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Committee on Statutory Instruments

Cynulliad
Cenedlaethol
Cymru

National
Assembly for
Wales

Meeting Venue:
Committee Room 2 - Senedd

Meeting date:
22 June 2011

Meeting time:
09:00

For further information please contact:

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Agenda

1 Introduction, apologies, substitutions and declarations of interest

2 Remit of the committee (Pages 1 - 4)

3 Statutory Instruments laid before or during the dissolution of the Third Assembly (Pages 5 - 7)

4 Instruments that would not have raised issues to be reported under Standing Order 21.2 or 21.3

Negative Resolution Instruments

The texts of the instruments which follow the negative procedure and have no reporting points could be found here:

http://www.assemblywales.org/bus-home/bus-legislation/bus-legislation-sub/bus-legislation-sub-annulment.htm

CA587 - The Child Measurement Programme (Wales)
Negative Procedure. Date made 28 March 2011. Date laid 30 March 2011. Coming into force date 1 August 2011

CA588 - The Public Health Wales National Health Service Trust (Membership and

Procedure) (Amendment) Regulations 2011
Negative Procedure. Date made 29 March 2011. Date laid 30 March 2011. Coming into force date 23 June 2011

CA589 - The Tax Credits (Approval of Child Care Providers) (Wales) (Amendment) Scheme 2011
Negative Procedure. Date made 28 March 2011. Date laid 30 March 2011. Coming into force date 1 April 2011

CA590 - The Beef and Veal Labelling (Wales) Regulations 2011
Negative Procedure. Date made 29 March 2011. Date laid 30 March 2011. Coming into force date 21 April 2011

CA591 - The Vegetable Seed (Wales) (Amendment) Regulations 2011
Negative Procedure. Date made 29 March 2011. Date laid 30 March 2011. Coming into force date 22 April 2011

CA592 - The Non-Domestic Rating (Small Business Relief) (Wales) (Amendment) Order 2011
Negative Procedure. Date made 29 March 2011. Date laid 30 March 2011. Coming into force date 22 April 2011

Affirmative Resolution Instruments

None

5 Instruments that would have raised issues to be reported under Standing Order 21.2 or 21.3

Negative Resolution Instruments

CA581 - The Waste (Miscellaneous Provisions) (Wales) Regulations 2011 (Pages 8 - 44)
Negative Procedure. Date made 28 March 2011. Date laid 28 March 2011. Coming into force date 29 March 2011

CA582 - The Social Care Charges (Means Assessment and Determination of Charges) (Wales) Regulations 2011 (Pages 45 - 78)
Negative Procedure. Date made 24 March 2011. Date laid 29 March 2011. Coming into force date 11 April 2011

CA583 - The Social Care Charges (Direct Payments) (Means Assessment and Determination of Reimbursement or Contribution) (Wales) Regulations 2011 (Pages 79 - 115)

Negative Procedure. Date made 24 March 2011. Date laid 29 March 2011. Coming into force date 11 April 2011

CA593 - The Reporting of Prices of Milk Products (Wales) Regulations 2011 (Pages 116 - 125)
Negative Procedure. Date made 29 March 2011. Date laid 31 March 2011. Coming into force date 21 April 2011

CA594 - The Care Homes (Wales) (Miscellaneous Amendments) Regulations 2011 (Pages 126 - 137)
Negative Procedure. Date made 29 March 2011. Date laid 31 March 2011. Coming into force date 1 June 2011

Affirmative Resolution Instrument

None

Statutory Instruments laid during the Fourth Assembly

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

Negative Resolution Instruments

The texts of the instruments which follow the negative procedure and have no reporting points could be found here:

http://www.assemblywales.org/bus-home/bus-legislation/bus-fourth-legislation-sub/bus-legislation-sub-annulment-fourth.htm

CSI3 - The Assured Tenancies (Amendment of Rental Threshold) (Wales) Order 2011
Negative Procedure. Date made 2 June 2011. Date laid 6 June 2011. Coming into force date 1 December 2011

CSI4 - The Food Additives (Wales) (Amendment) (No. 2) Regulations 2011
Negative Procedure. Date made 8 June 2011. Date laid 9 June 2011. Coming into force date in accordance with regulation 3

Affirmative Resolution Instruments

None

7 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

CSI1 - The Water Industry (Schemes for Adoption of Private Sewers) Regulations 2011 (Pages 138 - 186)
Affirmative procedure. Date made not stated. Date laid not stated. Coming into force date 1 July 2011

CSI2 - The Welsh Language Commissioner (Appointment) Regulations 2011 (Pages 187 - 198)
Affirmative procedure. Date made not stated. Date laid not stated. Coming into force date 29 June 2011

8 Date of the Next Meeting

To: Committee on Statutory Instruments
From: Committee Clerk

Date: June 2011

Paper Reference: CSI (4)-01-11(p1)

<u>Remit of the Committee</u>

Purpose

1. This paper sets out the remit of the Committee on Statutory Instruments for the information of Committee Members.

Committee's Remit

2. The Committee's remit was set out in the motion establishing the Committee as follows:

> *"...the National Assembly for Wales; in accordance with Standing Order 16.1, establishes a Committee on Statutory Instruments to carry out the functions of the responsible committee set out in Standing Orders 21.2 and 21.3 and to consider any other legislative matter, other than the functions required by Standing Order 26, referred to it by the Business Committee."*

The Committee's Specific Functions

<u>Standing Order 21.2</u>

3. This standing order places a duty on the Committee to consider all statutory instruments that are required by law to be laid before the Assembly, test them against the specific grounds listed in the Standing Order and, if the Committee has any concerns, report these to the Assembly within 20 days.

<u>Standing Order 21.3</u>

4. This standing order allows the Committee to report on a number of other matters concerning individual Statutory Instruments, which have become known by the shorthand term of "merits reports". It provides the Committee with a mechanism for drawing attention to subordinate legislation that, while it may not give concern on the technical grounds covered by standing order 21.2, raises other matters that the Committee believes should be drawn to the attention of the Assembly

5. The full standing orders and the specific reporting grounds are set out in the Annexe to this paper.

Other Legislative Matters

6. The Business Committee may also refer any other legislative matter to the Committee (except the scrutiny of Assembly Bills under Standing Order 26). No such matters have yet been referred to the Committee.

Recommendation

7. Members are invited to:

- note the content of this paper and the remit of the Committee; and
- consider whether there are any issues regarding the Committee's remit or the operation of the Committee that they wish to discuss.

Steve George
Committee Clerk

STANDING ORDER 21.2

21.2 A responsible committee must consider all statutory instruments or draft statutory instruments required by any enactment to be laid before the Assembly and report on whether the Assembly should pay special attention to the instrument or draft on any of the following grounds:

(i) that there appears to be doubt as to whether it is intra vires;
(ii) that it appears to make unusual or unexpected use of the powers conferred by the enactment under which it is made or to be made;
(iii) that the enactment which gives the power to make it contains specific provisions excluding it from challenge in the courts;
(iv) that it appears to have retrospective effect where the authorising enactment does not give express authority for this;
(v) that for any particular reason its form or meaning needs further explanation;
(vi) that its drafting appears to be defective or it fails to fulfil statutory requirements;
(vii) that there appear to be inconsistencies between the meaning of its English and Welsh texts;
(viii) that it uses gender specific language;
(ix) that it is not made or to be made in both English and Welsh;
(x) that there appears to have been unjustifiable delay in publishing it or laying it before the Assembly; or
(xi) that there appears to have been unjustifiable delay in sending notification under section 4(1) of the Statutory Instruments Act 1946 (as modified).

STANDING ORDER 21.3

21.3 A responsible committee may consider and report on whether the Assembly should pay special attention to any statutory instrument or draft statutory instrument required by any enactment to be laid before the Assembly on any of the following grounds:

(i) that it imposes a charge on the Welsh Consolidated Fund or contains provisions requiring payments to be made to that Fund or any part of the government or to any local or public authority in consideration of any licence or consent or of any services to be rendered, or prescribes the amount of any such charge or payment;
(ii) that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly;
(iii) that it is inappropriate in view of the changed circumstances since the enactment under which it is made or is to be made was itself passed or made;
(iv) that it inappropriately implements European Union legislation; or
(v) that it imperfectly achieves its policy objectives.

To: Committee on Statutory Instruments
From: Committee Clerk

Date: June 2011

Agenda Item: Item 3, 3.1 and 3.2

Paper Reference: CSI (4)-01-11(p2)

Statutory Instruments not scrutinised during the third Assembly

Purpose

1. To provide background for Committee Members on consideration of Statutory Instruments laid during the third Assembly that were not scrutinised by the then Constitutional Affairs Committee.

