inspection
Fees) Order 2012**

EXPLANATORY NOTE

(This note is not part of the Order)

This Order provides for fees to be payable by a relevant water supplier for the carrying out of certain functions under the Water Industry Act 1991 by an inspector appointed by the Welsh Ministers under that Act. The functions are related to the following investigations and reporting requirements—

- (a) checking water sampling and analysis arrangements;
- (b) checking water supply management arrangements;
- (c) investigating an event, incident, emergency or other matter arising from the quality or sufficiency of water;
- (d) checking the handling and reporting of consumer complaints about water quality; and
- (e) checking compliance with requirements to furnish information to, or to notify, the Welsh Ministers concerning these arrangements and matters.

This Order sets out the circumstances and manner in which fees are payable, approved, published and reviewed (article 4 and the Schedule).

The Welsh Ministers' Code of Practice on the carrying out of Regulatory Impact Assessments was considered in relation to this Order. As a result, a regulatory impact assessment has been prepared as to the likely costs and benefits of complying with this Order. A copy can be obtained from the Welsh Government, Cathays Park, Cardiff, CF10 3NQ.

Draft Order laid before the National Assembly for Wales under section 19 of the Public Bodies Act 2011, for approval by resolution of the National Assembly for Wales.

DRAFT WELSH STATUTORY
INSTRUMENTS

2012 No. (W.)

PUBLIC BODIES

**WATER INDUSTRY, ENGLAND AND
WALES**

**FEES AND CHARGES, ENGLAND AND
WALES**

**The Public Bodies (Water Supply
and Water Quality) (Inspection
Fees) Order 2012**

Made

Coming into force in accordance with article 1

The Welsh Ministers make the following Order in exercise of the powers conferred by sections 14(3) and 15(1) of the Public Bodies Act 2011⁽¹⁾ (“the Act”).

For the purposes of section 16 of the Act, the Welsh Ministers consider that—

- (a) this Order serves the purpose referred to in section 16(1) of the Act; and
- (b) the conditions in section 16(2)(a) and (b) of the Act are satisfied.

The Welsh Ministers have consulted in accordance with section 18 of the Act.

A draft of this Order and an explanatory document containing the information required by section 19(2) of the Act have been laid before the National Assembly

(1) 2011 c.24.

for Wales in accordance with section 19(1) after the end of the period of twelve weeks as specified in section 19(3). In accordance with section 19(4) of the Act, a draft of this Order has been approved by a resolution of the National Assembly for Wales after the expiry of the 40-day period referred to in that provision.

Title, commencement and extent

1.—(1) The title of this Order is the Public Bodies (Water Supply and Water Quality) (Inspection Fees) Order 2012.

(2) It comes into force on the day after the day on which it was made.

(3) It extends to England and Wales.

Interpretation

2.—(1) In this Order—

“the 1991 Act” (*“Deddf 1991”*) means the Water Industry Act 1991⁽¹⁾;

“Chief Inspector” (*“Prif Arolygydd”*) means the person designated as such under section 86(1B) of the 1991 Act;

“inspector” (*“arolygydd”*) means a person appointed by the Welsh Ministers under section 86(1) of the 1991 Act (assessors for the enforcement of water quality)⁽²⁾;

“relevant water supplier” (*“cyflenwr dŵr perthnasol”*) means—

- (a) a water undertaker⁽³⁾ whose area is wholly or mainly in Wales; or
- (b) a company which is the holder of a water supply licence within the meaning of section 17A of the 1991 Act (licensing of water suppliers) that uses the supply system of any

(1) 1991 c.56.

(2) Section 86 was amended by section 57 and section 101(1) of, and paragraph 27 of Schedule 8 to the Water Act 2003 c.37. There are other amending instruments but none are relevant. The functions under section 86 (except subsection (1A)) were made exercisable by the National Assembly for Wales (“the Assembly”) to the same extent as the powers, duties and other provisions to which section 86 applies are exercisable by the Assembly by article 2 of the National Assembly for Wales (Transfer of Functions) Order 1999 (S.I. 1999/672) (“the Order”); see the entry in Schedule 1 of the Order for the Water Industry Act 1991 as substituted by paragraph (e) of Schedule 3 to the National Assembly for Wales (Transfer of Functions) Order 2000 (S.I. 2000/253) and amended by Section 100(2) of the Water Act 2003. By virtue of section 162 of, and paragraph 30 of Schedule 11 to, the Government of Wales Act 2006 c.32, these functions conferred on the Assembly are exercisable by Welsh Ministers.

(3) See Schedule 1 to the Interpretation Act 1978 c.30.

water undertaker whose area is wholly or mainly in Wales; and

“supply system” (“*system gyflenwi*”) shall be construed in accordance with section 17B(5) of the 1991 Act.

(2) In this Order references to “the table” (“*y tabl*”) are to the table in the Schedule.

The chargeable period

3.—(1) In this Order the number of chargeable periods shall be calculated based on the following formula—

$$C = \frac{T}{7}$$

where—

“C” is the number of chargeable periods; and

“T” is the total time (expressed in hours) during which an inspector performs a function specified in paragraph (b), (c) or (d) of column 1 of the table on a calendar day.

(2) For the purposes of calculating “T” if the function is performed by more than one inspector, that total time taken by each inspector shall be aggregated.

Fees

4.—(1) The Chief Inspector may charge a relevant water supplier a fee, payable on invoice, for the exercise of such functions of an inspector under section 86(2) of the 1991 Act as are specified in column 1 of the table.

(2) The Chief Inspector must determine the fee in accordance with the corresponding entry in column 2 of the table.

(3) The rates to be applied to the determination of the fee referred to in column 2 of the table must be fixed by the Chief Inspector and—

- (a) be approved by the Welsh Ministers;
- (b) be published by the Welsh Ministers (which must include publication on a website), and
- (c) be reviewed by the Welsh Ministers on or before 30 June in each calendar year following the calendar year in which the fee was last approved by the Welsh Ministers under sub-paragraph (a).

(4) Any fees received under this Order must be paid into the Consolidated Fund.

Name

Minister for Environment and Sustainable
Development, one of the Welsh Ministers

Date

SCHEDULE

Article 4

FEES FOR THE PERFORMANCE OF FUNCTIONS UNDER SECTION 86 WATER INDUSTRY ACT 1991

Table

<i>1</i> <i>Function</i>	<i>2</i> <i>Fee</i>
<p>(a) Checking that the sampling and analysis arrangements for water samples collected by the relevant water supplier comply with—</p> <p>(i) the Water Supply (Water Quality) Regulations 2010⁽¹⁾;</p> <p>(ii) section 68 of the 1991 Act; and</p> <p>(iii) any requirements for sample data required to be provided under section 202 of the 1991 Act.</p>	<p>A fee to be calculated using the rate—</p> <p>(i) fixed for each group of 100 water sample results received and checked; and</p> <p>(ii) multiplied by the total number of each such group.</p>
<p>(b) Checking that—</p> <p>(i) the relevant water supplier's water supply management arrangements comply with—</p> <p>(aa) the Water Supply (Water Quality) Regulations 2010;</p> <p>(bb) section 37 of the 1991 Act;</p> <p>(cc) section 68 of</p>	<p>A fee to be calculated using the rate—</p> <p>(i) fixed for each chargeable period; and</p> <p>(ii) multiplied by the total number of chargeable periods spent performing the function.</p>

⁽¹⁾ S.I. 2010/994 (W.99) as amended by S.I. 2011/14 (W.7).

the 1991 Act; and
(ii) the relevant water supplier has complied with any requirement of the Welsh Ministers to furnish information about these arrangements under section 202 of the 1991 Act.

- (c) In relation to a relevant water supplier—
- (i) Investigating an event, incident, emergency or other matter where any of those matters indicate that the water supplier may not have complied with—
 - (aa) the Water Supply (Water Quality) Regulations 2010;
 - (bb) section 37 of the 1991 Act;
 - (cc) section 68 of the 1991 Act; and
 - (ii) checking that such an event, incident, emergency or other matter has been notified by the relevant water supplier in compliance with any requirement of the Welsh Ministers to furnish such information under section
- A fee to be calculated using the rate—
- (i) fixed for each chargeable period; and
 - (ii) multiplied by the total number of chargeable periods spent performing the function.

202 of the 1991 Act.

- | | |
|--|--|
| <p>(d) In relation to a relevant water supplier-</p> <p>(i) investigating a consumer complaint about the quality or sufficiency of water where the complaint indicates that the water supplier may not have complied with—</p> <p>(aa) The Water Supply (Water Quality) Regulations 2010;</p> <p>(bb) section 37 of the 1991 Act;</p> <p>(cc) Section 68 of the 1991 Act ; and</p> <p>(ii) checking that any requirement of the Welsh Ministers to furnish information about such complaints under section 202 of the 1991 Act has been complied with.</p> | <p>A fee to be calculated using the rate—</p> <p>(i) fixed for each chargeable period; and</p> <p>(ii) multiplied by the total number of chargeable periods spent performing the function.</p> |
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EXPLANATORY MEMORANDUM TO
THE PUBLIC BODIES (WATER SUPPLY AND WATER QUALITY)
(INSPECTION FEES) ORDER 2012

2012 No. [XXXX]

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Public Bodies (Water Supply and Water Quality) (Inspection Fees) Order 2012.

I am satisfied that the benefits outweigh any costs.

Name of Minister: J Griffiths

Date: 15 October 2012

1. This Explanatory Memorandum has been prepared by the Department for Environment and Sustainable Development and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

2. Purpose of the instrument

2.1 The purpose of this instrument is to enable inspectors appointed under the Water Industry Act 1991 (WIA 1991) “the Drinking Water Inspectorate” (DWI) to recover from relevant water suppliers the cost of regulatory work undertaken in relation to the quality of drinking water supplies wholly or mainly in Wales by way of a fee charging regime.

3. Matters of special interest to the Constitutional and Legislative Affairs Committee

3.1 This Order is being made by the Welsh Ministers in relation to relevant water suppliers wholly or mainly in Wales. A similar Order is being made by Defra in relation to relevant water suppliers wholly or mainly in England. The Orders are being made under the Public Bodies Act 2011. Each Order has different enabling powers under that Act so two separate Orders are required.

3.2 The Public Bodies Act 2011 confers powers on the Welsh Ministers and Secretary of State to modify the funding arrangements of the DWI. However, the respective enabling powers are distinct and separate. The enabling powers of the Welsh Ministers are conferred by Section 14(3) of the Act and the Secretary of State by Section 3(1). Further, the Secretary of State is required to obtain Treasury consent (Section 4(2) of the Act) whereas there is no such requirement on the Welsh Ministers.

3.3 In addition there are separate regulations in relation to water supply and water quality made under the Water Industry Act 1991 in relation to Wales and England. The Water Supply (Water Quality) Regulations 2010 (S.I 2010/994) apply to relevant water suppliers where the relevant water supplier’s area is wholly or mainly in Wales. The Water Supply (Water Quality) Regulations 2000 (S.I 2000/3184) apply to all other relevant water suppliers, i.e. where the relevant water supplier’s area is wholly or mainly in England.

3.4 The Orders are therefore being made separately in relation to Wales and England.

3.5 The Chief Inspector of Drinking Water is currently jointly appointed by the Welsh Ministers and the Secretary of State. The combined effect of the Orders will be to extend the charging regime to all relevant water suppliers in Wales and England.

3.6 Payment is to the Consolidated Fund as the Inspectors work on an England and Wales basis and are centrally funded.

4. Legislative Context

4.1 The Public Bodies Act 2011 confers powers on the Welsh Ministers in relation to certain public bodies and offices. Section 14(3) of the Act enables the Welsh Ministers to make an order modifying the funding arrangements of inspectors appointed by the Welsh Ministers under section 86 of the Water Industry Act 1991 (“WIA 1991”) (assessors for the enforcement of water quality).

4.2 This Order introduces a fee charging regime, which will, subject to the will of the Assembly and the length of time required for scrutiny, come into effect on 1 January 2013, or 31 January 2013.

4.3 The Order provides for a fee to be payable by water undertakers appointed, or licensed water suppliers licensed, under the WIA 1991 (“relevant water suppliers¹”), for the exercise of certain functions of the DWI, where the relevant water supplier’s area is wholly or mainly in Wales. These relevant water suppliers have a duty to comply with the Water Supply (Water Quality) Regulations 2010 (S.I. 2010/994) (“the 2010 Regulations”). The 2010 Regulations set out EU and national standards for public drinking water supplies and include requirements for relevant water suppliers to ensure that water is wholesome and clean, to take and analyse samples to check for compliance, to investigate failures and to carry out remedial action where water is unwholesome, along with certain reporting requirements. The fee charging regime in the Order will allow the DWI to recover the costs of its regulatory activity under the 2010 Regulations and the WIA in relation to relevant water suppliers who are wholly or mainly in Wales.

4.4 The Water Supply (Water Quality) Regulations 2010 apply to relevant water suppliers where the relevant water supplier’s area is wholly or mainly in Wales. The Water Supply (Water Quality) Regulations 2000 (S.I. 2000/3184) apply to all other relevant water suppliers, i.e. where the relevant water supplier’s area is wholly or mainly in England

5. Territorial Extent and Application

5.1 This instrument extends to Wales and England.

5.2 This instrument applies primarily in Wales but also applies to relevant water suppliers where the relevant water supplier’s area is mainly in Wales but partly in England (see paragraph 4.4).

5.3 A corresponding Order will also be laid in England. That Order will be identical in terms of effect but will apply to relevant water suppliers where the relevant water supplier’s area is mainly in England but partly in Wales.

6. European Convention on Human Rights

6.1 John Griffiths, Minister for Environment and Sustainable Development has made the following statement regarding Human Rights:

“In my view the provisions of the Public Bodies (Water Supply and Water Quality Fees) (Inspection Fees) Order 2012 are compatible with the Convention rights.”

7. Background

- What is being done and why?

7.1 The DWI is not an organisation or body; it is a lay term used to describe the Chief Inspector of Drinking Water (and inspectors) appointed under the Water Industry Act 1991 (WIA) by the Welsh Ministers and the Secretary of State.