Background

2. The Government laid a number of Statutory Instruments late in the third Assembly at a time when the Constitutional Affairs Committee was unable to scrutinise them in the usual way. The Committee agreed, therefore, to issue an omnibus "merits" report on these Instruments to draw attention to the instruments concerned.

3. The previous Committee's report is attached for information. With Business Committee approval, this has subsequently been circulated to all incoming Assembly Members for information. Committee Members will wish to note that all the instruments concerned have now come into force and have also passed the final date when the Assembly could have annulled them.

Issue

4. The Committee on Statutory Instruments will wish to consider what action to take in respect of these instruments. All have been considered by the Committee's legal advisors and by the Committee Clerk and in most cases no issues arise under either Standing Order 21.2 or Standing Order 21.3.

5. However, some of the instruments (CA581, CA582, CA583 and CA593) did raise issues that may have led to reports to the Assembly if the previous Committee had been given sufficient time to consider them. The specific issues of concern, together with the Government's response, are set out in the draft reports that have been circulated with the instruments concerned.

Recommendation

6. Committee Members are invited to consider:

- the statutory instruments identified by the Constitutional Affairs Committee;
- whether a report should be issued in line with the draft reports drawn up by officials; and
- whether any other actions are required (for example, writing to Ministers to draw attention to concerns)

Steve George
Committee Clerk

Statutory Instruments not considered by the Constitutional Affairs Committee before the dissolution of the Assembly.

Each of the following instruments was laid before the Assembly at a point that did not allow them to be properly considered by the third Assembly's Constitutional Affairs Committee.

In the fourth Assembly, the responsible Committee is not likely to be established until the 20-day deadline for reporting on the instruments has passed. The 40-day deadline[1], within which the Assembly is able to annul the instruments, may also have passed before the incoming Committee can consider these instruments.

In these circumstances, the instruments would not have been subject to any Assembly scrutiny procedure and the opportunity for Assembly Members to table motions to annul any of the instruments may be lost.

The Constitutional Affairs Committee has, therefore, agreed to report under Standing Order 15.3 that the National Assembly should pay special attention to these statutory instruments as giving rise to an issue of public policy likely to be of interest to the Assembly, namely that they may, because of when they were laid, by-pass the usual scrutiny arrangements for Statutory Instruments.

CA581 *The Waste (Miscellaneous Provisions) (Wales) Regulations 2011*

Explanation of Purpose:	See explanatory notes
Procedure:	Negative Procedure
Date made:	28 March 2011
Date laid:	28 March 2011
Coming into force:	29 March 2011
Final date for annulment:	14 June 2011

CA582 *The Social Care Charges (Means Assessment and Determination of Charges) (Wales) Regulations 2011*

Explanation of Purpose:	See explanatory notes
Procedure:	Negative Procedure
Date made:	24 March 2011
Date laid:	29 March 2011
Coming into force:	11 April 2011
Final date for annulment:	15 June 2011

CA583 *The Social Care Charges (Direct Payments) (Means Assessment and Determination of Reimbursement or Contribution) (Wales) Regulations 2011*

[1] Final dates for annulment have been calculated based on known recess dates at 31 March 2011

Explanation of Purpose: See explanatory notes
Procedure: Negative Procedure
Date made: 24 March 2011
Date laid: 29 March 2011
Coming into force: 11 April 2011
Final date for annulment: 15 June 2011

CA587 *The Child Measurement Programme (Wales) Regulations 2011*

Explanation of Purpose: See explanatory notes
Procedure: Negative Procedure
Date made: 28 March 2011
Date laid: 30 March 2011
Coming into force date: 1 August 2011
Final date for annulment: 16 June 2011

CA588 *The Public Health Wales National Health Service Trust (Membership and Procedure) (Amendment) Regulations 2011*

Explanation of Purpose: See explanatory notes
Procedure: Negative Procedure
Date made: 29 March 2011
Date laid: 30 March 2011
Coming into force date: 23 June 2011
Final date for annulment: 16 June 2011

CA589 *The Tax Credits (Approval of Child Care Providers) (Wales) (Amendment) Scheme 2011*

Explanation of Purpose: See explanatory notes
Procedure: Negative Procedure
Date made: 28 March 2011.
Date laid: 30 March 2011.
Coming into force date: 1 April 2011
Final date for annulment: 16 June 2011

CA590 *The Beef and Veal Labelling (Wales) Regulations 2011*

Explanation of Purpose: See explanatory notes
Procedure: Negative Procedure
Date made: 29 March 2011
Date laid: 30 March 2011
Coming into force date: 21 April 2011
Final date for annulment: 16 June 2011

CA591 *The Vegetable Seed (Wales) (Amendment) Regulations 2011*

Explanation of Purpose: See explanatory notes

Procedure:	Negative Procedure
Date made:	29 March 2011
Date laid:	30 March 2011
Coming into force date:	22 April 2011
Final date for annulment:	16 June 2011

CA592 *The Non-Domestic Rating (Small Business Relief) (Wales) (Amendment) Order 2011*

Explanation of Purpose:	See explanatory notes
Procedure:	Negative Procedure
Date made:	29 March 2011
Date laid:	30 March 2011
Coming into force date:	22 April 2011
Final date for annulment:	16 June 2011

CA593 *The Reporting of Prices of Milk Products (Wales) Regulations 2011*

Explanation of Purpose:	See explanatory notes
Procedure:	Negative Procedure
Date made:	29 March 2011
Date laid:	31 March 2011
Coming into force date:	21 April 2011
Final date for annulment:	17 June 2011

CA594 *The Care Homes (Wales) (Miscellaneous Amendments) Regulations 2011*

Explanation of Purpose:	See explanatory notes
Procedure:	Negative Procedure
Date made:	29 March 2011
Date laid:	31 March 2011
Coming into force date:	1 June 2011
Final date for annulment:	17 June 2011

Constitutional Affairs Committee Draft Report

CA581

Title: The Waste (Miscellaneous Provisions) (Wales) Regulations 2011

Procedure: **Negative**

These Regulations are supplementary to the Waste (England and Wales) Regulations 2011 ("the England and Wales Regulations"). They make amendments to several Welsh statutory instruments for the purposes of transposing, in relation to Wales, Directive 2008/98/EC of the European Parliament and of the Council on waste (OJ No. L 312, 22.11.2008, p3). They also revoke, for the same purpose, one Welsh statutory instrument.

Technical Scrutiny

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

Merits Scrutiny

Under Standing Orders 21.3 the Assembly is invited to pay special attention to the following instrument:-

1. These Regulations have failed to be implemented in Wales within the time frame set by the revised Waste Framework Directive ("the RWFD"). The UK (including the devolved administrations) was required to transpose the RWFD by 12th December 2010. The UK Government has not met that deadline. The Minister for Business and Budget has written to the Presiding Officer notifying him of the reasons pertinent to the breach. The primary reason was that it was necessary to wait for the England and Wales Regulations to be made in the first instance because it was those Regulations that principally transposed the RWFD. The Waste (Miscellaneous Provisions) (Wales) Regulations 2011("the Welsh Regulations") make a number of consequential amendments to Welsh Statutory Instruments which had been made by the Welsh Ministers previously. The need for separate legislation was because the Welsh instrument must be made bilingually, and the UK Government, for administrative reasons in the context of the transposition timetable, were unwilling to include such amendments in the England and Wales Regulations.

(Standing Order 21.3 (iv) – that it inappropriately implements European Union legislation.)

2. Regulations made under section 2(2) of the European Communities Act 1972 can be made using either the negative or affirmative procedure. The choice of procedure is at the discretion of the maker of the regulations (in

this case the Welsh Ministers) and no criteria are laid down in law for doing so.

These particular regulations were made in breach of the 21-day rule. The reasons for the breach were set out in the then Minister for Business and Budget's letter of 28 March 2011 to the Presiding Officer. Her letter also offered the following explanation for the use of the negative procedure in this case:

> *"…the choice of procedure has depended on the nature of the provision being made rather than procedural considerations. The Wales Regulations do not substantially affect the provisions of an Act of Parliament or Assembly Measure, they do not amend any provision of an Act or Measure, and provide only for consequential updatings of subordinate legislation to reflect changes in Directive terminology and objectives. It was concluded, therefore, that it would not be appropriate to make the Wales Regulations under the affirmative procedure."*

The Committee is wholly content with this explanation. Moreover, the Committee believes that it also provides important and useful criteria for judging whether any future legislation made under these powers (or legislation where Ministers have similar discretion over the procedure to be used) should be made by the affirmative or negative procedure.

The Committee believes that it would be helpful if explanatory memorandums relating to any future use of such powers could set out briefly, as a matter of special interest to the Committee, how the criteria set out in the Minister's letter have been used to judge whether to use the negative or affirmative procedures.

(Standing Order 21.3 (ii) – that it is of political or legal importance.)

Legal Advisers
Constitutional Affairs Committee

April 2011

The Government has responded as follows:

The Waste (Miscellaneous Provisions) (Wales) Regulations 2011

The Government has explained, through the Minister for Business and Budget's letter to the Presiding Officer, why it was necessary for the Welsh Regulations to contain provisions which refer to and depend on provisions in the England and Wales Regulations. It followed from this that the Welsh Regulations could not be made earlier than the England and Wales Regulations. As to those Regulations, the Government would point out that the revised Waste Framework Directive introduces several new provisions, in

addition to consolidating earlier Waste Directives, and places emphasis on engagement with stakeholders. The Government therefore considered it necessary to engage effectively with stakeholders through extensive public consultation before introducing the necessary legislation. However, the issues arising from the consultations had an impact on the timetable for the transposition of the Directive. The Government regrets this, but considers that its consultation and consideration of the issues arising has helped to ensure a more effective implementation of the Directive in Wales.

Explanatory Memorandum to The Waste (Miscellaneous Provisions) (Wales) Regulations 2011*.*

This Explanatory Memorandum has been prepared by Department for Environment and Sustainability and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 24.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Waste (Miscellaneous Provisions)(Wales) Regulations 2011. I am satisfied that the benefits outweigh any costs.

JANE DAVIDSON AM
Minister for the Environment, Sustainability and Housing
28 MARCH 2011

1. Description

These Regulations are supplementary to The Waste (England and Wales) Regulations 2011. They make amendments to several Welsh Statutory Instruments, and revoke one Welsh instrument, for the purposes of transposing for Wales, EC Directive 2008/98/EC on Waste, known as the revised Waste Framework Directive (rWFD).

2. Matters of special interest to the Constitutional Affairs Committee

The 21-day rule has not been complied with in the making of these Regulations. The Minister for Business and Budget has written to the Presiding Officer notifying him of the reasons pertinent to the breach.

In summary, it was necessary, in order to provide a timely, consistent and complete transposition of the rWFD, for these Regulations to contain references to provisions of (and to be made and to come into force at the same time as) the Waste (England and Wales) Regulations 2011. As those Regulations have been made under the affirmative procedure, but it would not have been appropriate to apply that procedure to these Regulations, it has followed that simultaneous making and coming into force could only be achieved by breach of the 21 day rule.

3. Legislative background

The Regulations are made in exercise of the powers conferred by section 2(2) of the European Communities Act 1972. Section 59(2) of the Government of Wales Act 2006 empowers the Welsh Ministers to exercise the section 2(2) powers if they have been appropriately designated for the purposes of section 2(2). The Welsh Ministers have been designated in relation to the prevention, reduction and management of waste. The relevant Designation Order is SI 2010/1552. By virtue of section 59(3) of the 2006 Act, the Welsh Ministers are to determine whether an instrument made in exercise of the section 2(2) powers is to be subject to the negative or affirmative procedure. As the Regulations make provision for supplementary consequential amendment and revocation, and do not amend an Act of Parliament, the Welsh Ministers have determined that the Regulations are to be subject to the negative procedure.

4. Purpose & intended effect of the legislation

The rWFD is being transposed principally through a composite SI, The Waste (England and Wales) Regulations 2011. The Waste (England and Wales) Regulations 2011 ("the 2011 England and Wales Regulations") are subject to the Affirmative Resolution Procedure. They were laid in draft before the Assembly on 8 February 2011 and, following debate in Plenary and approval by the Assembly on the 8 March 2011 were made on 28 March 2011. They came into force on 29 March 2011 . These Regulations transpose in England and Wales the revised WFD and in addition revise or repeal existing legislation in place which transposed the original WFD.

The Waste (Miscellaneous Provisions)(Wales) Regulations 2011 are required in order to make a number of consequential amendments to Welsh SI's, revoke The Environmental Protection (Duty of Care) (Wales) (Amendment) Regulations 2003 and to transpose changes introduced in the rWFD to the Hazardous Waste Directive. The provision made by the Regulations is equivalent in effect to provision made by the 2011 England and Wales Regulations in relation to England-only legislation. Separate legislation is required for Wales as provision in relation to Welsh instruments must be made bilingually, and the UK Government, for administrative reasons in the context of the transposition timetable, were unwilling to include such amendments in the 2011 England and Wales Regulations. The Regulations are therefore supplemental to the 2011 England and Wales Regulations and should be considered alongside them.

The Waste (Miscellaneous Provisions)(Wales) Regulations 2011l:,

1. Amend the Landfill Allowances Scheme (Wales) Regulations 2004,
2. Amend the Town and Country Planning (Local Development Plan) (Wales) Regulations 2005,
3. Amend the Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009
4. Amend the List of Waste (Wales) Regulations 2005
5. Amend the Hazardous Waste (Wales) Regulations 2005,
6. Revoke the Environmental Protection (Duty of Care) (Amendment) (Wales) Regulations 2003

The amendments to the regulations listed at 1-4 are minor, essentially substituting references to the original WFD with references to the "new" rWFD and (in the Town and Country Planning (Local Development Plan)(Wales) Regulations 2005) to substitute a new definition of "Waste Strategy for Wales" so as to align it with the requirements for Waste Management Plans contained in the rWFD.

The revocation at 6 is consequential to the revocation, by the 2011 England and Wales Regulations, of the Environmental Protection (Duty of Care) Regulations1991. The 2003 Regulations, which are revoked, made provision only to amend the 1991 Regulations in relation to Wales. The equivalent England-only instrument (the Environmental Protection (Duty of Care) (England) (Amendment) Regulations 2003 is revoked by the 2011 England and Wales Regulations.

The changes to the Hazardous Waste Regulations 2005 are required because whilst the rWFD repeals and re-enacts the Hazardous Waste Directive and the Waste Oils Directive, it also introduces some changes which impact on the management of hazardous waste. The Hazardous Waste (England and Wales) Regulations 2005 and the Hazardous Waste (Wales) Regulations 2005 already transpose the Hazardous Waste Directive and are largely effective to transpose all the requirements of the provisions in relation to the management of Hazardous Waste in the r WFD. However some amendments are required to the Hazardous Waste Wales Regulations. These amendments

are the same in England and Wales. The 2011 England and Wales Regulations will make the necessary Hazardous Waste amendments for England and these Regulations will make the Hazardous Waste amendments for Wales. The amendments made by these Regulations are of necessity technical and fragmented in nature. They comprise various minor amendments to update references and definitions, but in addition some more substantive amendments are made: the following paragraphs describe their nature and effect:-

Article 17 of the rWFD requires Member States to *"take the necessary action to ensure that the production, collection and transportation of hazardous waste...including action to ensure traceability from production to final destination..."*. (i.e. cradle to grave tracking).

Cradle to grave tracking enables the Environment Agency to verify that businesses have handled their hazardous waste properly to prevent it from harming the environment, to have passed it only to someone authorised to deal with it and to have correctly entered the details of the waste on the consignment note so as to help others know how to handle it. These provisions are currently transposed in the Hazardous Waste (England and Wales) Regulations 2005 (in relation to England) and the Hazardous Waste (Wales) Regulations 2005 (in relation to Wales). However, where hazardous waste is collected from multiple premises on a single journey, it has become apparent that the system of associated paperwork provided for in the 2005 Regulations does not provide the Environment Agency with a fully effective cradle to grave tracking system format in the context of the rWFD requirements. The Regulations therefore amend the procedures in the current system for tracking multiple consignments by providing for a revised multiple consignment system which removes the requirement for a multiple collection summary note. This is because post-consultation research has confirmed that the summary note is not an essential requirement for cradle-to-grave monitoring movements of hazardous waste – however, the new requirement for a round number to be included on the consignment note and in the consignee returns will ensure the requisite cradle-to-grave tracking of hazardous waste.

Article 4(1) of the rWFD requires the application of a five step waste hierarchy as a priority order. To assist in meeting this requirement, the Regulations provide for the revised consignment notes to include a declaration to ensure that, when hazardous waste is transferred between owners, the person transferring the waste confirms they have applied the waste hierarchy as a priority order when taking their decision on the treatment option to which the waste is being consigned.