7.2 The DWI is the regulator for drinking water quality and safety. It was formed in 1990 to provide independent assurance that water supplies in Wales and England are safe and drinking water quality is acceptable to consumers. The DWI provides independent scrutiny of relevant water suppliers’ activities in relation to supplying water to consumers in Wales and England; works with other stakeholders such as local authorities and the Health Protection Agency for the improvement of both public and private drinking water supplies; commissions research to build a sound evidence base on drinking water quality; and publishes data on drinking water quality in Wales and England.

¹ Updated details of the relevant water suppliers are provided in the annual report of the Chief Inspector for Drinking Water.

7.3 The DWI is entirely funded by Defra, and sits within Defra but differs from other parts of the department in that the role of the Chief Inspector and inspectors are recognised in statute, and they exercise powers delegated directly to them by the Secretary of State through their appointment under the WIA (save where the function has been transferred to the Welsh Ministers). The Chief Inspector and inspectors act for and on behalf of the Welsh Ministers and Secretary of State in relation to the functions set out in the WIA to ensure the safety and quality of drinking water. The DWI does this by professional expert assessment of technical data and audits of relevant water supplier assets and operational procedures, taking enforcement action where appropriate including prosecution for offences as set out in the WIA and Water Supply (Water Quality) Regulations 2010.

7.4 The work of the DWI can be divided into two areas: regulatory and policy functions. The regulatory functions relate to the DWI's statutory role in ensuring relevant water suppliers meet their statutory requirements, and in the discharge of the statutory duties of the Welsh Ministers and Secretary of State, as set out in the WIA. The policy functions relate to the general powers and duties set out in Section 86 of the WIA.

Regulatory functions:

- Technical audits involving the inspection and assessment of relevant water suppliers' water supply arrangements.
- Investigation of water quality events, incidents and other matters.
- Checking compliance with statutory requirements, and legal instruments.
- Technical evaluation of relevant water suppliers' water quality data.
- Investigations of consumer complaints relating to drinking water quality as notified by members of the public, local authorities or businesses.
- Statutory reporting on drinking water quality by relevant water suppliers.

Policy functions:

- Commissioning and management of research programme on drinking water quality and health as evidence base for technical advice roles listed below.
- Providing scientific and technical advice to the Welsh Ministers, officials in the Welsh Government and Defra and local authorities on drinking water issues, policies and standards.
- Assisting with Parliamentary and Welsh Ministers questions on drinking water quality issues.
- Involvement with national, European and international issues and organisations in the development of guidelines and standards for drinking water quality, and measures to improve drinking water safety.

7.5 The Welsh Ministers and Defra propose to enable the DWI to recover the cost of their regulatory activities directly from relevant water suppliers. This will provide a fair system that ensures that regulatory costs are recovered in proportion to their individual relative regulatory burden.

7.6 The overall rationale for charging is that if an industry undertakes an activity that causes (or could potentially cause) an adverse effect on others (such as pollution or risk to public health) which requires regulation, it should face the regulatory cost. This is underpinned by the 'polluter pays' principle set out in the EU Water Framework Directive (2000/60/EC). The role of the water supply industry in supplying safe water supplies is regarded as a fundamental part of public health management.

7.7 The Order will enable the Chief Inspector and inspectors appointed by him or her to recover the costs of the DWI's regulatory activities from relevant water suppliers who are wholly or mainly in Wales by way of a charging scheme. A corresponding Order will also be made in England in relation to relevant water suppliers who are wholly or mainly in England.

7.8 By introducing a charging scheme, DWI will come into line with other related water regulators such as Ofwat and the Environment Agency. The DWI will identify the costs of its regulatory services in relation to each of the individual relevant water suppliers for each calendar year. Ofwat, who are aware of the proposed charging scheme, have confirmed to the Chief Inspector that the cost recovery arrangements for the DWI would have little consequence for their price setting processes.

7.9 In practice, the costs borne by the relevant water suppliers may be passed on to consumers as ultimate beneficiaries, subject to any application by water suppliers and approval by the economic regulator Ofwat. However consumers will continue to derive benefit from the independent validation and verification by the DWI of the drinking water quality they receive from relevant water suppliers.

7.10 Once approval for the charging scheme is received, the DWI will write to each water supplier with details of the scheme for example, when the charges commence, the services that will be chargeable and an indication of charges per service.

8. Compliance with Section 16 of the Public Bodies Act 2011

8.1 Section 16(1) of the Public Bodies Act 2011 provides that the Welsh Ministers may make an order under sections 13 and 14 only if the Welsh Ministers consider that the order serves the purpose of improving the exercise of public functions, having regard to –

- (a) efficiency,
- (b) effectiveness,
- (c) economy, and
- (d) securing appropriate accountability to Ministers.

Efficiency and Effectiveness

8.2 The activities of the DWI and the regulations are risk based therefore the charging scheme will relate directly to DWI's assessment of risk as well as the efficiency and effectiveness of each relevant water supplier, with high performing water suppliers attracting lower charges due to fewer audits, complaints and failed results. In addition the charging regime will make transparent the DWI's risk assessment and associated deployment of resources.

Economy

8.3 It is vital in the current economic climate that financial savings are made across Government. The DWI is currently funded entirely by Defra, and its costs of operation therefore fall to the taxpayer. Allowing the DWI to charge the industry for its regulatory work will result in a saving to the taxpayer of around £1.9m per year (see Impact Assessment for costings) and will contribute towards Defra's planned saving in the current spending review. On the introduction of the charging scheme the relevant water suppliers may be able to pass the costs onto customers, subject to individual water supplier's decisions as to whether to charge and approval by the economic regulator Ofwat. This would increase the average annual water bill by around 15 pence. The charging scheme will be introduced in January 2013 and water suppliers will be invoiced bi-annually thereafter.

Securing appropriate accountability to Ministers

8.4 Stakeholder audits of the scheme would facilitate transparency and accountability to water suppliers for both the charging process and the overall costs. This scheme will increase DWI's accountability to Welsh Ministers by taking the element of funding from Defra.

8.5 Section 16(2) of the Public Bodies Act 2011 provides that the Welsh Ministers may make an order under those sections only if the Welsh Ministers consider that –

- (a) the Order does not remove any necessary protection, and
- (b) the Order does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise

8.6 The Welsh Ministers consider that the conditions in section 16(2) are met. The power to modify funding arrangements which will enable DWI to charge for their regulatory activities will not remove any necessary protection nor prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

9. Discussions in Parliament during passage of the Public Bodies Bill

9.1 The inclusion of the DWI in the Public Bodies Bill was debated in the House of Lords Committee on 7th March 2011 (the relevant text from Hansard can be found at <http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/110307-0004.htm> columns 1503 - 1508). An amendment had been tabled to remove a group of bodies from the Bill, including the DWI. The House wanted to know why these bodies, who had very significant responsibilities in terms of sustaining and protecting the environment, had been included in the Bill.

9.2 In relation to the DWI, the House was informed that the changes were very minor and removed financial burden from the taxpayer. In light of this the amendment was withdrawn. However, in order to comply with the wishes of the Welsh Government, a Government amendment was tabled which restricted the order-making power of Ministers to the Drinking Water Inspectorate in England. This amendment was agreed.

10. Consultation outcome

10.1 The joint consultation was completed by Defra on a Wales and England basis.

10.2 The proposal to enable the DWI to recover the cost of its regulatory functions from relevant water suppliers was originally raised in the formal consultation on the Flood and Water Management Bill in 2009. The questions asked were:

- Do you agree that DWI should introduce charging to recover the cost of their regulatory activities from water companies and licensed water suppliers in line with other water regulators?
- Do you agree with the principle that charges to individual water companies and licensed water suppliers should be proportional to the relative regulatory burden they represent?

The consultation received 638 responses, of which the main respondents were stakeholders such as water suppliers, local authorities, NGOs, consultants, trade associations, private individuals and community groups. Of the 638 responses received, only 39 were in relation to the proposed charging scheme and of those a majority agreed with the proposal. A copy of the summary of responses can be found at:

<http://webarchive.nationalarchives.gov.uk/20100111085541/http://www.defra.gov.uk/corporate/consult/flood-water-bill/responses-summary.pdf>

A copy of the page relating to the DWI proposal from the summary document is attached at Annex A.

10.3 The main themes and issues that arose from the consultation were:

- Customers would still end up footing the bill and be unlikely to see any reduction in tax burden.
- The charging scheme should be based on the five principles of better regulation; proportionate, transparent, consistent, targeted and accountable.
- The DWI should ensure it operates in the most efficient and cost effective manner to limit the regulatory burden on companies and customers.
- Ensure these proposed ‘pay as you use’ changes could not perversely encourage water suppliers to hide their potential problems and failures in any effort to reduce costs.

10.4 The provisions however were removed from the draft Bill to reduce its size and were not discussed in Parliament, but the DWI continued to consult and work with the water industry to address the issues raised in the consultation. The provisions were subsequently included in the Public Bodies Bill.

10.5 The further informal consultation approach was agreed by the Welsh Government’s consultation advisors as it is aimed at a niche market (water companies, the Environment Agency, Ofwat and the Consumer Council for Water). The Drinking Water Inspectorate gave a presentation to members of the Water Industry Forum on 4 April 2012. This provided the relevant stakeholders with an opportunity to comment on the implementation of the proposed charging scheme.

10.6 All Forum members were in support of the proposal for charging and the approach proposed.

11. Guidance

11.1 The DWI will provide guidance to the water industry in the form of an Information Letter to Board Level Contacts in each business in line with established ways of working with the water industry.

12. Impact

12.1 The impact on business.

The charging system will be designed to be broadly cost reflective at the level of the individual, site or firm. A business that requires only light regulation (and therefore gives rise to few costs for the regulator) should generally pay lower charges than a business that needs frequent or more detailed interventions by the regulator.

12.2 The impact on the public sector.

In practice, the costs borne by water companies may be passed on to consumers as ultimate beneficiaries, subject to water companies’ decisions and approval by the economic regulator Ofwat. Consumers will continue to derive benefit from the independent validation and verification by the DWI of the drinking water quality they receive from water companies. Ultimately therefore there will be a transfer of funding from taxpayers to water bill payers. Whilst this involves a switch from a progressive fundraising system (i.e. one which is scaled by ability to pay) to one which is more regressive, because the aggregate costs to be recovered are relatively small compared with other chargeable costs, the impact on individual consumers’ bills will be less than a 0.1% increase (around 15 pence per annum). Given this, and the fact that water companies will soon be able to consider social tariff schemes to assist those with the most significant affordability issues, we judge the equity impacts arising from the proposal to be negligible.

Title: The Public Bodies (Water Supply and Water Quality) (Inspection Fees) Order 2012 IA No: Defra 1382 Lead department or agency: Defra Other departments or agencies:	Impact Assessment (IA)	
	Date: 23/02/2012	
	Stage: Final	
	Source of intervention: Domestic	
	Type of measure: Secondary legislation	
Contact for enquiries: Tracy Westell/Milo Purcell		
Summary: Intervention and Options		RPC Opinion: GREEN

Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Measure qualifies as One-Out?
£1.021m	£12.834m	£1.407m	No NA

What is the problem under consideration? Why is government intervention necessary?

Defra currently funds the Drinking Water Inspectorate (DWI) for both its regulatory and policy functions; it now proposes to enable DWI to recover the costs of its existing regulatory functions from the water industry. This proposal brings the funding arrangements for the DWI in line with general government policy on charging, which states that businesses which benefit from regulation should bear the cost of regulation, not the taxpayer. Also, the Hampton Review 2005 included a specific recommendation that regulators should be more accountable to those who benefit from their delivery functions.

What are the policy objectives and the intended effects?

The proposal will:

- make DWI more accountable to those who benefit from its regulatory functions;
- make DWI funding more transparent;
- contribute around £2.0m per annum saving in the current spending review and reduce future pressures.

The proposal will also bring DWI in line with the cost recovery mechanisms for other water regulators (Ofwat, Consumer Council for Water and the Environment Agency).

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Option 0: Do nothing

Option 1: Enable cost recovery for existing services using basic methodology.

Option 2: Provide the regulatory service through the private sector.

Defra's preferred option is Option 1 which will enable DWI to recover the cost of its existing regulatory functions from water companies. It is also consistent with the views of water companies that the scheme should be as simple as possible. Although the option involves a modest net cost of around £1m, this is judged to be more than outweighed by the non-monetised benefits of aligning the charging of DWI services to those who benefit.

Will the policy be reviewed? It will be reviewed. If applicable, set review date: 06 2015

Does implementation go beyond minimum EU requirements?			N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro No	< 20 No	Small Yes	Medium Yes	Large Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded: N/A		Non-traded: N/A

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible SELECT SIGNATORY: Date:

Summary: Analysis & Evidence

Policy Option 1

Description: Option 1: Introduce a charging scheme using basic methodology

FULL ECONOMIC ASSESSMENT

Price Base Year 2011	PV Base Year 2010	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: n/a	High: n/a	Best Estimate: -1.02

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	n/a	n/a	n/a
High	n/a	n/a	n/a
Best Estimate	0	1.7	13.86

Description and scale of key monetised costs by 'main affected groups'

Average annual costs are £1.7m. This is made up of additional administrative costs of £200K in the first two years, then £100K thereafter, as well as £2.0m in charges raised from the water industry (from year 3 onwards). Over 10 years, the total cost has a net present value of £13.9m. The majority of this is the cost of the charges raised on industry (a cost to business with a net present value of £12.8m or £1.5m as an annualised cost (£1.4m as an EANCB at 2009 prices).

Other key non-monetised costs by 'main affected groups'

The cost to water companies and licensed water suppliers of reviewing and processing a bi-annual invoice from the DWI are negligible and not monetised. No additional data/administrative costs are incurred.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	n/a	n/a	n/a
High	n/a	n/a	n/a
Best Estimate	0	1.5	12.83

Description and scale of key monetised benefits by 'main affected groups'

Benefits are the reduced cost to government arising from transferring the annual funding of DWI operations to the industry. This exactly offsets the increased cost to the industry (£12.8m in total PV terms, or £1.5m as an annualised cost).