The new consignment note is provided at Part 3 of the Schedule to the Regulations.

Article 18 : Ban on the mixing of hazardous waste

The controls on hazardous waste in the rWFD are similar to those in the existing Hazardous Waste Directive. However, Article 18(2) of the rWFD introduces an additional condition that must be met to allow a derogation from the ban on mixing hazardous waste, which is that the mixing operation must conform to best available techniques.

The rWFD also provides that the reclassification of hazardous waste as non-hazardous waste may not be achieved by diluting or mixing the waste with the aim of lowering the initial concentrations of hazardous substances to a level below the thresholds for defining waste as hazardous. Although Part 4 of the Hazardous Waste (Wales) Regulations 2005 bans the mixing of hazardous waste unless it is permitted as part of a disposal or recovery operation, it does not account for diluting waste with the intention of lowering the initial concentrations of hazardous substances to a level below the thresholds for defining waste as hazardous.

The Regulations therefore amend the 2005 Regulations to transpose the new dilution requirements and it is proposed to issue, jointly with the UK, revised guidance on dilution.

The Hazardous Waste (Wales) Regulations 2005 are also amended to transpose the requirement of Article 21(1)(c) of the rWFD so that where technically feasible or economically viable, waste oils are not mixed with other kinds of waste or substances, if such mixing impedes their treatment.

Article 20 : Hazardous waste produced by households

The rWFD uses the term “hazardous waste produced by households” whereas the Hazardous Waste (Wales) Regulations 2005 refer to “domestic waste”. The Assembly Government and the UK Government consider the two terms to be equivalent and the 2005 Regulations will maintain the term “domestic waste”. However, the Regulations insert into the 2005 Regulations a definition to the effect that “domestic waste” means “waste produced by a household”. Guidance will be produced to avoid the potential for confusion with the wider definition of “household waste” which includes waste from universities, schools and hospitals.

Dealers and brokers

Article 35 of the rWFD sets out record keeping requirements. These are similar to those set out in the Hazardous Waste (Wales) Regulations 2005. However, the requirement now extends to hazardous waste dealers and brokers. They are now required to keep records of the quantity, nature and origin of the waste, and, where relevant, the destination, frequency of collection, mode of transport and treatment method foreseen in respect of the waste, and to make that information available, on request, to the competent authorities. To transpose this new requirement, the Regulations amend regulation 49 of the Hazardous Waste (Wales) Regulations 2005.

The Environment Agency currently handles brokers in the same way as it handles carriers. They can register with the Agency either as a carrier, carrier/broker or broker. Where dealers/brokers register as carriers or carrier/brokers, they can consign waste on behalf of the producer and where they do this are required to keep a copy of the relevant documentation for 3 years at their principal place of business. In such cases the new requirement may make little practical difference, but the overall impacts of this change are not yet known. The view of the Assembly Government and the UK Government,, which is shared with the Environment Agency, is that for the time being it will be sufficient to adopt a pragmatic monitoring approach towards the implementation of this new requirement in order to ensure a proportionate application of Article 35.

Retention of consignment notes

In the Hazardous Waste (Wales) Regulations 2005, operators and transfer stations are required to keep consignment notes for the life of the site. This means that they are accumulating large quantities of notes. The Assembly Government and the UK Government consider that there is no reason for these types of facilities to keep the notes for such a length of time. The Regulations therefore amend the 2005 Regulations so that the period for which all treatment facilities (i.e. facilities carrying out disposal or recovery of hazardous waste), except landfills, are required to retain consignment notes is 5 years rather than the life of the site.

There are some recovery operations that can take place at the site of a landfill, and for which the permit may be consolidated. Where this is the case, the time limit in relation to recovery will require retention of the consignment note for the life of the permit.

Hazardous Waste Properties

Annex III to the rWFD also introduces changes to hazardous properties. These changes are given effect by these Regulations.

Risks

There are risks if this instrument is annulled. Member States are required to transpose the rWFD by 12 December 2010. The UK has not met that deadline and the European Commission is likely to begin infraction proceedings early in 2011, which if successful carry the risk of substantial fines being awarded against the UK (of which the Assembly Government would be expected to meet a proportionate part in accordance with its responsibilities for transposition and failure to do so). The UK Government and the Assembly Government are transposing the rWFD, through the 2011 England and Wales Regulations 2011 and these Regulations. It follows that although these Regulations comprise only a limited element of the transposition, they are essential to it and their annulment would amount to a substantive transposition failure. Moreover, in a domestic context, annulment of these Regulations would result in an incomplete and ineffective regime and

thus cause substantive prejudice to business, public authorities and other sectors.

5. Consultation

Two consultations were held on the transposition of the rWFD: the second consultation included the proposed amendments to the Hazardous Waste Regulations in England and Wales.

There were 87 responses to the stage one consultation from people/organisations living/operating on a Wales only basis plus those who operate on an England and Wales basis. The responses were submitted by a wide cross section of stakeholders, ranging from private individuals, public bodies, large waste management companies, small third sector organisations and campaign groups. Information about the stage one consultation, and the report summarising the responses to that consultation, are available at. http://wales.gov.uk/consultations/environmentandcountryside/stage2waste/?lang=en

The responses to the stage one consultation were considered and taken into account in the preparation of the stage two consultation proposals.

There were 166 responses to the stage two consultation across England and Wales. Generally, the responses received to the consultation did not differentiate between England and Wales. Many of the organisations who replied operate on an England and Wales basis. The responses were submitted by a wide range of stakeholders, including businesses, public bodies and trade associations. 9 respondents covered Wales only. Information about the stage two consultation, and the report summarising the responses to that consultation, are available at: http://wales.gov.uk/consultations/environmentandcountryside/stage2waste/?lang=en

The responses to the stage two consultation have been considered and taken into account in preparing the 2011 England and Wales Regulations and these Regulations.

6. Regulatory Impact Assessment (RIA)

These Regulations are supplemental to the regulations that are principally responsible for transposing the rWFD i.e. the 2011 England and Wales Regulations, which are being made on a composite basis with England. The Impact Assessment of the 2011 England and Wales Regulations has been progressed and completed on an England and Wales basis and sets out the costs and benefits associated with the policy options adopted in relation to the entirety of the transposition of the rWFD. Accordingly, an RIA has not been completed for these Regulations because the costs and benefits of the policy options covered by their provisions have been assessed in the Impact

Assessment of the 2011 England and Wales Regulations and were consulted on as detailed above in section 5.

The Impact Assessment indicates that the impact on business, charities and voluntary bodies is limited because the revised WFD principally re-enacts existing waste management controls and there are no additional costs for businesses etc in continuing to comply with these controls.

In terms of the proposed change, within the Hazardous Waste regulations, to the use of a standard single consignment note to track movements of hazardous waste that form part of a multiple consignment round, the Impact Assessment indicates that there will be reduced costs for a typical business currently using the statutory regulatory procedure. It follows that making the changes through these Regulations to a single consignment note will result in a reduction of administration costs to a typical business. If this is projected to the 846 businesses across England and Wales reporting multiple collections this will result in a national cost reduction of £3,045,600.

WELSH STATUTORY INSTRUMENTS

2011 No. 971 (W. 141)

ENVIRONMENTAL PROTECTION, WALES

The Waste (Miscellaneous Provisions) (Wales) Regulations 2011

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations are supplementary to the Waste (England and Wales) Regulations 2011 ("the England and Wales Regulations"). They make amendments to several Welsh statutory instruments for the purposes of transposing, in relation to Wales, Directive 2008/98/EC of the European Parliament and of the Council on waste (OJ No. L 312, 22.11.2008, p3). They also revoke, for the same purpose, one Welsh statutory instrument.

A full impact assessment of the effect that the provisions of the England and Wales Regulations and these Regulations will have on business, the voluntary sector and the public sector is available from the Waste Programme, Department for Environment, Food and Rural Affairs, Ergon House, Horseferry Road, London SW1P 2AL.

WELSH STATUTORY INSTRUMENTS

2011 No. 971 (W. 141)

ENVIRONMENTAL PROTECTION, WALES

The Waste (Miscellaneous Provisions) (Wales) Regulations 2011

Made 28 March 2011

Laid before the National Assembly for Wales 28 March 2011

Coming into force 29 March 2011

The Welsh Ministers are designated(**1**) for the purposes of section 2(2) of the European Communities Act 1972 in relation to the prevention, reduction and management of waste.