Other key non-monetised benefits by 'main affected groups'

The DWI will be able to inform the public on how well water companies have progressed with their drinking water safety management. Improved independence of DWI in relation to its regulatory budget & improved accountability of DWI in relation to the water industry and consumers – through approval mechanism on proposed charges. The proposed system will encourage water companies to help deliver lighter touch regulation as charges will reflect their respective regulatory burden.

Key assumptions/sensitivities/risks	Discount rate (%)	3.5
<ul style="list-style-type: none"> - changes to DWI governance and support arrangements might affect the charging regime but none are planned presently - uncertainties regarding future market reform – plans unknown, but the proposal is sufficiently flexible to adapt to expansion of competition in the sector - DWI future efficiency [see evidence base for safeguards] 		

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:	In scope of OIOO?	Measure qualifies as
Costs: 1.41	No	NA
Benefits: 0		
Net: 1.41		

Summary: Analysis & Evidence

Policy Option 2

Description: Option 2: Provision of the regulatory service through the private sector

FULL ECONOMIC ASSESSMENT

Price Base Year n/a	PV Base Year n/a	Time Period Years n/a	Net Benefit (Present Value (PV)) (£m)		
			Low: n/a	High: n/a	Best Estimate: n/a

COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
	Low	n/a		
High	n/a		n/a	n/a
Best Estimate	n/a		n/a	n/a

Description and scale of key monetised costs by 'main affected groups'

The costs of this option have not been monetised (see below).

Other key non-monetised costs by 'main affected groups'

Much water monitoring activity is already delivered in conjunction with water and other private sector companies and the elements of the regulatory process which remain with DWI are judged to be too specialised to be economically viable for the private sector. Even if viable, the delivery of these functions privately would compromise the residual DWI's ability to deliver policy advice and may impact on public confidence (see risks). Monopoly providers may still need some regulation.

BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
	Low	n/a		
High	n/a		n/a	n/a
Best Estimate	n/a		n/a	n/a

Description and scale of key monetised benefits by 'main affected groups'

This benefits of this option have not been monetised.

Other key non-monetised benefits by 'main affected groups'

This option might, if viable, deliver small further efficiency benefits and savings compared with Option 1 - but overall is not felt to viable for the reasons given above.

Key assumptions/sensitivities/risks

Discount rate (%)

n/a

See Option 1. In addition, a key risk of this option is that the transfer of remaining public responsibilities within the drinking water regulatory regime to the private sector would compromise the independence of operations and impact on public confidence and health.

BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: n/a	Benefits: n/a	Net: n/a	No	NA

Evidence Base (for summary sheets)

Background

The DWI was established in 1990 as the drinking water quality regulator for the privatised water industry. All inspectors, including the Chief Inspector of Drinking Water, are appointed under section 86 of the Water Industry Act 1991 (“the WIA”).

The DWI differs from ordinary divisions in Defra in that the role of inspectors and the Chief Inspector is recognised in statute, and they exercise powers delegated directly to them by the Secretary of State.

The Chief Inspector exercises the powers of the Secretary of State and Welsh ministers as set out in the WIA (as amended by the Water Act 2003) in relation to the safety and quality of drinking water. The DWI does this by means of technical audit of water company assets and operational procedures, taking enforcement action where appropriate including prosecution for offences as set out in the WIA and Water Supply (Water Quality) Regulations 2000 (as amended).

The Chief Inspector also acts for the Secretary of State in relation to enforcing that local authorities take action as set out in the Private Water Supply Regulations 2009 in relation to private water supplies. The Chief Inspector is responsible for publishing drinking water reports and providing the European Commission with data demonstrating compliance by the UK with the EC Drinking Water Directive 98/83/EC. Similar arrangements exist in Scotland and Northern Ireland and the Chief Inspector discharges Secretary of State duties as member state through a Memorandum of Understanding with her equivalents in Scotland and Northern Ireland. The Chief Inspector (and Inspectors) exercises these powers independently of Ministers.

DWI undertakes a range of statutory and non-statutory roles. The work of DWI can be divided into activities that stem from its statutory role in ensuring water companies meet their statutory requirements, and in the discharge of the statutory duties of the Secretary of State and Welsh Government, as set out in the WIA, and those that support policy functions.

Regulatory functions:

- Technical audits involving the inspection and assessment of water companies' water supply arrangements.
- Investigation of water quality events and incidents.
- Checking compliance with statutory requirements, and legal instruments.
- Technical evaluation of water companies' water quality data.
- Investigations of consumer complaints relating to drinking water quality as notified by members of the public, local authorities or businesses.
- Statutory public reporting on drinking water quality.

Policy functions:

- Commissioning and management of research programme on drinking water quality and health as evidence base for technical advice roles listed below
- Providing scientific and technical advice to Ministers and officials in Defra and Welsh Government on drinking water issues, policies and standards
- Assisting with Parliamentary questions on drinking water quality issues

- Involvement with national, European and international issues and organisations in the development of guidelines and standards for drinking water quality, and measures to improve drinking water safety

Although DWI's budget falls within the Water, Floods, Environmental Risk and Regulation Directorate's total programme allocation, the Secretary of State is ultimately responsible for allocating resources to DWI, and is accountable to Parliament for that expenditure. Therefore, currently, tax payers fund both DWI's regulatory functions and policy functions.

Problem under consideration

When DWI was set up it was funded by the taxpayer. Although administratively simple, it is not the solution that most appropriately reflects the principles of a market for drinking water quality. It does not reflect the polluter or risk owner or beneficiary pays principle, and creates moral hazard in the industry to the extent that water companies do not have as full a stake as they might in the costs of regulating drinking water quality.

Also, the Hampton Review of 2005 included a specific recommendation that regulators should be more accountable to those who benefit from their delivery functions. Defra considers that providing a mechanism for the DWI to recover the costs of its existing regulatory functions from the water industry will assist in achieving this recommendation by linking directly the costs incurred by the regulator to the activities associated with individual water companies. This will improve transparency on funding arrangements. DWI has a good record in respect of other Hampton recommendations and demonstrates very good compliance with the expectations of the Regulators' Compliance Code, as recorded by the BIS/BRE report of its review of DWI dated March 2010. This review focussed on an assessment of regulatory performance against Hampton principles and Macrory characteristics of effective inspection and enforcement.

Furthermore, the Cave Review into competition in the water industry is expected to lead, over time, to an increase in the number of water suppliers, and therefore an increase in the work faced by DWI. It is anticipated that this, along with increased numbers of inset appointees throughout England and Wales, will increase the extent of DWI regulation in these sectors. Enabling DWI to recover the cost of their regulatory activities directly from water undertakers (including inset appointees) and licensed water suppliers will provide a fair system that ensures that regulatory costs are recovered in proportion to their individual relative regulatory burden.

Rationale for intervention

Water customers suffer from the problem of asymmetric information. They cannot obtain information themselves on the quality of drinking water supplied to them as many aspects of drinking water quality are unobservable at the point of use. Health effects may take hours, weeks or even decades to have an impact and may be difficult to attribute to water consumption. This is compounded by the fact that (with the exception of some business customers) they receive supplies from monopoly providers and they are therefore unable to signal their preferences regarding drinking water quality by switching suppliers. Government intervention is required to police drinking water quality and this is effectively the rationale for DWI itself and the rationale for extensive statutory monitoring.

However, a significant proportion of the DWI's activities relates to monitoring the way water companies meet their regulatory requirements through technical audit and associated activities. As it is the water industry and their customers that benefit from these regulatory services, they should bear the cost of the service they receive.

Enabling DWI to change the way its regulatory functions are funded [from water companies rather than the Exchequer] will add to the increased independence of DWI within government which is important for industry and consumer confidence. DWI already has its own budget; it has separate accommodation from the Defra policy division; produces an independent annual report; and the Chief Inspector of Drinking Water, appointed by the Secretary of State and Welsh Ministers, has specific independent powers on enforcement and prosecution.

By introducing a charging system, DWI's position will be consistent with that of other water industry regulators, Ofwat and the Environment Agency, and with the Consumer Council for Water.

Policy objective

The Defra Charging Handbook 2005 provides guidance to facilitate consistent, coherent, transparent and predictable charging for regulatory services across Defra. The overall rationale for charging is that if an industry undertakes an activity that causes (or could potentially cause) an adverse effect on others (such as pollution or risk to public health) which requires regulation, it should face the regulatory cost. The role of the water supply industry in supplying safe water supplies is regarded as a fundamental part of public health management.

In addition, the proposed scheme to recover actual costs incurred will assist in meeting three of the Handbooks strategic principles:

The polluter, risk owner or beneficiary pays - The polluter or risk owner or beneficiary should bear the costs of any measures to prevent harm that they might otherwise cause by their actions or non-actions, including the cost of monitoring regimes. For drinking water supplies, the actions necessary to mitigate pollution and protect consumers are undertaken by water companies, and regulated by DWI. The risks are owned and managed by water companies, who are required by legislation to act proactively to mitigate risks to public health and levels of service relating to the quality of water supplies. It is also in the interests of water companies to engage in the process to minimise the impact of significant failures on their reputations and on consumer confidence. The effectiveness of active management of residual risks that impact on water quality as introduced by DWI are well established within the water industry and are known to be cost effective. Furthermore, water companies benefit from the regulatory activities of DWI [examples set out below]. Transparent allocation to individual water companies, rather than to the taxpayer, of DWI's costs for regulating these functions better aligns funding arrangements with this principle.

Aim for full cost recovery - This is the Government's broad policy for services. If policymakers do not plan to recover the full cost of the service they provide, and hence the service is being intentionally subsidised, they will need to justify this decision. This proposal enables DWI to fully recover the costs for its existing regulatory functions, as listed above.

Charges paid by the individual or firm should broadly reflect the cost incurred by the regulator in regulating that firm or individual - The charging system should be designed to be broadly cost reflective at the level of the individual, site or firm. A business that requires only light regulation (and therefore gives rise to few costs for the regulator) should generally pay lower charges than a business that needs frequent or more detailed interventions by the regulator.

This proposal brings the arrangements for the DWI in line with Defra general policy on charging, which is that businesses that benefit from regulation, not the taxpayer, should bear the cost of regulation.

In practice, the costs borne by water companies may be passed on to consumers as ultimate beneficiaries, subject to water companies decisions and approval by the economic regulator Ofwat. Consumers will continue to derive benefit from the independent validation and verification by DWI of the drinking water quality they receive from water companies. Ultimately therefore there will be a transfer of funding from taxpayers to water bill payers. Whilst this involves a switch from a progressive fundraising system (i.e. one which is scaled by ability to pay) to one which is more regressive, because the aggregate costs to be recovered are relatively small compared with other chargeable costs, the impact on individual consumers' bills will be less than a 0.1% increase. Given this, and the fact that water companies will soon be able to consider social tariff schemes to assist those with the most significant affordability issues, we judge the equity impacts arising from the proposal to be negligible.

As the proposal comprises charges for existing regulatory activities, and does not entail a change in regulatory functions, it does not come within the scope of policy on one-in, one-out. This has been confirmed by BRE.

Description of options considered

Option 0 - Do nothing and continue to subsidise the full costs of DWI. This is not compliant with the Hampton Review recommendations, or with the Defra Charging Handbook strategic aims, nor is it consistent with other charging mechanisms of related water regulators. (Note however that under any option, Defra will continue to fund the "policy service" part of DWI which provides advice to Ministers and officials).

Option 1 - Introduce a charging scheme using basic methodology – this is Defra's preferred option. This option will enable DWI to recover the cost of its regulatory functions from water companies. It is also consistent with the views of water companies that the scheme should be as simple as possible, whilst still retaining some basic incentives to reduce the regulatory burden by maintaining performance with statutory obligations.

Consideration was also given to introduce a charging scheme using more detailed methodology. However, when consulted, the clear view of water companies was that the sums to be raised through this charging process were very small (at around £2m over the whole industry per annum) in relation to wider industry costs, and that the charging regime burden should reflect this. Thus, minimising data submissions and administrative costs would be of greater benefit for both them and customers than the potential financial incentives to be gained from a more complex incentivisation mechanism. Some companies noted that the reputational impact of regulatory underperformance would be of far greater significance than the direct financial costs involved.

In summary, whilst a very complex charging method could be designed, the preference is for a simpler one, with some incentives but which gives water companies and DWI necessary certainty. It is also noted that other water industry regulatory charging options (e.g. for Ofwat and CC Water) are simply defined.

Cost recovery will recover costs incurred based on a two part charge: a charge using the number of tests for compliance purposes reported by each water company, which directly relates to DWI workload for each company on routine checking and monitoring; and a charge based on water company performance – reflecting directly the allocation of DWI's resources to deal with underperformance using a risked based approach, principally in investigating and reporting on compliance failure, incident management and technical audit.

Option 2 - Provision of the regulatory service through the private sector. This option was considered, but was not assessed quantitatively for the following reasons. The current regulatory model for drinking water quality has in place substantial private sector involvement. For example, delivery of the statutory monitoring (water sampling and analysis) that is required by the Water Supply (Water Quality) Regulations 2000 (as amended) has already been vested in water companies as a recoverable cost that is passed on to consumers through their water bills. It is integrated with process control and operational management requirements, and the estimated cost of these combined functions across all water companies in England and Wales is £500m pa.

Also, the quality assurance arrangements necessary to ensure the integrity of this substantial monitoring and control programme are conducted by co-regulation, involving bodies such as the United Kingdom Accreditation Service [the sole national accreditation service recognised by Government]; the analytical service industry; and water companies, using an agreed specification put in place by DWI. The remaining elements of regulation retained by DWI provide the minimal oversight necessary to deal with non-compliance by independent enforcement [or prosecution, where necessary], and with public reporting to maintain public confidence. These elements of the regulatory process are so specialised and of low margin that it is not likely to be economically viable for the private sector to deliver.

Finally, the service is critically important for public accountability in the provision of safe clean drinking water, and is fundamental to the protection of public health and maintenance of public confidence in public water supplies. This means that delivery of remaining regulatory functions through the private sector is still likely to need to include at least some oversight, especially if the provider has a high degree of monopoly power. This would impose costs and therefore reduce the already modest financial savings possible from this option. The provision of the regulatory service through the private sector would also inhibit DWI policy support functions as it would not benefit from the wider knowledge and information obtained in the course of regulatory activities undertaken by a separate private organisation. Industry satisfaction with these arrangements appears high, as reported by a recent BRE Hampton Implementation audit of DWI.

Monetised and non-monetised costs and benefits of each option (including administrative burden)

Option 1 - The monetised cost of the regulatory functions undertaken by the DWI on behalf of the water industry is estimated to be £2.0m per annum [Source: DWI; see list of function above]. This would represent a cost transfer to the industry [net economic impact=0] and in practice would be implemented from the third year onwards.

However, net costs arise from provision for transitional set-up costs, estimated by DWI at £200k in FY 11/12 and FY12/13 [to provide administrative and IT arrangements to support charging], and for ongoing management costs of £100k per annum [for data collation; administrative support; and financial management].

The cost to water companies and licensed water suppliers of reviewing and processing a bi-annual invoice from the DWI are negligible and are therefore not monetised. There are no additional costs relating to data gathering or submissions. The profile of the monetised costs is summarised in the following table.

Summary of monetised costs (undiscounted £,000s)

Year	1	2	3	4	5	6	7	8	9	10	Total
Admin costs	200	200	100	100	100	100	100	100	100	100	1200
Industry charges*			2000	2000	2000	2000	2000	2000	2000	2000	16000
Total	200	200	2100	2100	2100	2100	2100	2100	2100	2100	17200

* = A transfer and fully offset by savings to government (which comprise the monetised benefits of Option 1)

In line with best practice the monetised impacts have been discounted at an annual rate of 3.5%. This calculation is intended to convert all impacts into a consistent basis on which they can be compared according to social time preference. More information on discounting is available from www.hm-treasury.gov.uk/d/green_book_complete.pdf.

The charging scheme will place proportionate costs on water companies and licensed water suppliers based on the level of regulatory activity involved. Water companies may pass the charges onto water customers, which could result in an increase to the average annual water bill of up to 15 pence.

Offset against the net costs above are the unmonetised benefits arising from the proposed arrangements, which:

- will assist the DWI in achieving one of the Hampton Review's recommendation that regulators should be more accountable to those who benefit from their delivery functions.
- will encourage water companies to improve their drinking water safety management and therefore help to deliver lighter touch regulation as they will be charged in proportion to their own regulatory burden on DWI.
- brings the arrangements for the DWI in line with general policy on charging, and consistent with similar regulatory arrangements within the water industry.
- Contributes to the improved operational efficiency of DWI itself, arising from the greater transparency and public accountability inherent in the scheme.

The DWI operates a risk based approach to technical audits of water companies and their drinking water supply arrangements. The regulatory activity applicable to each water company and each licensed water supplier is governed by the potential risk of its activities to public health. Regulatory monitoring for compliance with EU law is already risk based with the number of tests required varying according to the volume of water supplied/population served. The activity levels applicable to each company/licensed supplier will therefore vary, and will also change over time relative to the risks, and by the outcome of regulatory monitoring. The number and type of licensed water suppliers may also change according to competitive market forces and Government policy.

Risks and assumptions

Risks include:

- changes to DWI governance and support arrangements may impact on the charging regime – but none are planned presently
- uncertainties regarding future market reform – plans are currently unknown, but the proposal is sufficiently flexible to adapt to expansion of competition in the sector
- potential inefficiency in DWI operations leading to increased costs. Safeguards to ensure DWI's on-going efficiency include
 - o Public reporting of water company and DWI performance in the annual Chief Inspector's report
 - o Defra governance oversight, as per existing arrangements
 - o Defra internal audit, as per existing arrangements
 - o BRE audit and the Regulators Compliance Code, regular assessment and public reporting arrangements
 - o Stakeholder audit by invitation, continuing current practice of inviting water companies to carry out their own audit of DWI activities and performance

Assumptions include:

- That DWI remains within Defra for accommodation and administration/services support.
- Although a sunset clause does not apply to this scheme, it is proposed that the effectiveness of the arrangements will be reviewed in June 2015.

Wider impacts**Economic/Financial**

The proposed charging scheme will apply to all water companies and licensed suppliers (none of these are classified as micro businesses). Each company/supplier will pay the costs incurred for the checking and monitoring, and technical audit services and inspections they receive, therefore not imposing a discriminatory burden on small firms/businesses.

Water companies and licensed water suppliers may pass the charges onto their water customers, who are the main beneficiaries of the regulatory work (wholesome drinking water). It is estimated that if water companies did pass this cost on to customers, the average annual water bill could increase by around 15 pence.

Social

There are no social impacts or additional impacts on rural areas.

Environmental

The overall rationale for charging is that if an industry undertakes an activity that causes an adverse effect on others (such as pollution or risk to public health) which requires regulation, it should face the regulatory cost. The role of the water supply industry in supplying safe water supplies is regarded as a fundamental part of public health management.

The water industry meets the cost of the statutory direct monitoring (water sampling and analysis) that is required by the Water Supply (Water Quality) Regulations 2000 (as amended).

A significant proportion of the DWI's activities relates to monitoring the way water companies meet their regulatory requirements through technical audits and associated activities. As it is the water industry and its customers that benefit from these regulatory services, they should bear the cost of the regulatory services provided.

The regulatory service is fundamental to the protection of public health in the provision of safe clean drinking water and to the maintenance of public confidence in public water supplies.

Water companies benefit from:

- Consistent, authoritative interpretation of regulatory requirements that facilitates a level playing field for all participants;
- Provision of guidance on matters of good practice; and
- Public confidence in an industry vital to social and economic wellbeing that accrues from independent scrutiny of functions that are substantially self-regulated and co-regulated by private sector organisations.

Consumers benefit from:

- The contribution of regulation to the consistent delivery of statutory obligations that brings focus on outcomes;
- Timely and proportionate independent investigation and public accountability when failure occurs;
- Regular, transparent and efficient provision of information verified by an independent source; and
- Assurance that there is an independent advocate for their interests in drinking water quality matters.

This proposal is consistent with the principle of a sustainable economy.

Consultation

The DWI charging scheme proposal was originally included in the formal consultation on the Floods and Water Management Bill in 2009. Stakeholders such as water companies, local authorities, NGOs, the agriculture sector, trade associations, private individuals and community groups were the main respondents. A majority of responses agreed with the proposal (only 9% disagreed with the proposal) and there were no significant issues requiring revision in the proposed policy. The main issues identified by the consultation were:

- 1) The charging scheme should be based on the five principles of better regulation; proportionate, transparent, consistent, targeted and accountable
- 2) DWI should ensure it operates in the most efficient and cost effective manner to limit the regulatory burden on companies and customers.
- 3) Look for formal confirmation that these proposed incentives for lighter touch regulations would not result in perverse outcomes by encouraging water companies to hide their potential problems and failures in any effort to reduce costs.

These issues have been taken into account in the final proposal. In particular, regarding issue 3 above, DWI will continue to be vigilant through its audit and inspection processes to ensure water suppliers meet their statutory responsibilities, and it has the powers to take enforcement action to deal with underperformance, if needed.

An informal consultation, in the form of meetings and stakeholder workshops for water companies and licensed suppliers, Ofwat, CCWater and Water UK, who represents the water industry, began on 24th October and ran for 6 weeks, closing on 5th December 2011. As industry were already aware and supportive of this proposal, no specific issues were raised.

Summary and preferred option with description of implementation plan

Currently Defra funds both the regulatory functions and the policy and technical advice functions undertaken by the DWI. However, a significant proportion of the DWI's activities relate to scrutinising the way water companies (including licensed water suppliers and inset appointees) meet their regulatory requirements through technical audits and inspections. As it is the water industry that benefits from these regulatory services, option 1, introducing a charging scheme, is the preferred option as it would bring the arrangements for the DWI in line with general policy on charging, which is that businesses that benefit from regulation, not the taxpayer, should bear the cost of regulation. Ofwat, who are aware of the proposed charging scheme, have confirmed to the Chief Inspector that the cost recovery arrangements for the DWI would have little consequence for their price setting processes.

By introducing a charging scheme, DWI will come into line with other related water regulators such as Ofwat and the Environment Agency and also the Consumer Council for Water which is a consumer body, who all charge for their regulatory activities. All three regulators recover their costs through the licensing regime (which is statutory). DWI will identify the costs of its regulatory services in relation to the costs incurred by each of the individual water companies.

The Public Bodies Bill includes the required primary legislation to provide powers for DWI to introduce a charging scheme. The scheme itself would be introduced by way of an Order made under this general charging power (schedule 4, amendment 79A - 'Inspectors appointed by the Secretary of State under section 86 of the Water Industry Act 1991'). Although the bodies listed within the schedules of the Bill are subject to sunseting, Orders made, for example in respect of charging powers, will survive the removal of the body from the Act and will remain in force.

The operation of the charging scheme will be assessed in June 2015, to ensure that it is achieving its desired outcomes that it was designed to achieve and if necessary make any required adjustments.

The proposed scheme will provide the Secretary of State and Welsh Ministers (and therefore the Chief Inspector appointed to act on their behalf) with the power to recover costs of the DWI's existing regulatory activities by way of a charging scheme. It is proposed that the Welsh Order will enable Welsh Ministers to make Regulations to allow charging in relation to water companies whose supply area is wholly or mainly in Wales and the English Order will provide the same power for the Secretary of State in respect of water companies whose supply area is wholly or mainly in England. Following the informal consultation, it is proposed that the Order will come into force 1st January 2013.

Charges will be introduced from January 1st 2013. Costs will be invoiced directly bi-annually.

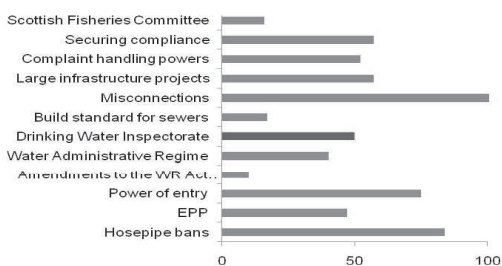
13. Monitoring & review

13.1 The operation of the charging scheme will be assessed in June 2015 by the Welsh Government and Defra. Although it has not yet been decided how the scheme will be assessed, its aim will be to ensure that it is achieving its desired outcomes that it was designed to achieve and if necessary make any required adjustments.

3.23 Drinking Water Inspectorate recovery of charges

Fifty responses commented on this section. The majority agreed with the proposals.

Question 151: Do you agree that DWI should introduce charging to recover the cost of their regulatory activities from water companies and licensed water suppliers in line with other water regulators?; and



Question 152: Do you agree with the principle that charges to individual water companies and licensed water suppliers should be proportional to the relative regulatory burden they represent?

Key issues raised by stakeholders included concerns that customers would still end up footing the bill and are unlikely to see any reduction in their tax burden.

Others suggested that the charging scheme should be based on the five principles of better regulation; i.e. it should be proportionate, transparent, consistent, targeted and accountable; and that the DWI should ensure it operates in the most efficient and cost effective manner to limit the regulatory burden on companies and customers.

Respondents looked for formal confirmation that these proposed 'pay as you use' charges could not perversely encourage water companies to hide their potential problems and failures in an effort to reduce costs.

**Department for Environment, Food and Rural Affairs
October 2011**

**Proposal for the recovery of costs by the Drinking Water
Inspectorate**

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The proposal

To update details on the implementation of a cost recovery scheme by DWI that will enable it to recover the cost of its regulatory functions from water companies.

The scheme will provide the Secretary of State and Welsh Ministers (and therefore the Chief Inspector appointed to act on their behalf) with the power to recover costs of DWI regulatory activities by way of a charging scheme. It is proposed that the Welsh Order will enable Welsh Ministers to make Regulations to allow charging in relation to water companies whose supply area is wholly or mainly in Wales and the English Order provides the same power for the Secretary of State in respect of water companies whose supply area is wholly or mainly in England. Following an informal consultation in the autumn.

It is proposed that the Orders will come into force on 1st January 2013.

Publication of this consultation paper initiates a 6 week period during which the DWI will be seeking the views of the water industry and any organisation or individual who may have a personal or professional interest in the charging scheme. The consultation will run from 24th October 2011 to 5th December 2011.

Please send your responses to this consultation to dwi.consultation@defra.gsi.gov.uk by **5th December 2011**.

Background

The Drinking Water Inspectorate (DWI) was established in 1990 as the drinking water quality regulator for the privatised water industry. All inspectors, including the Chief Inspector, are appointed under section 86 of the Water Industry Act 1991.

The Chief Inspector of Drinking Water exercises the powers of the Secretary of State and Welsh ministers as set out in the Water Industry Act 1991 (as amended by the Water Act 2003) in relation to the safety and quality of drinking water. DWI does this by means of technical audit of water company assets and operational procedures, taking enforcement action where appropriate including prosecution for offences as set out in the Act and Water Supply (Water Quality) Regulations.

The Chief Inspector also acts for Ministers in relation to enforcing that local authorities take action as set out in the Private Water Supply Regulations in relation to private water supplies. The Chief Inspector is responsible for publishing drinking water reports and providing the European Commission with data demonstrating compliance by the UK with the EC Drinking Water Directive. Similar arrangements exist in Scotland and Northern Ireland and the Chief Inspector discharges these duties for the member state through a Memorandum of Understanding with her equivalents in Scotland and Northern Ireland. The Chief Inspector (and inspectors) exercises these powers independently of Ministers.

DWI operates a risk based approach to technical audits of water companies and their drinking water supply arrangements. The regulatory activity applicable to each water company and each licensed water supplier is governed by the potential risk of its activities to public health. Regulatory monitoring for compliance with EU law is already risk based with the number of tests required varying according to the volume of water supplied/population served. The activity levels applicable to each company/licensed supplier will therefore vary, and will also change over time relative to the risks, and by the outcome of regulatory monitoring. The number and type of licensed water suppliers may also change according to competitive market forces and Government policy.