The Welsh Ministers make these Regulations in exercise of the powers conferred by section 2(2) of the European Communities Act 1972.(**2**)

Title, commencement and extent

1.—(1) The title of these Regulations is the Waste (Miscellaneous Provisions) (Wales) Regulations 2011.

(2) These Regulations—

(a) come into force on 29 March 2011; and

(b) apply in relation to Wales.

Amendment of the Hazardous Waste (Wales) Regulations 2005

2. The Schedule, which provides for amendment of the Hazardous Waste (Wales) Regulations 2005(**1**), has effect.

(**1**) S.I. 2010/1552.

(**2**) 1972 c.68. Where the Welsh Ministers have been designated in relation to a matter or purpose, they may then exercise the powers conferred by section 2(2) in relation to that matter or purpose; see section 59(2) of the Government of Wales Act 2006 (c.32).

Amendment of the Landfill Allowances Scheme (Wales) Regulations 2004

3. In regulation 2(1) of the Landfill Allowances Scheme (Wales) Regulations 2004(**2**), in the definition of "waste facility" ("*cyfleuster gwastraff*"), for "Article 1(e) and (f) of Council Directive 75/442/EEC on waste", substitute "Article 3(19) and (15) of Directive 2008/98/EC of the European Parliament and of the Council on waste".

Amendment of the List of Wastes (Wales) Regulations) 2005

4.—(1) The List of Wastes (Wales) Regulations 2005(**3**) are amended as follows.

(2) In regulation 2—

(a) for sub-paragraph (a) of paragraph (1), substitute—

""the Waste Directive" ("*y Gyfarwyddeb Wastraff*") means Directive 2008/98/EC of the European Parliament and of the Council on waste";

(b) for sub-paragraph (c) of paragraph (1), substitute—

"(c) a reference to hazardous properties is a reference to the properties set out in Annex III to the Waste Directive.";

(c) for sub-paragraph (b) of paragraph (2), substitute—

"(b) "the List of Wastes" ("*y Rhestr Wastraffoedd*") means the list of wastes set out in the Annex to the List of Wastes Decision and a reference to the List of Wastes includes a reference to its introduction ("the Introduction to the List").".

(3) In regulation 4—

(a) before "properties", insert "hazardous";

(b) omit "of Annex III".

(4) Omit paragraphs 1 and 2 of Schedule 2.

Amendment of the Town and Country Planning (Local Development Plan) (Wales) Regulations 2005

5. In regulation 2(1) of the Town and Country Planning (Local Development Plan) (Wales)

(**1**) S.I. 2005/1806 (W.138) amended by S.I. 2006/937, 2007/3538, 2009/2861 and, 2010/675.

(**2**) S.I. 2004/1490, to which there are amendments not relevant to these Regulations.

(**3**) S.I. 2005/1820 (W. 148).

Regulations 2005(1), for the definition of "Waste Strategy for Wales" ("*Strategaeth Wastraff Cymru*") substitute—

""Waste Strategy for Wales" ("*Strategaeth Wastraff Cymru*") means the national waste management plan within the meaning of the Waste (England and Wales) Regulations 2011, known by that name and prepared by the Welsh Ministers;".

Amendment of the Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009

6. In Schedule 2 to the Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009(2), in paragraph 3(1), for the words from "Directive 2006/12/EC" to the end, substitute "Directive 2008/98/EC of the European Parliament and of the Council on waste".

Revocation of the Environmental Protection (Duty of Care) (Amendment) (Wales) Regulations 2003

7. The Environmental Protection (Duty of Care) (Amendment) (Wales) Regulations 2003(3) are revoked.

Jane Davidson

Minister for Environment, Sustainability and Housing, one of the Welsh Ministers

28 March 2011

(1) S.I. 2005/2839 (W.203).
(2) S.I. 2009/995 (W. 81).
(3) S.I. 2003/1720 (W.187)

SCHEDULE
Regulation 2

Amendments to the Hazardous Waste (Wales) Regulations 2005

PART 1

Amendments

1. The Hazardous Waste (Wales) Regulations 2005(**1**) are amended as follows.

2. For regulation 2, substitute—

"The Waste Directive and the meaning of waste

2.—(1) For the purposes of these Regulations—

(a) "the Waste Directive" ("*y Gyfarwyddeb Wastraff*") means Directive 2008/98/EC of the European Parliament and of the Council on waste;

(b) "waste" ("*gwastraff*") means anything that—

(i) is waste within the meaning of Article 3(1) of the Waste Directive; and

(ii) subject to regulation 15, is not excluded from the scope of that Directive by Article 2(1), (2) or (3).

(2) In these Regulations, a reference to the Waste Directive conditions is a reference to the conditions set out in Article 13 of that Directive, that is to say, to ensure that waste management is carried out without endangering human health, without harming the environment and, in particular—

(a) without risk to water, air, soil, plants or animals;

(b) without causing a nuisance through noise or odours; and

(c) without adversely affecting the countryside or places of special interest.".

3. For regulation 3, substitute—

(**1**) S.I. 2005/1806 (W.138) amended by S.I. 2006/937, 2007/3538, 2009/2861, 2010/675.

“Annex III to the Waste Directive

3. A reference in these Regulations to—

(a) Annex III is a reference to Annex III (properties of waste which render it hazardous) to the Waste Directive, as that Annex is set out in Schedule 3;

(b) hazardous properties is a reference to the properties in Annex III.”.

4. In regulation 4(1), in the definition of “the List of Wastes” (“*y Rhestr Wastraffoedd*”), omit from “, being the list” to the end.

5. In regulation 5—

(a) in paragraph (1)—

(i) for the definition of “consignment note” (“*nodyn traddodi*”), substitute—

““consignment note” (“*nodyn traddodi*”), in relation to a consignment of hazardous waste, means the identification document which is required to accompany the hazardous waste when it is transferred pursuant to Article 19(2) of the Waste Directive.”,

(ii) in the appropriate place, insert—

““domestic waste” (“gwastraff domestig”) means waste produced by a household;”,

(iii) for the definition of “multiple collection” (“*amlgasgliad”*), substitute—

““multiple collection” (“*amlgasgliad*”) means a journey made by a single carrier which meets the following conditions—

(a) the carrier collects more than one consignment of hazardous waste in the course of the journey;

(b) each consignment is collected from different premises;

(c) all the premises from which a collection is made are in Wales; and

(d) all consignments collected are transported by that carrier in the course of a journey to the same consignee;”,

(iv) omit the definition of “multiple collection consignment note” (“*nodyn traddodi amlgasgliad*”);

(b) for paragraph (2), substitute—

“(2) In these Regulations—

“broker” (“*brocer]”)* means an undertaking arranging the recovery or disposal of waste on behalf of others, including such brokers who do not take physical possession of the waste;

"collection" ("*casglu*") means the gathering of waste, including the preliminary sorting and preliminary storage of waste for the purposes of transport to a waste treatment facility;

"dealer" ("*deliwr*") means any undertaking which acts in the role of principal to purchase and subsequently sell waste, including such dealers who do not take physical possession of the waste;

"disposal" ("*gwaredu*") means any operation which is not recovery even where the operation has as a secondary consequence the reclamation of substances or energy (Annex I of the Waste Directive sets out a non-exhaustive list of disposal operations)

"holder" ("*deiliad*") means the producer of the waste or the person who is in possession of it ;

"management" ("*rheoli*") means the collection, transport, recovery and disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including actions taken as dealer or broker;

"producer" ("*cynhyrchydd*") means anyone whose activities produce waste ("original waste producer") or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of the waste;

"recovery" ("*adfer*") means any operation the principal result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function, or waste being prepared to fulfil that function, in the plant or in the wider economy (Annex II of the Waste Directive sets out a non-exhaustive list of recovery operations);

"waste oil" ("*olew gwastraff*") means any mineral or synthetic lubrication or industrial oil which has become unfit for the use for which it was originally intended, such as used combustion engine oils and gearbox oils, lubricating oils, oils for turbines and hydraulic oils,

and cognate expressions must be construed accordingly.";

(c) in paragraph (3)(c), for ", schedule of carriers or multiple collection consignment note", substitute "or schedule of carriers".

6. In regulation 8(1), for "Annexes I, II and III", substitute "Annex III".

7. In regulation 9—

(a) in paragraph (1)—

(i) for "Annexes I, II and III", substitute "Annex III";

(ii) omit "to the Hazardous Waste Directive";

(b) after paragraph (1), insert—

"(1A) The power at paragraph (1) to decide that waste be treated as non-hazardous does not apply to waste which has been diluted or mixed with the aim of lowering the initial concentrations of hazardous substances to a level below the thresholds for defining waste as hazardous.".

8. In regulation 18—

(a) after the words "it has been", insert "diluted or has been";

(b) after paragraph (a), insert—

"(aa) in the case of hazardous waste comprising waste oil, waste oil of different characteristics;".

9. In regulation 19—

(a) in paragraph (1), for "(2) and (3)", substitute "(2), (3) and (4)";

(b) in paragraph (3), omit "or a registered exemption";

(c) after paragraph (3), insert—

"(4) Paragraph (1) applies to the mixing of waste oil—

(a) only to the extent that the prohibition in that paragraph is technically feasible and economically viable; and

(b) only where such mixing would impede the treatment of the waste oil.".

10. In regulation 20(1)(a), omit "or a registered exemption".

11. In regulation 35—

(a) in paragraph (1)(a) for "(3)" substitute "(2)";

(b) omit paragraphs (1)(c) and (4):

(c) in paragraph (5)—

(i) for "consignment note, schedule of carriers or multiple collection consignment note", substitute "consignment note or schedule of carriers",

(ii) for “Schedule 4, 5 or 6”, substitute “Schedule 4 or 5”;

(d) after paragraph (5), insert—

“(6) Until the end of the period of 6 months beginning with the day on which the Waste (Miscellaneous Provisions) (Wales) Regulations 2011 are made—

(a) a carrier may elect to use the multiple collection procedure which applied immediately before the coming into force of those Regulations; and

(b) the forms set out in these Regulations as originally enacted, or forms requiring the same information is substantially the same format, may be used instead of those substituted by the Waste (Miscellaneous Provisions) (Wales) Regulations 2011.”.

12. In regulation 36(1), for “38” substitute “39”.

13. Omit regulation 38.

14. In regulation 42(2)—

(a) in paragraph (1), for “regulations 43 and 44” substitute “regulation 43”;

(b) in paragraph (2), omit “38(6)(b) and (c),”.

15. In regulation 43(1), omit “other than a case to which regulation 44 applies”.

16. Omit regulation 44.

17. In regulation 47—

(a) after paragraph (5)(b), omit “and”;

(b) in paragraph (5)(c), at the beginning, insert “subject to paragraph (5A),”;

(c) after paragraph (5), insert—

“(5A) If the person required to make or retain a register has a waste permit pursuant to which the site is operated, the period for retention of a consignment note required to be kept by regulation 51(2)(a) is—

(a) for 5 years after the deposit of the waste; or

(b) if the permit authorises disposal of waste in a landfill, until the permit is surrendered or revoked.

(5B) In paragraph (5A), “landfill” has the meaning given in Article 2(g) of Council Directive 1999/31/EC on the landfill of waste, but does not include any operation excluded from the scope of that Directive by Article 3(2).
”.

18. In regulation 48—

(a) in paragraph (3)(c), for “Annex IIA or IIB of the Waste Directive”, substitute “Annex I or II of the Waste Directive (as the case may be)”;

(b) in paragraph (6)(a), omit “and”;

(c) in paragraph (6)(b), at the beginning, insert “subject to paragraph (6A),”;

(d) after paragraph (6), insert—

“(6A) If the person required to make or retain a register has a waste permit pursuant to which the site is operated, the period for retention of a consignment note required to be kept by regulation 51(2)(a) is—

(a) for 5 years after the disposal or recovery of the waste; or

(b) if the permit authorises disposal of waste in a landfill (in addition to other treatment), until the permit is surrendered or revoked.

(6B) In paragraph (6A), “landfill” has the meaning given in Article 2(g) of Council Directive 1999/31/EC on the landfill of waste, but does not include any waste excluded from the scope of that Directive by Article 3(2).”.

19. In regulation 49—

(a) in paragraph (1), for “consignor of hazardous waste”, substitute “consignor or broker of, or dealer in, hazardous waste”;

(b) for paragraph (3), substitute—

“(3) Any person required to keep a record by paragraph (1) must preserve it—

(a) while the person is a holder of the waste or (if not a holder) has control of the waste; and

(b) for 3 years after the date on which the waste is transferred to another person.”;

(c) in paragraph (4)—

(i) after “holder”, insert “, dealer, broker”;

(ii) after “recorded”, insert “chronologically”;

(d) in paragraph (5)—

(i) after the first occurrence of “holder”, insert “, dealer, broker”,

(ii) in sub-paragraph (b), before “consignor”, insert “dealer, broker or”.

20. In regulation 50(3), after “entered”, insert “chronologically”.

21. In regulation 51(2)(a)—

(a) omit "multiple consignment notes and";

(b) omit "or 44"; and

(c) after the second occurrence of "pursuant" insert "to".

22. In regulations 52(1) and 55(3), for "Annex IIA or Annex IIB", substitute "Annex I or Annex II".

23. Omit regulation 57.

24. In regulation 60—

(a) in paragraph (1), for "Article 5", substitute "Article 16";

(b) omit paragraph (2).

25. In regulation 65(c), for "44" substitute "43".

26. In the table in regulation 65A(1), omit the row commencing "regulation 44".

27. In regulation 69(1)(e), for "44" substitute "43".

28. Omit Schedules 1, 2 and 6.

29. For Schedule 3, substitute the Schedule set out in Part 2.

30. For Schedule 4, substitute the Schedule set out in Part 3.

31. In paragraph 4(3)(a) of Schedule 7, for "43 or 44" substitute "36 or 43".

32. In paragraph 1 of Schedule 7, for "paragraph 7" substitute "paragraph 6".

33. In paragraph 6 of Schedule 7—

(a) in paragraph (1), for "regulation 38(1)", substitute "the definition of "multiple collection" ("*amlgasgliad*") in regulation 5(1)";

(b) in paragraph (2), omit all the words after "these Regulations";

(c) omit paragraph (3).

34. In Schedule 11, omit paragraphs 5 to 8 and 11 to 25.

PART 2

The new Schedule 3

"SCHEDULE 3 Regulation 3

Annex III to the Waste Directive

Properties of waste which render it hazardous

H1 "Explosive": substances and preparations which may explode under the effect of flame or which are more sensitive to shocks or friction than dinitrobenzene.

H2 "Oxidizing": substances and preparations which exhibit highly exothermic reactions when in contact with other substances, particularly flammable substances.

H3-A "Highly flammable"

- liquid substances and preparations having a flash point below 21°C (including extremely flammable liquids), or

- substances and preparations which may become hot and finally catch fire in contact with air at ambient temperature without any application of energy, or

- solid substances and preparations which may readily catch fire after brief contact with a source of ignition and which continue to burn or be consumed after removal of the source of ignition, or

- gaseous substances and preparations which are flammable in air at normal pressure, or

- substances and preparations which, in contact with water or damp air, evolve highly flammable gases in dangerous quantities.

H3-B "Flammable": liquid substances and preparations having a flash point equal to or greater than 21°C and less than or equal to 55°C.

H4 "Irritant": non-corrosive substances and preparations which, through immediate, prolonged or repeated

contact with the skin or mucous membrane, can cause inflammation.

H5	"Harmful": substances and preparations which, if they are inhaled or ingested or if they penetrate the skin, may involve limited health risks.
H6	"Toxic": substances and preparations (including very toxic substances and preparations) which, if they are inhaled or ingested or if they penetrate the skin, may involve serious, acute or chronic health risks and even death.
H7	"Carcinogenic": substances and preparations which, if they are inhaled or ingested or if they penetrate the skin, may induce cancer or increase its incidence.
H8	"Corrosive": substances and preparations which may destroy living tissue on contact.
H9	"Infectious": substances and preparations containing viable micro-organisms or their toxins which are known or reliably believed to cause disease in man or other living organisms.
H10	"Toxic for reproduction": substances and preparations which, if they are inhaled or ingested or if they penetrate the skin, may induce non-hereditary congenital malformations or increase their incidence.
H11	"Mutagenic": substances and preparations which, if they are inhaled or ingested or if they penetrate the skin, may induce hereditary genetic defects or increase their incidence.
H12	Waste which releases toxic or very toxic gases in contact with water, air or an acid.
H13(*)	"Sensitizing": substances and preparations which, if they are inhaled or if they penetrate the skin, are capable of eliciting a reaction of hypersensitization such that on further exposure to the substance or preparation, characteristic adverse effects are produced.