Reasons for the proposal

The Hampton Review of 2005 on good regulatory practice included a specific recommendation that regulators should be more accountable for the way in which they undertake their delivery functions. Defra and the Welsh Government consider that providing a mechanism for DWI to recover the costs of its delivery functions from the water industry will assist in achieving this recommendation.

A significant proportion of DWI activity relates to monitoring the way water companies meet their regulatory requirements through technical audit and associated activities. As it is the water industry who benefits from these regulatory services, they should bear the cost of providing that service.

The proposed charging scheme would also apply the following strategic principals:

The polluter, risk owner or beneficiary pays - The polluter or risk owner should bear the costs of any measures to prevent harm that they might otherwise cause by their actions or non-actions, including the cost of monitoring regimes. This provides incentives for the development and adoption of less damaging methods and practices.

- **Charges paid by the individual or firm should broadly reflect the cost incurred by the regulator in regulating that firm or individual** - The charging system will be broadly cost reflective at the level of the individual, site or firm. A business that requires only light regulation hence gives rise to few costs for the regulator should generally pay lower charges than a business that needs frequent or more detailed interventions by the regulator.

By introducing a charging scheme, DWI will come into line with other related water regulators such as Ofwat and the Environment Agency and also the Consumer Council for Water (a consumer body), all of which charge for their regulatory activities. This proposal also brings the arrangements for DWI in line with general policy on charging, which is that businesses which benefit from regulation, not the taxpayer, should bear the cost of regulation.

The charging scheme will result in proportionate charges on water companies based on the level of technical audits and inspections involved. This will create a financial incentive for water companies to improve their water safety management.

The Costs involved (including administrative burden)

The estimated annual cost of the regulatory functions undertaken by DWI on behalf of the water industry is estimated at around £1.9m per annum.

Water companies may pass the charges onto their water customers, who are the main beneficiaries of the regulatory work (wholesome drinking water). It is estimated that if water companies did pass this cost on to customers, the average annual water bill could increase by around 15 pence.

The administrative burden on industry arising from this proposal are negligible.

The benefits of the proposal

The benefits of this option are that it:

- will assist DWI in achieving one of the Hampton Review's recommendation that regulators should be more accountable for the way in which they undertake their delivery functions.
- will create a financial incentive for water companies to improve their water safety management.
- brings the arrangements for DWI in line with general policy on charging.

Implementation matters

A significant proportion of DWI activity relates to scrutinising the way water companies (including licensed water suppliers and inset appointees) meet their regulatory requirements through technical audits and inspections. As it is the water industry which benefits from these regulatory services, the proposal to introduce a charging scheme would bring the arrangements for DWI in line with general policy on charging, which is that businesses which benefit from regulation, not the taxpayer, should bear the cost of regulation.

The charging scheme would provide a financial incentive for water companies to improve their procedures for water safety management. As companies will be paying for the technical audit services and inspections they receive, they will balance these costs against management measures which would lead to fewer technical audits and inspections and so potentially reduce the overall cost.

By introducing a charging scheme, DWI will come into line with other related water regulators such as Ofwat and the Environment Agency (EA) and also the Consumer Council for Water (CCWater) which is a consumer body, who all charge for their regulatory activities. All three regulators recover their costs through the licensing regime (which is statutory). It is proposed that DWI will develop a system to identify the costs of their regulatory services in relation to each of the individual water companies and licensed suppliers which will allow cost recovery to be apportioned fairly to individual water companies and licensed suppliers.

Proposals to enable DWI to recover the cost of its regulatory functions from water companies were raised previously in the consultation on the Flood and Water Management Bill in 2009. However, the provisions were removed from the final session of the Bill to reduce its size. This consultation advises that the proposals have now been included in the Public Bodies Bill, and addresses the implementation of those proposals.

The implementation of the proposal is dependent on the outcome of parliamentary scrutiny of the Public Bodies Bill, and it receiving Royal Assent. If enacted, the Public Bodies Bill will provide the required primary legislation that provide powers for DWI to introduce a charging scheme. The scheme itself would be introduced by way of an Order made under this general charging power.

The proposed charging scheme will apply to all water companies and licensed suppliers. Each company/supplier will pay for the technical audit services and inspections they receive, therefore it is not considered to impose a discriminatory burden on small firms.

As explained in the previous consultation, those regulatory functions for which it is proposed to recover costs include:

- Technical audits involving the inspection and assessment of water companies' water supply arrangements.
- Investigation of water quality events and incidents.
- Checking compliance with statutory requirements, and legal instruments.
- Technical evaluation of water companies' water quality data.
- Investigations of consumer complaints relating to drinking water quality as notified by members of the public, local authorities or businesses.
- Statutory public reporting on drinking water quality.

Questions

- 1. Do you have any comments on the proposals for implementation of a cost recovery scheme by DWI that will enable it to recover the cost of its regulatory functions from water companies?**
-

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Annex C

www.defra.gov.uk

www.dwi.gov.uk

Summary of responses to the consultation on proposals for the recovery of costs by the Drinking Water Inspectorate

February 2012



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Background

The Drinking Water Inspectorate (DWI) was established in 1990 as the drinking water quality regulator for the privatised water industry.

Proposals to enable DWI to recover the cost of its regulatory functions from water companies were raised in the consultation on the Flood and Water Management Bill in 2009. However, the provisions were removed from the final session of the Bill to reduce its size. The proposals were subsequently included in the Public Bodies Bill, and addressed the implementation of those proposals.

Consequently, a further non-formal consultation was undertaken from 24th October 2011 to 5th December 2011 to seek views on the proposal for DWI to develop a system to identify the costs of their regulatory services in relation to each of the individual water companies and licensed suppliers that would allow cost recovery to be apportioned fairly to individual water companies and licensed suppliers.

The question posed in this consultation was:

- 1. Do you have any comments on the proposals for implementation of a cost recovery scheme by DWI that will enable it to recover the cost of its regulatory functions from water companies?**

Analysis of responses

Number and detail of those that responded

The consultation was available on both the Defra and DWI websites. In addition, 33 key stakeholders in the water industry were emailed directly notifying them of the consultation. A total of 21 responses were received. A list of the organisations who responded can be found below in Appendix 1.

Summary of responses

Overall views

- Nearly all respondents supported the proposal for charging in principle, and the approach proposed.
- There was recognition by many respondents of some common themes: the importance of a simple, fair to all, transparent and stable system, which minimises the administrative burden on all parties concerned, but which did not encourage inappropriate behaviours on the part of the water companies, and which provided incentives for water companies for efficiency improvements .
- It was pointed out by one respondent that DWI accountability did not require an extension to cost recovery, although they were supportive of the principles for better regulation outlined in the Hampton review

Points made by respondents

1) Principle of cost recovery

- The point was made that the link between accountability and cost recovery was not clear, and that it was not immediately apparent how this particular recommendation from the Hampton review would be achieved.
- One respondent did not agree that Regulator accountability extended to cost recovery or that the 'polluter pays' principle applies to water companies in this particular context

2) Cost recovery process

- The point was made that impact /effectiveness studies involving stakeholders would be welcomed, and the proposal to facilitate further stakeholder audits was welcomed to facilitate transparency and accountability for both the charging process and for the overall costs.
- It was suggested that a list of included and excluded activities for charging should be available
- A respondent pointed out that DWI activity relating to private supplies should not be included.
- It was suggested that statutory public reporting should not be included in any charging mechanism as this is a duty undertaken on behalf of the Secretary of State.
- A number of respondents made the point that costs for dealing with events and audits should reflect the severity of the issue under investigation. A respondent stated that costs relating to Inspector training should not be included.
- A number of companies commented on the timing of the proposals, noting that this would be an unfunded cost for water companies, as it sat outside the funding provisions for the current price review cycle. In addition, there may be internal funding issues associated with the timing of charging in the last quarter of 2012/2013 where budgets have already been set.
- It was suggested there should be an appeals process in place as part of any charging mechanism.
- Some inset appointees and smaller water companies noted the potential for them to incur what they considered might be disproportionately high charges.
- Some respondents noted to need to clarify with Ofwat how funding provision might be included in business plans.

3) Mechanism for charging

- Several respondents were of the view that consideration should be given to operating on a fixed cost basis only to minimise administrative burden, and that if a variable cost element is to be included it should relate only to those activities arising from water quality events and/or compliance failures. There were a number of refinements suggested on this theme. One respondent suggested that all costs be treated as variable.
- It was noted that using the number of compliance samples as a basis for the fixed element of the charge would better reflect the level of DWI activity, and also that the data is readily available.
- A respondent suggested the use of financial turnover as a basis for the fixed element of the charge as it reflects company efficiency.
- Several respondents noted the need to ensure stability in DWI revenues.

The way ahead

Defra proposes to make enabling regulations based on the technical content in the consultation draft. The points made by respondents will be considered further to refine the processes and mechanisms for charging.

List of respondents to the consultation

Water UK
OFWAT
CCWater
Dee Valley Water
South West Water
Northumbrian Water
Albion Water
Sembcorp Bournemouth Water
Severn Trent Water
SSE
Albion Water
United Utilities
Anglian Water
Portsmouth Water
Veolia Water East
Veolia Water South East
Veolia Water projects
South Staffordshire Water
Thames Water
Yorkshire Water
Dwr Cymru Welsh Water

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This document/publication is also available on our website at:
<http://www.defra.gov.uk/consult/2011/10/24/dwi/>

Any enquiries regarding this document/publication should be sent to us at:
dwi.consultation@defra.gsi.gov.uk

Constitutional and Legislative Affairs Committee

(CLA(4)-22-12)

CLA184

Constitutional and Legislative Affairs Committee Report

**Title: The Public Bodies (Water Supply and Water Quality)
(Inspection Fees) Order 2012**

Procedure: Super-affirmative

This Order provides for fees to be payable by a relevant water supplier for the carrying out of certain functions under the Water Industry Act 1991 by an inspector appointed by the Welsh Ministers under that Act.

Technical Scrutiny

No points are identified for reporting under Standing Order 21.2 in respect of this instrument

Merits Scrutiny

The following points are identified for reporting under Standing Order 21.3 in respect of this instrument.

Although the subject matter (the calculation of inspection and related fees) is of the sort more commonly found in statutory instruments subject to the negative procedure, this instrument is subject to a super-affirmative procedure by virtue of section 19 of the Public Bodies Act 2011.

Orders to the same effect are being made for England and Wales, but because the enabling powers are different, two orders are being used rather than a combined order. This has the advantage that the legislation applicable to Wales is made bilingually.

[that it is of political or legal importance or gives rise to issues likely to be of interest to the Assembly – Standing Order 21.3(ii)]

Legal Advisers

Constitutional and Legislative Affairs Committee

October 2012

Agenda Item 4

LEGISLATIVE CONSENT MEMORANDUM

ENTERPRISE AND REGULATORY REFORM BILL – POWERS TO INCLUDE SUNSET AND REVIEW PROVISIONS IN SUBORDINATE LEGISLATION

Supplementary Legislative Consent Motion

1. “To propose that the National Assembly for Wales, in accordance with Standing Order 29.6, agrees that those provisions of the Enterprise and Regulatory Reform Bill which relate to a power for Welsh Ministers to include sunset and review clauses in subordinate legislation, insofar as they fall within the legislative competence of the National Assembly for Wales, should be considered by the UK Parliament.”

Background

2. The supplementary Legislative Consent Motion at paragraph 1 above has been tabled by Jane Hutt AM, Minister for Finance and Leader of the House, under Standing Order (“SO”) 29.6 of the Standing Orders of the National Assembly for Wales (the “National Assembly”). This Legislative Consent Memorandum is laid under SO 29.2. SO 29 prescribes that a Legislative Consent Motion must be tabled, and a Legislative Consent Memorandum laid, before the National Assembly if a UK Parliamentary Bill makes provision in relation to Wales for a purpose that falls within the legislative competence of the National Assembly or has a negative effect on that competence.

3. The Enterprise and Regulatory Reform Bill (the “Bill”) was introduced in the House of Commons on the 23 May 2012. The Bill can be found at:

[Bill documents — Enterprise and Regulatory Reform Bill 2012-13 — UK Parliament](#)

Summary of the Bill and its Policy Objectives

4. The Bill is sponsored by the Department of Business, Innovation and Skills (“BIS”). The main purpose of the Bill is to encourage long term growth and simplify regulation. The Bill aims to:

- overhaul the employment tribunal system, and transform the dispute resolution landscape;
- improve the effectiveness and efficiency of competition enforcement and the competitiveness of markets, by strengthening the regime and improving the speed and predictability for business;
- set the purposes of the Green Investment Bank and ensure its independence;
- strengthen the framework for setting directors’ pay by introducing binding votes;

- extend the Primary Authority scheme, reduce inspection burdens on business and strengthen the legal framework for sunset clauses on regulation;
- repeal unnecessary legislation, cutting the burden on business and citizens.

5. The Bill extends to Wales.

Provisions in the Bill for which consent is sought

6. The relevant provisions are the sunset and review provisions in clause 49 of the Bill as introduced into Parliament (clause 50 of the Bill as amended in Public Bill Committee in the House of Commons, HC Bill 61).

7. This clause amends the Interpretation Act 1978.

8. The effect of this amendment is that where an Act of Parliament, or an Act or Measure of the Assembly, confers a subordinate-making power on anyone other than the Scottish Ministers, subordinate legislation made under the power *may* (it doesn't have to) include a sunset or review provision.

9. A sunset provision is a provision which makes the subordinate legislation expire at the end of a period to be specified in that subordinate legislation. A review provision is one which requires the maker of the subordinate legislation to review its effectiveness within time limits to be specified in that subordinate legislation.

10. Where the subordinate legislation is amending other subordinate legislation, the amending subordinate legislation may include a sunset or review provision in respect of the subordinate legislation to be amended.

11. If the Bill is passed, all the subordinate legislation-making powers and duties which the Welsh Ministers have under a UK Act of Parliament or an Assembly Measure or Act will then encompass the *power* to include a sunset or review provision within that subordinate legislation.

12. This will apply in respect of existing powers under UK Acts or Assembly Acts or Measures to make subordinate legislation, as well as those acquired by the Welsh Ministers from the passing of the Bill onwards. This is because reference to the new section 14A (which clause 50 of the Bill will insert into the Interpretation Act) is being added to paragraph 1 of Schedule 2 to the Interpretation Act 1978. That paragraph contains the list of provisions in the Interpretation Act which apply to UK Acts and Assembly Measures and Acts *whenever passed*.

Advantages of utilising this Bill rather than Assembly legislation

13. It would be possible for an Assembly Act to achieve a significant part of what the Bill provision is doing, by amending all the Welsh Ministers' subordinate legislation-making powers and duties which fall within Assembly

competence, so that those powers encompass the ability to include sunset and review provisions in the subordinate legislation made using those powers and duties.

14. However, in order for it to be absolutely clear to the users of legislation when the power to include a sunset or review provision applied, this would require legislative provision that is more cumbersome than the simple device of amending the Interpretation Act.

15. If an Assembly “Interpretation Act” contained a similar general provision to this one, it could only have effect in respect of subordinate legislation which fell within the Assembly’s competence. Therefore, legislation users would need to work out whether a particular piece of subordinate legislation was within the Assembly’s competence before they could tell whether a sunset or review clause could be included in it.

16. The only way to ensure that it was clear when a sunset or review clause could be included would be to list in an Assembly “Interpretation Act” all the subordinate legislation making powers which were covered. That would result in a very long piece of legislation which would require significant resources to draft and pass.

17. In addition, the Bill’s sunset and review provisions apply in respect of any Welsh Ministers’ subordinate legislation making powers which do not fall within Assembly competence. They are therefore more comprehensive in effect than the provisions which could be made in an Assembly Act.

18. As such, there are good reasons for utilising the Bill to make these provisions and to apply them to Welsh Ministers’ subordinate legislation making powers.

19. It is also worth noting that the relevant provisions are enabling provisions: they give the Welsh Ministers the power to include sunset and review provisions in subordinate legislation, but Welsh Ministers may decide not to exercise these powers. Further, any exercise by the Welsh Ministers of these powers would normally be subject to Assembly scrutiny, either through affirmative or negative procedures in the Assembly.

Financial implications

20. There are no anticipated financial implications for the Welsh Government following from the application of the sunset and review provisions in respect of Welsh Ministers’ subordinate legislation-making powers. Any financial implications of invoking sunset or review provisions in relation to particular proposals would be considered in each individual case.

Jane Hutt AM
Minister for Finance and Leader of the House
October 2012

Paratowyd y ddogfen hon gan gyfreithwyr Cynulliad Cenedlaethol Cymru er mwyn rhoi gwybodaeth a chynghor i Aelodau'r Cynulliad a'u cynorthwywyr ynghylch materion dan ystyriaeth gan y Cynulliad a'i bwyllgorau ac nid at unrhyw ddiben arall. Gwnaed pob ymdrech i sicrhau bod y wybodaeth a'r cynghor a gynhwysir ynnddi yn gywir, ond ni dderbynnir cyfrifoldeb am unrhyw ddibyniaeth a roddir arnynt gan drydydd partion.

This document has been prepared by National Assembly for Wales lawyers in order to provide information and advice to Assembly Members and their staff in relation to matters under consideration by the Assembly and its committees and for no other purpose. Every effort has been made to ensure that the information and advice contained in it are accurate, but no responsibility is accepted for any reliance placed on them by third parties

Communities, Equality and Local Government Committee

Legal Advice Note

THIRD LEGISLATIVE CONSENT MEMORANDUM - ENTERPRISE AND REGULATORY REFORM BILL -

Background

1. On the 5th October 2012, the Minister for Finance and Leader of the House gave notice of a motion in the following terms –
“To propose that the National Assembly for Wales, in accordance with Standing Order 29.6, agrees that those provisions of the Enterprise and Regulatory Reform Bill which relate to a power for Welsh Ministers to include sunset and review clauses in subordinate legislation, insofar as they fall within the legislative competence of the National Assembly for Wales, should be considered by the UK Parliament.”
2. The Legislative Consent Memorandum (“LCM”) was considered on the 9th October 2012 by the Business Committee, who agreed to refer the LCM to the Constitutional and Legislative Affairs Committee for scrutiny. The Business Committee agreed that the Committee should report on the LCM by 15 November 2012 to allow the Legislative Consent Motion to be debated in plenary on 20 November 2012. This Note is intended to inform that consideration.
3. This is the third LCM in relation to the Enterprise and Regulatory Reform Bill. A previous LCM was laid on the 12th June in relation to the water industry and another on the 10th July in relation to the Green Investment Bank. The matters dealt with in those LCMs are not included in the analysis that follows.

The Bill

4. The Enterprise and Regulatory Reform Bill was introduced in the House of Commons on the 20rd May 2012 by the Secretary of State for Business, Innovation and Skills. The Bill was given a Second Reading on the

11th June 2012 and then proceeded to Committee Stage. It completed its progress through the House of Commons on the 17th October, and will now proceed to the House of Lords. The Bill consists of six Parts, of which the current LCM is only concerned with clause 49 of the Bill as introduced into Parliament (clause 50 of the Bill as amended at Committee Stage in the House of Commons). This clause is contained in Part 5 of the Bill.

5. The different Parts of the Bill would change the law in different ways in different parts of the UK. In relation to the provision in question, the Explanatory Notes state that it extends to the whole of the United Kingdom. In relation to Wales, the Notes state that –

“Westminster will not normally legislate with regard to devolved matters falling within the legislative competence of the National Assembly for Wales. Certain of the provisions of the Bill extending to Wales fall within the legislative competence of National Assembly for Wales. The consent of the National Assembly for Wales is therefore being sought for them through a legislative consent motion.”

Unfortunately, the Notes do not explain which provisions in the Bill will be the subject of such motions. This lack of clarity is reflected in the fact that this is the third Legislative Consent Memorandum to be laid in the National Assembly in relation to provisions that were included in the Bill when it was introduced.

6. “The main purpose of the Bill [according to the Explanatory Notes] is to encourage long term growth and simplify regulation generally.”

7. The detailed explanation of this clause can be found in paragraphs 367 and 368 of the Explanatory Notes to the Bill:

“367. This clause amends the Interpretation Act 1978 to help give effect to the Government’s policy on the use of sunset and review provisions which was first published in March 2011. A sunset provision provides for legislation to cease to have effect at a particular point in time. A review provision requires a person to review the effectiveness of the legislation within or at the end of a specified period.

368. Clause 49 inserts a new section 14A into the Interpretation Act 1978. This ensures Ministers and other people making subordinate legislation may include sunset and review provisions in that legislation and in other subordinate legislation where that is being amended. A review provision may include an obligation to consider whether the objectives of the legislation remain appropriate, and whether they could be achieved in another way. Review or sunset provisions may apply to all or part of the legislation or to its application in particular circumstances. Subordinate legislation including sunset or review provisions may also include certain supplementary provisions, for example transitional or consequential provisions or savings in

connection with the sunset or review provision. New section 14A does not apply to Scottish Ministers.”

8. The effect of the clause is that any power to make orders or regulations will automatically include power to limit their effect to a specific period of time or to require the provisions to be reviewed. This is something that can already be included if the enabling power is broad enough. Thus regulations made during the foot and mouth emergency of 2001 under section 2(2) of The European Communities Act were often expressed to cease to have effect on a certain date. The clause that is the subject of the LCM would apply that power to all enabling legislation.

Legislative Competence

9. The provisions to which the LCM refers do not come neatly within the National Assembly’s legislative competence. They are relevant to all powers to make delegated legislation granted to Welsh Ministers (as well as UK ministers), and could be included specifically in individual Assembly Bills that do come within that competence. The current approach means that would not be necessary. Its approach is similar to that in section 14 of the Interpretation Act (which Act the current clause would amend) that provides that any power to make subordinate legislation of the types described in the Act automatically includes a power to amend or revoke that subordinate legislation.

The Consent Memorandum

10. The Legislative Consent Memorandum identifies clause 49 (on introduction) as the one that relates to the Assembly’s legislative competence and requires legislative consent. It is a clause that is not dependent on other provisions of the Bill.

11. Any statutory instruments made in reliance on this new power would still be subject to the affirmative or negative Assembly procedure if that applies to the substantive provision that is to be reviewed or to apply for a fixed period. Such a fixed period can be amended (shortened or extended) by amending orders or regulations as appropriate.

12. Recent examples of regulations that came before the Assembly that contained review provisions were the Waste (England and Wales) (Amendment) Regulations 2012 and the Conservation of Habitats and Species (Amendment) Regulations 2012. Both were considered by the Constitutional and Legislative Affairs Committee on the 24th September 2012. In relation to the former, the Committee reported under Standing Order 21.3(ii) as follows:

“Regulation 2 (5) provides for the insertion of a new regulation 49 into the 2011 Regulations, which requires the Secretary of State to review the operation and effect of those Regulations in relation to England within 5 years after 1st October 2012 and within every 5 years after that. The Explanatory Memorandum is silent as to why in the event that it was not considered appropriate for the Welsh Ministers to carry out a review, this is the case.”

The Government’s response was:

“The current UK Government’s policy is to include a clause in all regulations that requires a review in a specified timescale. The Welsh Government does not have a similar policy in Wales. Welsh Ministers are able to review the regulations at any time. Consequently, the inclusion of the review provision in the instrument, was relevant only to England.”

13. The Government’s response was understandable given that governments can review any legislation within their power at any time. The LCM explains clearly the merits of the approach proposed in the clause in question, but does not explain why the Government accepts those merits if its approach is to review legislation when it considers it appropriate rather than at a pre-determined time laid out in the legislation.

Conclusion

14. **The clause will simply apply to all enabling powers a power to provide for a cessation date or a review. That is something that can currently be included specifically in Assembly Bills. Any legislation made in reliance on the power will still be subject to Assembly scrutiny procedures in the usual way. It appears that the Welsh Government does not plan to make significant use of the power.**

Legal Services

October 2012

LEGISLATIVE CONSENT MEMORANDUM

PUBLIC SERVICE PENSIONS BILL – CLAUSES RELATING TO RESTRICTIONS TO BE APPLIED TO NEW SCHEMES

Legislative Consent Motion

1. “To propose that the National Assembly for Wales, in accordance with Standing Order 29.6, agrees that provisions of the Public Service Pensions Bill as introduced into the House of Commons on 13 September 2012 relating to the restrictions to be applied to new pension schemes for public bodies, in so far as they fall within the legislative competence of the National Assembly for Wales, should be considered by the UK Parliament.”

Background

2. The Legislative Consent Motion at paragraph 1 above has been tabled by Jane Hutt AM, Minister for Finance and Leader of the House, under Standing Order 29.6 of the Standing Orders (SO) of the National Assembly for Wales (the National Assembly). This Legislative Consent Memorandum is laid under SO29.2. SO 29 prescribes that a Legislative Consent Motion must be tabled, and a Legislative Consent Memorandum laid, before the National Assembly if a UK Parliamentary Bill makes provision in relation to Wales for a purpose that falls within the legislative competence of the National Assembly.

3. The Public Service Pensions Bill (the Bill) was introduced into Parliament on 13 September 2012. The Bill can be found at <http://services.parliament.uk/bills/2012-13/publicservicepensions/documents.html>

Summary of the Bill and its Policy Objectives

4. The Bill sets out the new arrangements for the creation of schemes for the payment of pensions and other benefits. It provides powers to Ministers to create such schemes according to a common framework of requirements. The Bill also provides powers to HM Treasury to set specific technical details of certain requirements and gives powers to The Pensions Regulator to operate a system of independent oversight over the operation of these schemes.

5. It is intended that the powers in the Bill will supersede powers, including those contained in the following legislation, to create schemes for the payment of pensions and other benefits:

- Superannuation Act 1972 , for civil servants, people employed in local government service, teachers and persons engaged in health services;
- Fire and Rescue Services Act 2004 ;
- Armed Forces (Pensions and Compensation) Act 2004 ;
- Police Pensions Act 1976 ;

- Judicial Pensions and Retirement Act 1993 ; and
- Superannuation (Northern Ireland) Order 1972 .

6. The Bill protects the benefits already earned by members of existing public service pension schemes and allows continued membership of those schemes for certain categories of person who are closest to retirement.

7. The stated aims of the Bill are to:

- Ensure a good level of retirement income for public service workers, with a reasonable degree of certainty;
- Be affordable and sustainable – with cost risk managed and shared effectively;
- Provide a fair balance of cost and benefits between public service workers and other taxpayers;
- Protect those closest to retirement;
- Have a clear legal framework and governance structure – and be widely understood by workers;
- Stand the test of time – have no more reform for at least 25 years.

8. More specifically, the Bill will:

- Allow for the creation of new Career Average pension schemes
- Ensure new schemes have Normal Pension Ages linked to the State Pension Age for all but the armed forces, police and fire service;
- Provide for a cap on the taxpayer's liability;
- Include transitional protection for those less than ten years from their Normal Pension Age on 1 April 2012;
- Introduce a very high barrier to changes to specific elements of these pension designs;
- Ensure that all new pension schemes have a Board and a regulator so their members can have confidence that they are being run effectively.

Provisions in the Bill for which consent is sought

9. The National Assembly for Wales has competence in relation to pension schemes for Assembly Members, Welsh Ministers and members of local authorities. Clause 27 of the Bill does two things -

- (a) it imposes constraints on the design of new pension schemes that may be created under the power in clause 28(4) for those bodies and offices whose pension schemes are closed by clause 28(2) and whose members cannot join one of the schemes established under clause 1; and

(b) it also governs the design of pension schemes that are set up in the future or established under future legislation for public bodies (unless future legislation makes specific, different provision).