(*) As far as testing methods are available.

H14 "Ecotoxic": waste which presents or may present immediate or delayed risks for one or more sectors of the environment.

H15 Waste capable by any means, after disposal, of yielding another substance, e.g. a leachate, which possesses any of the characteristics above.

Notes

1. Attribution of the hazardous properties "toxic" (and "very toxic"), "harmful", "corrosive", "irritant", "carcinogenic", "toxic to reproduction", "mutagenic" and "ecotoxic" is made on the basis of the criteria laid down by Annex VI, to Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances.

2. Where relevant the limit values listed in Annex II and III to Directive 1999/45/EC of the European Parliament and of the Council of 31 May 1999 concerning the approximation of laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations shall apply.

Test methods

The methods to be used are described in Annex V to Directive 67/548/EEC and in other relevant CEN-notes."

PART 3

The new Schedule 4

“SCHEDULE 4 Regulation 35(2)

HAZARDOUS WASTE (WALES) REGULATIONS 2005
RHEOLIADAU GWASTRAFF PERYGLUS (CYMRU) 2005

Part A NOTIFICATION DETAILS
Rhan A MANYLION HYSBYSU

1. Consignment Note Code: | | | | | | | / | | | | | |
   Cod Nodyn Traddodi:

2. The waste described below is to be removed from (name, address, postcode, telephone, e-mail, facsimile):
   Mae'r gwastraff a ddisgrifir isod i'w gludo o (enw, cyfeiriad, cod post, ffôn, e-bost, ffacs):

3. Premises Code (where applicable): | | | | | | |
   Cod y Fangre (os yw'n gymwys):

4. The waste will be taken to (name, address & postcode):
   Cludir y gwastraff i (enw, cyfeiriad a chod post):

5. The waste producer was (if different from 2.) (name, address, postcode, telephone, e-mail, facsimile):
   Cynhyrchydd y gwastraff oedd (os yw'n wahanol i 2) (enw, cyfeiriad, cod post, ffôn, e-bost, ffacs);

Part B DESCRIPTION OF THE WASTE
Rhan B DISGRIFIAD O'R GWASTRAFF

1. The process giving rise to the waste(s) was:
   Y broses a roes fod i'r gwastraff(oedd) oedd:

2. SIC for the process giving rise to the waste:
   SIC am y broses a roes fod i'r gwastraff:

WASTE DETAILS (where more than one waste type is collected all of the information given below must be completed for each EWC identified)
MANYLION Y GWASTRAFF (os cesglir mwy nag un math o wastraff rhaid cwblhau'r holl wybodaeth a roddir isod ar gyfer pob EWC a ddynodwyd)

The waste(s) is:
Dyma'r gwastraff(oedd):

Description of waste *Disgrifiad o'r gwastraff*	List of Wastes (EWC) code (6 digits): *Cod Rhestr y Gwastraffoedd (EWC) (6 digid)*						Quantity (kg): *Cyfaint (kg):*	The chemical/biological components in the waste and their concentrations are: *Dyma gyfansoddion cemegol/ biolegol y gwatraff a'u crynodiadau:*		Physical Form (Gas, Liquid, Solid, Powder, Sludge or Mixed): *Ffurf Ffisegol (Nwy, Hylif, Solid, Powdwr, Llaca neu Gymysgfa):*	Hazard code(s): *Cod(au) perygl:*	Container type, number & size: *Math, rhif a maint y cynhwysydd*
								Component	Concentration (% or mg/kg)			

The information given below is to be completed for each EWC identified
Mae'r wybodaeth a roddir isod i'w chwblhau ar gyfer pob EWC a ddynodwyd

EWC Code *Cod EWC*						UN identification number(s) *Rhif(au) dynodi UN*	Proper shipping name(s) *Enw(au) priodol y llwyth*	UN Class(es) *Dosbarth(au) UN*	Packing Group(s) *Grŵp neu Grwpiau Pecynnu*	Special handling requirements *Gofynion trafod arbennig*

Part C CARRIER'S CERTIFICATE
Rhan C TYSTYSGRIF Y CLUDWR

(If more than one carrier is used, please attach Schedule for subsequent carriers. If schedule of carriers is attached tick here). ☐
(Os defnyddir mwy nag un cludwr, amgaewch Atodlen ar gyfer cludwyr dilynol. Os amgaeir atodlen o gludwyr, ticiwch fan hyn).

I certify that I today collected the consignment and that the details in A2, A4 and B3 are correct and I have been advised of any specific handling requirements.
Yr wyf yn ardystio fy mod heddiw wedi casglu'r llwyth a bod y manylion yn A2, A4 a B3 yn gywir a fy mod wedi cael fy hysbysu o unrhyw ofynion trafod arbennig.

Where this consignment forms part of a multiple collection, the round number and collection number are: *Pan fo'r llwyth hwn yn ffurfio rhan o amlgasgliad, rhif y cylch casglu a rhif y casgliad yw:*	/

1. Carrier Name:
   Enw'r Cludwr:

   On behalf of (name, address, postcode, telephone, e-mail, facsimile):
   Ar ran (enw, cyfeiriad, cod post, ffôn, e-bost, ffacs):

2. Carrier registration no./ reason for exemption:
   Rhif cofrestru'r cludwr / rheswm dros esemptiad:

3. Vehicle registration no.(or mode of transport, if not road):
   Rhif cofrestru'r cerbyd (neu'r cyfrwng cludo os nad ar ffordd)

Signature/ *Llofnod*

Date/ *Dyddiad* at/ *am* hrs/ *o'r gloch*

Part D CONSIGNOR'S CERTIFICATE
Rhan D TYSTYSGRIF Y TRADDODWR

I certify that the information in A, B and C above has been completed and is correct, that the carrier is registered or exempt and was advised of the appropriate precautionary measures. All of the waste is packaged and labelled correctly and the carrier has been advised of any special handling requirements. I confirm that I have fulfilled my duty to apply the waste hierarchy as required by regulation 12 of the Waste (England and Wales) Regulations 2011.

Yr wyf yn ardystio bod yr wybodaeth yn A, B ac C uchod wedi ei chwblhau ac yn gywir, bod y cludwr wedi ei gofrestru neu'n esempt a'i fod wedi cael ei hysbysu o'r mesurau rhagofalu priodol. Cafodd yr holl wastraff ei becynnu a'i labelu yn gywir a chafodd y cludwr ei hysbysu o unrhyw ofynion trafod arbennig. Yr wyf yn cadarnhau fy mod wedi cyflawni fy nyletswydd i ddefnyddio'r hierachaeth wastraff fel y mae'n ofynnol gan reoliad 12 o Reoliadau Gwastraff (Cymru a Lloegr) 2011.

1. Consignor Name:
   Enw'r Traddodwr:

On behalf of (name, address, postcode, telephone, e-mail, facsimile):
Ar ran (enw, cyfeiriad, cod post, ffôn, e-bost, ffacs):

Signature/ *Llofnod*

Date/ *Dyddiad*
at/ *am* hrs/ *o'r gloch*

Part E CONSIGNEE'S CERTIFICATE (where more than one waste type is collected all of the information given below must be completed for each EWC)
Rhan E TYSTYSGRIF Y TRADDODAI (os cesglir mwy nag un math o wastraff rhaid cwblhau'r holl wybodaeth a roddir isod ar gyfer pob EWC)

Individual EWC code(s) received *Cod(au) EWC unigol a dderbyniwyd*						Quantity of each EWC code received (kg) *Cyfaint pob cod EWC a dderbyniwyd (kg)*	EWC Accepted/Rejected *Cod EWC a dderbyniwyd/ a wrthodwyd*	Waste Management operation (R or D code) *Gweithrediad Rheoli Gwastraff (cod R neu D)*

1. I received this waste at the address given in A4 on (date) at hrs
   Daeth y gwastraff hwn i law yn y cyfeiriad ar roddir yn A4 ar am o'r gloch

2. Vehicle registration no. (or mode of transport, if not road):
   Rhif cofrestru'r cerbyd (neu'r cyfrwng cludo os nad ar ffordd)

3. Where waste is rejected please provide details:
   Os gwrthodir y gwastraff, rhowch y manylion isod:

I certify that environmental permit/registered exemption no(s). authorises the management of the waste described in B at the address given in A4..

Where the consignment forms part of a multiple collection, as identified in Part C, I certify that the total number of consignments forming the collection are: ☐

Yr wyf yn ardystio bod y drwydded amgylcheddol/ caniatâd/ esemptiad cofrestredig ....rhif(au) yn awdurdodi rheoli'r gwastraff a ddisgrifir yn B yn y cyfeiriad a roddir yn A4.