10. It is the latter provision which impacts on areas within the Assembly's legislative competence for this reason. Should the Assembly wish to create specific new pension schemes for Assembly Members or local government councillors, after the Bill has been enacted and this clause comes into force, those new schemes would be caught by the provisions relating to the creation of new public body pensions in clause 27

11. The Bill extends to England, Wales, Scotland and Northern Ireland. Wales, Scotland and Northern Ireland are being asked for consent in relation to provisions within the Bill to make new schemes for pensions and other benefits where there is devolved competence.

12. Although the Bill impacts on the Assembly's competence to create new pension schemes for Assembly Members or local government councillors it does not impact on the current or future use of the existing National Assembly for Wales Members' Pension Scheme or existing arrangement for Welsh local councillors which are provided for by Local Government Pension Schemes already covered within the Bill.

Advantages of utilising this Bill

13. It is the Welsh Government's view that it is fair and appropriate for the legislation on pension reforms to apply to all public bodies in Wales. It will ensure there will be a consistent approach to pension arrangement across Wales that aligns with wider changes across the UK public sector.

14. Dealing with this legislation in a UK Bill represents the most appropriate legislative vehicle to ensure a consistent approach for (a) the revision of certain existing schemes and (b) the creation of new pension schemes according to a common framework of requirements.

Financial Implications

15. There are no financial implications associated with this Bill. Under the Bill, Wales will contribute towards new pension schemes delivering a projected 10% saving in the longer term; generating UK wide savings of around £65bn by 2061/62. In addition the total UK wide pension reform package (which includes the switch in indexation from RPI to CPI and increased employee contributions) will deliver more than £430bn savings, in current GDP terms, over the next 50 years.

Jane Hutt AM
Minister for Finance and Leader of the House
September 2012

Paratowyd y ddogfen hon gan gyfreithwyr Cynulliad Cenedlaethol Cymru er mwyn rhoi gwybodaeth a chynghor i Aelodau'r Cynulliad a'u cynorthwywyr ynghylch materion dan ystyriaeth gan y Cynulliad a'i bwyllgorau ac nid at unrhyw ddiben arall. Gwnaed pob ymdrech i sicrhau bod y wybodaeth a'r cynghor a gynhwysir ynddi yn gywir, ond ni dderbynnir cyfrifoldeb am unrhyw ddibyniaeth a roddir arnynt gan drydydd partion.

This document has been prepared by National Assembly for Wales lawyers in order to provide information and advice to Assembly Members and their staff in relation to matters under consideration by the Assembly and its committees and for no other purpose. Every effort has been made to ensure that the information and advice contained in it are accurate, but no responsibility is accepted for any reliance placed on them by third parties

Communities, Equality and Local Government Committee

Legal Advice Note

LEGISLATIVE CONSENT MEMORANDUM – PUBLIC SERVICE PENSIONS BILL

Background

1. On the 2nd October 2012, the Minister for Finance and Leader of the House gave notice of a motion in the following terms –
“To propose that the National Assembly for Wales, in accordance with Standing Order 29.6, agrees that provisions of the Public Service Pensions Bill as introduced into the House of Commons on 13 September 2012 relating to the restrictions to be applied to new pension schemes for public bodies, in so far as they fall within the legislative competence of the National Assembly for Wales, should be considered by the UK Parliament .”
2. The Legislative Consent Memorandum (“LCM”) was considered on the 9th October 2012 by the Business Committee, who agreed, in accordance with Standing Order 29.4, agreed to refer it to the Constitutional and Legislative Affairs Committee for scrutiny. The Business Committee agreed that the Committee should report on the LCM by 15 November 2012 to allow the motion to be debated in plenary on 20 November 2012. This Note is intended to inform that consideration.

The Bill

3. The Public Service Pensions Bill was introduced into the House of Commons on 13 September 2012 by the Chancellor of the Exchequer. The Second Reading debate is scheduled for the 22nd October. The detailed background to the Bill can be found in paragraphs 3–11 of the Explanatory Notes to the Bill at
<http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0070/en/2013070en.htm>
4. The Bill would change the law in all parts of the United Kingdom, and legislative consent will be sought from each of the devolved legislatures.

This is explained in the Explanatory Notes that accompanied it on introduction in the Commons as follows –

TERRITORIAL EXTENT

12. This Bill extends to England and Wales, Scotland and Northern Ireland.

13. The Northern Ireland Assembly's consent will be sought in relation to the provisions of this Bill to make schemes for pensions and other benefits that are within the competence of that Assembly.

14. This Bill contains provisions that trigger the Sewel Convention in Scotland. The provisions relate to the pensions of certain members of the Scottish judiciary and a power to require the closure and reform of pension schemes in public bodies for which the Scottish Parliament has competence. The Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. We have sought "in principle" agreement from Scottish Ministers to seek a Legislative Consent Motion for these provisions. If there are amendments relating to such matters which trigger the Convention, the consent of the Scottish Parliament will also be sought for them.

15. The consent of the National Assembly for Wales will be sought in relation to provisions in this Bill which apply to new pension schemes for public bodies and" statutory office holders; the National Assembly for Wales has competence in relation to pension schemes for Assembly Members, Welsh Ministers and members of local authorities."

These Explanatory Notes were prepared by the Treasury to assist consideration of the Bill.

5. The purpose of the Bill is generally to set out the new arrangements for the creation of schemes for the payment of pensions and other benefits. It provides powers to Ministers to create such schemes according to a common framework of requirements. The Bill also provides powers for the Treasury to set specific technical details of certain requirements and gives powers to the Pensions Regulator to operate a system of independent oversight over the operation of these schemes..

6. The Explanatory Notes explain further that:

"It is intended that the powers in the Bill will supersede powers, including those contained in the following legislation, to create schemes for the payment of pensions and other benefits:

- Superannuation Act 1972, for civil servants, people employed in local government service, teachers and persons engaged in health services;*
- Fire and Rescue Services Act 2004;*

- *Armed Forces (Pensions and Compensation) Act 2004;*
- *Police Pensions Act 1976;*
- *Judicial Pensions and Retirement Act 1993; and*
- *Superannuation (Northern Ireland) Order 1972.*

The Bill protects the benefits already earned by members of existing public service pension schemes and allows continued membership of those schemes for certain categories of person who are closest to retirement.”

Legislative Competence

7. The provisions to which the LCM refers come within the National Assembly’s legislative competence under Subjects 4 (Economic Development) and 13 (National Assembly for Wales) of Schedule 7 to the Government of Wales Act 2006.

8. The wording under heading 4 (Economic Development) was amended by the National Assembly for Wales (Legislative Competence) (Amendment of Schedule 7 to the Government of Wales Act 2006) Order 2007 (SI 2007/2143) to include a specific exception in relation to occupational and personal pension schemes. This in turn was amended by the National Assembly for Wales (Legislative Competence) (Amendment of Schedule 7 to the Government of Wales Act 2006) Order 2010. In consequence the exception to the Assembly’s legislative competence in relation to pensions contains a carve out for matters referred to in the LCM and reads as follows:

“Occupational and personal pension schemes (including schemes which make provision for compensation for loss of office or employment, compensation for loss or diminution of emoluments, or benefits in respect of death or incapacity resulting from injury or disease), apart from schemes for or in respect of Assembly members, the First Minister, Welsh Ministers appointed under section 48, the Counsel General or Deputy Welsh Ministers and schemes for or in respect of members of local authorities.”

9. Heading 13 (National Assembly for Wales) contains the following specific reference to pensions: *Salaries, allowances, pensions and gratuities for and in respect of Assembly members, the First Minister, Welsh Ministers appointed under section 48, the Counsel General and Deputy Welsh Ministers.* Thus, when the exception for pensions was inserted by the 2007 order, it was necessary to include a carve out so that the exception did not contradict the competence granted under heading 13. The further carve out members of local authorities was made by the 2010 order.

The Consent Memorandum

10. The Legislative Consent Memorandum identifies clause 27 as the one that relates to the Assembly's legislative competence. Clause 27 identifies the requirements in the Bill that will apply to new public body pension schemes, which would include those for Assembly Members, the First Minister, Welsh Ministers, the Counsel General or Deputy Welsh Ministers and for or in respect of members of local authorities.

11. There is a further issue in relation to competence. Clause 16 requires that no benefits are to be provided under an existing scheme listed in Schedule 5. These include "A scheme constituted by paragraph 6(3) of Schedule 11 to the Welsh Language (Wales) Measure 2011 (nawm 1)". Paragraph 6(3) reads as follows:

*"(3) The Welsh Ministers may pay—
(a) pensions to, or in respect of, persons who have been members of the Tribunal, and
(b) amounts for or towards provision of pensions to, or in respect of, persons who have been members of the Tribunal."*

12. The Assembly's legislative competence in relation to the Welsh language under Schedule 7 is much broader than it was under Schedule 5 to the Government of Wales Act 2006. If this provision was within the Assembly's legislative competence in 2011, it remains so now. It is therefore unclear why the Welsh Government has not made reference to this in the LCM.

13. There are other specific Welsh references in the Bill. Clause 1 excepts scheme regulations made by Welsh Ministers relating to fire and rescue workers from those for which the consent of the Treasury is required. Welsh Ministers have a power to make schemes in relation to the fire and rescue services, but the National Assembly has no power to make primary legislation on the subject because of the exception of occupational and personal pension schemes from its legislative competence. Clause 20(5) contains a requirement to consult the National Assembly if certain changes are proposed to such schemes.

14. This Bill will make no changes to the legislative competence of the National Assembly. Accordingly, it will remain within the Assembly's competence to make provision in Acts of the Assembly that are not consistent with the requirements of the current Bill.

Conclusion

15. The Bill will make significant changes to legislation for public sector pension schemes. It includes specific provisions relating to pension ages for Members of parliament and Members of the European Parliament as well as many public sector workers. The issue for Assembly Members to consider is whether they are content to be

included (with the Counsel General and members of Welsh local authorities) in the legislation, whilst retaining the competence to legislate differently at a later date in those limited cases if they see fit.

Legal Services

October 2012

**Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol
Constitutional and Legislative Affairs Committee**

Cynulliad
Cenedlaethol
Cymru

National
Assembly for
Wales

Jane Hutt AM
Minister for Finance and Leader of the
5th Floor
Tŷ Hywel
Cardiff Bay
CF99 1NA



24 October 2012

Dear Jane

**Public Service Pensions Bill: Legislative Consent Memorandum –
Invitation to give evidence to the Constitutional and Legislative Affairs
Committee**

The Constitutional and Legislative Affairs Committee considered the Legislative Consent Memorandum for the Public Service Pensions Bill at its meeting on 22 October 2012.

The Committee noted that the Memorandum made no mention of the provisions in the Bill that refer to the powers of Welsh Ministers in relation to the fire and rescue services, nor to those that affect the pension arrangements of members of the Welsh Language Tribunal.

The latter was of particular concern as the Committee's attention was drawn to the contrast between Schedules 5 and 7 to the Government of Wales Act 2006. Schedule 7 contains a specific exception under 'Economic development' for 'Occupational and personal pension schemes', to which the only carve-outs are for Assembly members, the First Minister, Welsh Ministers, the Counsel General or deputy Welsh Ministers and schemes for or in respect of members of local authorities. These are the schemes referred to in your LCM.

Schedule 5, on the other hand, contained no such exception, so that the Assembly was able to legislate for pensions for members of the Welsh Language Tribunal as a matter incidental to its competence to promote and facilitate the use of the Welsh language.

Section 16 of the Bill, and Schedule 5 to it, appear to have the effect of preventing the Welsh Ministers from making the arrangements approved by the Assembly in paragraph 6 of Schedule 11 to the Welsh Language Measure.

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The exception that appears in Schedule 7 to the Government of Wales Act 2006 will prevent the Assembly legislating to make alternative arrangements, whether consistently with the Pensions Bill or otherwise.

Furthermore, Matter 12.16 in Schedule 5 to the 2006 Act gave the Assembly legislative competence not merely in relation to members of local authorities, but also of National park authorities and fire and rescue authorities. This competence too appears to have been lost in the transition from Part 3 to Part 4 of the 2006 Act.

Members of the Committee are therefore likely to wish to explore with you

- why these matters were not referred to in the LCM;
- what arrangements are now proposed for the pensions of members of the Welsh Language Tribunal;
- whether it was intended that the Assembly should have a more limited competence under Schedule 7 than under Schedule 5, and if so, why;
- if not, what is being done to seek to restore that competence, and whether the present Bill provides an opportunity to do so.

In addition, the Bill also includes provisions that may affect the Remuneration Board's ability to revise or remake the Assembly Members' pension scheme in future, or at least affect the Board's thinking. As you are aware, the Board is currently consulting on issues and options prior to a full review of Assembly Members' pension arrangements. The Committee may, therefore, also wish to take your mind on the potential impact on the work of the Board and whether the Assembly Commission should have the opportunity to take a view formally on the Memorandum before it is considered in Plenary.

It may be that these are all matters that could be cleared up in correspondence. However, given the relative lack of time for these points to be clarified before the Committee is required to report to the Assembly, it would be helpful if you could attend the Committee's meeting on Monday 5 November 2012 at 2:30pm to discuss the matters set out above. I do not envisage the Committee requiring more than 30 minutes of your time on this occasion.

I would be grateful if your officials could liaise with the Deputy Clerk of the Committee Olga Lewis (tel: 02920 898154) with regards to the practical arrangements.

I look forward to hearing from you.

Yours sincerely



David Melding AM
Chair

Jane Hutt AC / AM
Y Gweinidog Cyllid ac Arweinydd y Ty
Minister for Finance and Leader of the House



Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref LF/JH/0391/12

David Melding AM
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Constitutional and Legislative Affairs
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31 October 2012

Dear David,

Public Service Pensions Bill: Legislative Consent Motion – Invitation to give evidence to the Constitutional and Legislative Affairs Committee

Thank you for your letter of 25 October inviting me to attend the Constitutional and Legislative Affairs Committee meeting on 5 November. Unfortunately, I will be unable to attend on this occasion. I have therefore set out my response to the committee's comments regarding the Public Service Pensions Bill Legislative Consent Memorandum (LCM) below.

Why Welsh Ministers' powers in relation to fire and rescue services and Welsh Language Tribunal pension arrangements were not referred to in the Memorandum.

The legislative consent memorandum did not refer to the powers of Welsh Ministers because these matters did not bear directly on the issue of the motion, that being the legislative competence of the National Assembly for Wales to create new pension schemes for Assembly Members, Welsh Ministers and members of local authorities.

The Bill does address areas where Welsh Ministers have executive functions. Welsh Ministers have powers, and have exercised their powers, under the Fire and Rescue services Act 2004 to make orders relating to the pension schemes for firefighters. The statutory power extends to all employees of fire and rescue authorities but non-firefighter employees are covered within the Local Government Pension Scheme.

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The other pension arrangement you mention is within the Welsh Language (Wales) Measure 2011 which enables the Welsh Ministers to make pension payments to the members of the Welsh Language Tribunal. To date no such arrangements have been put in place.

The Bill's provisions will mean that the firefighters pension schemes and the Welsh Language Tribunal members' scheme (if there were one) would close and be replaced by schemes which comply with the requirements of the Bill.

I will therefore make a written statement to the Assembly on the Bill's effects on the powers of Welsh Ministers, as opposed to those matters within legislative competence in due course.

What arrangements are now proposed for the pensions of members of the Welsh Language Tribunal?

Preparatory work in relation to the establishment of the Welsh Language Tribunal and appointment of Tribunal members is underway. The Welsh Language Measure gives the Welsh Ministers a power to pay pensions to, or in respect of, persons who have been members of the Tribunal. It also gives the Welsh Ministers a power to pay amounts for or towards provision of pensions to, or in respect of, persons who have been members of the Tribunal. This is being considered as part of the preparatory work for the establishment of the Tribunal.

Whether it was intended that the Assembly should have a more limited competence under Schedule 7 than under Schedule 5; and if so, why; If not, what is being done to seek to restore the competence, and whether the present Bill provides an opportunity to do so

The Welsh Government's view is that in Schedule 7 to the Government of Wales Act 2006 the term "local authorities" includes both National Park authorities (NPAs) and fire and rescue authorities (FRAs). I understand that this view is shared by the Wales Office. Accordingly the carve out for pensions for the members of local authorities means that there is also a carve out for pensions for members of NPAs and FRAs.

You suggest that the pension provision made in the Welsh Language Measure was possible under Schedule 5 because the pension provision was inserted as being incidental to the purposes of the Measure but that is not permissible under Schedule 7. The Welsh Government's view is that if the Assembly was to consider making a Welsh Language Act now, the "incidental" power would still be available even though pensions are in general excepted. We believe this is clear from section 108(3) to (5) of the Government of Wales Act 2006.

Accordingly I do not consider that there is a need to restore any competence in this area.

Whether the Assembly Commission should have the opportunity to take a view formally on the memorandum / motion before it is considered in Plenary

I will write to the Assembly Commission seeking their view on this matter. The debate on agreeing the LCM is scheduled for 20 November. I would be content to postpone the debate to provide the Commission sufficient time to consider the issue if requested.

In that event, we would have to balance the need to allow as much time as we would wish with the parliamentary timetable, and I would wish any new date to be agreed with Business Committee.

*Yours sincerely,
Jane*

Jane Hutt AC / AM

Y Gweinidog Cyllid ac Arweinydd y Ty
Minister for Finance and Leader of the House

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol Constitutional and Legislative Affairs Committee

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Minister for Environment and Sustainable Development
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Wales



11 October 2012

Dear Minister

CLA178 - The Bluetongue (Wales) (Amendment) Regulations 2012

The Constitutional and Legislative Affairs Committee considered the above Statutory Instrument at its meeting on 8 October 2012 and agreed that I should bring to your attention the Committee's report made under Standing Order 21.3 on the merits of the Instrument.

The Committee agreed to invite the Assembly to pay special attention to this Instrument on the grounds that they inappropriately implement European Union legislation. [Standing Order 21.3(iv).] The Committee's report was laid in the Table Office on 10 October 2012 and is attached for information. The Committee was of the view that the Regulations should make specific reference to the requirements for surveillance zones as set out in the Directive. I would be grateful if you could consider the report and let the Committee have your response in due course.

I am copying this report to the First Minister for information and have also arranged for the report and this letter to be drawn to the attention of Assembly Members.

Yours sincerely

David Melding AM
Chair

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John Griffiths AC / AM
Gweinidog yr Amgylchedd a Datblygu Cynaliadwy
Minister for Environment and Sustainable Development



Llywodraeth Cymru
Welsh Government

Eich cyf/Your ref
Ein cyf/Our ref
David Melding AM
Chair
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24 October 2012

Dear David,

Thank you for your letter of 11 October regarding The Bluetongue (Wales) (Amendment) Regulations 2012 ('The Regulations').

I note the Constitutional and Legislative Affairs Committee's concerns regarding The Regulations not setting out the requirements for surveillance zones as in the EU Directive. However we do not believe that this is an issue that affects the operation of the legislation for the reasons set out in our previous response.

The requirements of the Directive are clear and unambiguous, therefore, despite not being included in the Regulations, the operation of the EU law is not undermined. However, we do note the Committee's concerns regarding under implementation with regards to surveillance zones. Consequently we propose to amend the legislation to include reference to the surveillance zone distances at the next review of the regulations.

Yours sincerely

John Griffiths AC / AM
Gweinidog yr Amgylchedd a Datblygu Cynaliadwy
Minister for Environment and Sustainable Development

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Constitutional and Legislative Affairs Committee

CLA(4)-20-12

CLA178

Constitutional and Legislative Affairs Committee Report

Title: The Bluetongue (Wales) (Amendment) Regulations 2012

Procedure: Negative

These regulations amend the Bluetongue (Wales) Regulations 2008 by transposing Directive 2012/5/EU (the Directive) as regards vaccination against bluetongue and will allow animal keepers to vaccinate their animals against bluetongue using inactivated vaccines.

Technical Scrutiny

No points are identified for reporting under Standing Order 21.2 in respect of this instrument.

Merits Scrutiny

The following point is identified for reporting under Standing Order 21.3 in respect of this instrument at the present time.

Article 1 of the Directive amends Directive 2000/75/EC (the 2000 Directive). Article 1(2) of the Directive, which amends Article 5 of the 2000 Directive, includes the following –

“2. Whenever live attenuated vaccines are used, Member States shall ensure that the competent authority demarcates:

- (a) a protection zone, consisting of at least the vaccination area;
- (b) a surveillance zone, consisting of a part of the Union territory with a depth of at least 50 kilometres extending beyond the limits of the protection zone.”

Article 1(4) of the Directive replaces Article 8(2)(b) of the 2000 Directive with the following –

"(b) The surveillance zone shall consist of a part of the Union territory with a depth of at least 50 kilometres extending beyond the limits of the protection zone and in which no vaccination against bluetongue with live attenuated vaccines has been carried out during the previous 12 months.";

The Regulations do amend the Bluetongue (Wales) Regulations 2008 in relation to surveillance zones, but no reference is made to the required depth of at least 50 kilometres.

The National Assembly is therefore invited to pay special attention to these Regulations because they inappropriately implement European Union legislation. [Standing Order 21.3(iv)]

David Melding AM

Chair, Constitutional and Legislative Affairs Committee

8 October 2012

The Government has responded as follows:

The Bluetongue (Wales) (Amendment) Regulations 2012

Response to Merits Scrutiny Reporting Point

The minimum distances specified in Article 1(4) of Directive 2012/5/EU (“the Directive”) can, and would, be imposed by the Welsh Ministers as the “competent authority” within the meaning of Article 1 of the Directive in the event of an outbreak and it is not necessary make reference to those minimum distances in the Bluetongue (Wales) (Amendment) Regulations 2012 (“the Regulations”).

The Bluetongue (Wales) Regulations 2008, as amended by the Regulations, confer executive powers on the Welsh Ministers to declare the necessary zones, while the Directive is clear and unambiguous on what the requisite distances are. The Welsh Ministers are, of course, subject to those demarcation requirements. Therefore, the ability of the Welsh Ministers to deal with any outbreak, lawfully and in accordance with the requirements of the Directive, is not in question. The Regulations give proper effect to the Directive and it is not necessary for the Regulations to make reference to the minimum distances specified in the Directive.

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Constitutional and Legislative Affairs Committee

Report: CLA(4)-21-12 : 22 October 2012

The Committee reports to the Assembly as follows:

Instruments that raise no reporting issues under Standing Order 21.2 or 21.3

Negative Resolution Instruments

CLA180 – The Local Government (Performance Indicators) (Wales) Order 2012

Procedure: Negative.

Date made: 2 October 2012.

Date laid: 8 October 2012.

Coming in to force date: in accordance with article 1(3).

CLA182 – The National Health Service (Primary Dental Services) (Amendments Related to Units of Dental Activity) (Wales) Regulations 2012

Procedure: Negative.

Date made: 9 October 2012.

Date laid: 11 October 2012.

Coming into force date: 1 November 2012

CLA183 – The Sea Fish (Specified Sea Areas) (Prohibition of Fishing Method) (Wales) Order 2012

Procedure: Negative.

Date made: 10 October 2012.

Date laid: 11 October 2012.

Coming into force date: 1 November 2012

Affirmative Resolution Instruments

None

Instruments that raise reporting issues under Standing Order 21.2 or 21.3

Negative Resolution Instruments

CLA181 – The Play Sufficiency Assessment (Wales) Regulations 2012

Procedure: Negative.

Date made: 6 October 2012.

Date laid: 8 October 2012.

Coming into force date: 2 November 2012

Affirmative Resolution Instruments

None

Other Business

Public Service Pensions Bill: Legislative Consent Memorandum

The Committee considered the Legislative Consent Memorandum for the Public Service Pensions Bill – Clauses Relating to Restrictions to be Applied to New Schemes. Advice from the Committee's Legal adviser suggested that the LCM might raise wider issues about the Assembly's Legislative Competence. The Committee agreed to write to the Minister for Finance and Leader of the House Jane Hutt AM, as the responsible Minister setting out these concerns with a view to the Minister attending the Committee's next meeting to answer any outstanding concerns on the matter.

Subsidiarity monitoring report (May 2012 – August 2012)

The Committee noted the second subsidiarity monitoring report, covering the proposals received between May and August 2012.

Subordinate legislation made by Welsh Ministers under Assembly Measures

The Committee noted the paper on subordinate legislation made by Welsh Ministers under Assembly Measures that was published by Research Service in October 2012. The Committee also noted that consideration of this matter had been mistakenly reported in the report of the Committee's meeting on 8 October 2012.

Committee Correspondence

CLA169 – The National Health Service (Dental Charges) (Wales) (Amendment) Regulations 2012

The Committee noted the response of the Minister for Health and Social Services, Lesley Griffiths AM, to the Chair's letter dated 26 September regarding the accuracy of the Explanatory Memorandum to the National Health Service (Dental Charges) (Wales) (Amendment) Regulations 2012 [CLA169].

CLA171 – The Waste (England and Wales) (Amendment) Regulations 2012

The Committee noted the response of the Minister for Environment and Sustainable Development John Griffiths AM to the Chair's letter dated 27 September regarding the merits points reported on the Waste (England and Wales) (Amendment) Regulations 2012 [CLA171].

Simon Thomas AM

Acting Chair, Constitutional and Legislative Affairs Committee

22 October 2012

Annex 1

Constitutional and Legislative Affairs Committee

(CLA(4)-21-12)

CLA181

Constitutional and Legislative Affairs Committee Report

Title: The Play Sufficiency Assessment (Wales) Regulations 2012

Procedure: Negative

These Regulations which are made under section 11(1) of the Children and Families (Wales) Measure 2010:-

- set out the required content of a local authority's assessment of the sufficiency of play opportunities in its area;
- set out the individuals and groups that a local authority must consult;
- require an action plan to be prepared as part of the assessment by each local authority;
- provide for the frequency of the assessments, and the manner in which the results of the assessments must be published.

Technical Scrutiny

No points are identified for reporting under Standing Order 21.2 in respect of this instrument

Merits Scrutiny

The following points are identified for reporting under Standing Order 21.3 (ii) in respect of this instrument - that it gives rise to issues of public policy likely to be of interest to the Assembly

- In November 2010, the Children and Young People Committee of the third Assembly published the report of its Inquiry *into 'safe places to play and hang out'*. In the report's first recommendation, the Committee urged the Welsh Government:

*"...to complete its review of the standards and guidance for play at the earliest opportunity.... The guidance should include a clear definition of 'play' that includes **both structured and free play**.... [Our emphasis]."*

- The Welsh Government subsequently accepted the Committee's recommendation and made clear that:

“Greater clarification will be provided on the meaning of ‘play’ and the term will be sufficiently broad to include both ‘structured’ and ‘free play’.”

- Paragraph 8.2 of the Explanatory Memorandum (EM) refers to the Welsh Government consultation on the draft regulations and indicates that a significant proportion (as many as 56%) of those responding may want greater clarity in the regulations, and were *“primarily concerned about the relation between freely chosen play and adult led recreational activities.”*
- The EM states that *‘the summary report responds to this concern in more detail’*, that *“the Regulations and the Statutory Guidance have been amended accordingly”* and that *“A summary of the amendments...has been made available on the Welsh Government’s web site.”*
- At the time of the Committee’s meeting the summary report was unavailable on the Welsh Government website. Although, copies of the report were made available at the meeting, this did not provide the Committee with sufficient time to be able to assess whether the Welsh Government has fully addressed the recommendation in the Children and Young People’s Report or the concerns raised by respondents to the consultation on the draft regulations.
- The Committee was also mindful of its role in drawing attention to subordinate legislation that addressed concerns and recommendations made by Assembly Committees.

Simon Thomas AM

Acting Chair, Constitutional and Legislative Affairs Committee

22 October 2012