Pan fo'r llwyth yn ffurfio rhan o amlgasgliad, fel a ddynodir yn Rhan C, yr wyf yn ardystio mai cyfanswm y llwythi sy'n ffurfio'r casgliad yw:

Name/ *Enw*
On behalf of (name, address, postcode, telephone, e-mail, facsimile):
Ar ran (enw, cyfeiriad, cod post, ffôn, e-bost, ffacs):

Signature/ *Llofnod*

Date/ *Dyddiad* at/ *am* hrs/ *o'r gloch*

"

Jane Hutt AC/AM
Y Gweinidog dros Fusnes a'r Gyllideb
Minister for Business and Budget

Llywodraeth Cynulliad Cymru
Welsh Assembly Government

Eich cyf/Your ref
Ein cyf/Our ref SF/JD/ 0073/11

Lord Dafydd Elis Thomas AM
Presiding Officer
National Assembly for Wales

28 March 2011

Dear Dafydd

THE WASTE (MISCELLANEOUS PROVISIONS) (WALES) REGULATIONS 2011

I am writing to inform you that in order to bring the Waste (Miscellaneous Provisions) (Wales) Regulations 2011 into force, it has become necessary to breach the 21 day rule. The Regulations will be made on 28 March 2011 and will come into force on 29 March 2011.I have set out below the background to the Regulations and the reasons why it has been necessary to breach the 21 day rule

The new EU Waste Framework Directive (Directive 2008/98/EC) ("the Directive") must be transposed by the UK into its domestic law. In Wales, the Welsh Ministers are responsible for transposition, having been designated to make legislation for this purpose using the powers at section 2(2) of the European Communities Act 1972. In addition, the powers at section 2 of the Pollution, Prevention and Control Act (to make regulations to for the purpose of regulating pollution) have been transferred to the Welsh Ministers: these powers also enable subordinate legislation to be made to transpose the Directive.

As there are no substantive issues of fact which would justify a transposition for Wales which would be different to that required for England, the Welsh Ministers have worked with the Secretary of State for Environment, Food and Rural Affairs to develop joint consultations and composite legislation which would transpose the Directive for both England and Wales: the Waste (England and Wales) Regulations 2011 ("the England and Wales Regulations").

The Directive's deadline for transposition expired on 12 December 2010. Following two comprehensive consultations, it is now intended that the transposing legislation will come into force early in March. It is essential that this is not further delayed, as the UK is now liable to immediate infraction proceedings with the consequent risk of very serious fines.

The Directive consolidates and replaces previous Directives on waste (it repeals Directives 75/439/EEC, 91/689/EEC and 2006/12/EC) and it also strengthens the EU's policy on waste in key areas such as waste prevention and the reduction of the environmental impacts of waste generation.

Transposition of the Directive's requirements therefore necessitates revision to a wide range of existing legislation in England and Wales. Much of this has been made using powers transferred to or conferred on the National Assembly for Wales and subsequently the Welsh Ministers, and in many cases the legislation has been made separately by them for Wales (although its content is essentially identical to equivalent legislation made by the Secretary of State for England).

Bae Caerdydd • Cardiff Bay
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In order to amend Welsh subordinate legislation (i.e. made by the Assembly or the Welsh Ministers) it is of course necessary to amend both the Welsh and English versions. However, the England and Wales Regulations, being a composite instrument, will be made in English only. It would nevertheless have been possible for the Regulations to contain amendments to the Welsh versions of our legislation, but the UK Government were not willing for them to do so for administrative reasons in the context of the transposition timetable..

In order to deal with this issue, it was necessary for the relevant amendments to be contained in a separate instrument to be made by the Welsh Ministers – this is the purpose of the Waste (Miscellaneous Provisions) (Wales) Regulations 2011 ("the Wales Regulations"). It should be noted that all of the amendments in the Wales Regulations to Welsh legislation are equivalent to corresponding amendments to English legislation in the England and Wales Regulations: there are no differences in policy or practical effect. It follows that the Wales Regulations are in nature supplementary to the England and Wales Regulations. The latter are effective to transpose the Directive in relation to England, but there is a gap in relation to Wales which the Wales Regulations have effect to fill.

Given the role of the Wales Regulations in relation to the England and Wales regulations, a draft of the Wales Regulations was appended for information to the Explanatory Memorandum accompanying the draft England and Wales Regulations when these were laid before the Assembly.

The Wales Regulations contain two provisions which refer to and depend on provisions in the England and Wales Regulations.

The first provision is Regulation 5, which amends the definition of "Waste Strategy or Wales" at Regulation 2 of the Town and Country Planning (Local Development Plan) (Wales) Regulations 2005 ("the LDP Regulations")."). The significance of this is that Regulation 13 of the LDP Regulations requires Local Planning Authorities to have regard to the Waste Strategy for Wales in preparing their Local Development Plans. That requirement is essential because appropriate LDP content is a key contributor to the effectiveness of the Waste Strategy for Wales in delivering the Directive's requirement for there to be national waste plans.

The reference in Regulation 5 to the England and Wales Regulations (and therefore to the transposition of the Directive's revised requirements for national waste plans) guarantees, straightforwardly and clearly, that the document which LPAs take into account in preparing their LDPs will be a national waste plan which complies with the Directive.

The second provision is paragraph 30 of Part 1 to the Schedule, which provides for Schedule 4 of the Hazardous Waste (Wales) Regulations 2005 to be substituted by the Schedule set out in Part 3 of the Schedule to the Wales Regulations. Part D of the new Schedule requires consignors of waste to confirm that they have applied the duty to apply the waste hierarchy as required by regulation 12 of the England and Wales Regulations.

Regulation 35 of the Hazardous Waste (Wales) Regulations 2005 requires that anyone removing hazardous waste from premises must complete a consignment note in the form set out in Schedule 4 (or a form requiring the same information in substantially the same format)

A key reason for the substitution of the new Schedule 4 is the Directive's requirement that persons undertaking waste activities must take all reasonable measures to apply the Directive's hierarchy of priorities for waste: i.e. prevention, preparing for re-use, recycling, other recovery, and disposal. This requirement is transposed by Regulation 12 of the England and Wales Regulations. The waste hierarchy duty will be particularly relevant where a person is considering the disposal of hazardous waste. Thus it is necessary, in transposition, to provide for the consignment note to demonstrate that the duty has been complied with.

It is considered that there was no satisfactory alternative to making these references. Firstly, it follows from the fact that the England and Wales Regulations are required to transpose the Directive that there were no equivalent existing statutory provisions to which reference could instead have been made.

Secondly, whilst it would in theory have been possible to provide free-standing provisions with the Wales Regulations, these would have been complex, referred directly to or repeated provisions of the Directive rather domestic legislation, and the direct link to the England and Wales Regulations would have been lost: this is considered undesirable as the England and Wales Regulations provide and explain the overall context for the transposition.

As there were no satisfactory drafting alternatives to the references to the England and Wales Regulations, it follows that it is necessary for the Wales Regulations to be made no earlier than the England and Wales Regulations.

However, it is also considered essential to bring the two instruments into force at the same time. Not doing so would result in a staggered and temporarily inconsistent implementation of the Directive in Wales, which would cause significant inconvenience and detriment to all those affected.

Finally, regard was had to the fact that instruments made under the enabling power for the Wales Regulations (section 2(2) of the European Communities Act 1972) may be made using the negative <u>or</u> affirmative procedure. This is at the discretion of the maker of the instrument and no criteria are laid down (see section 59(3) of the Government of Wales Act 2006). It follows that it would in theory have been possible for the Wales Regulations to have been made on an affirmative basis and to have followed a timetable parallel to that of the England and Wales Regulations.

However, in practice the choice of procedure has depended on the nature of the provision being made rather than procedural considerations. The Wales Regulations do not substantially affect the provisions of an Act of Parliament or Assembly Measure, they do not amend any provision of an Act or Measure, and provide only for consequential updatings of subordinate legislation to reflect changes in Directive terminology and objectives. It was concluded, therefore, that it would not be appropriate to make the Wales Regulations under the affirmative procedure.

Therefore, taking into account all above the matters, it was concluded that the detriment caused by the breach of the 21 day Rule, whilst regrettable, would have been outweighed by the detriment and disadvantages arising from the other available options.

A copy of this letter goes to Janet Ryder AM, Chair of the Constitutional Affairs Committee, and to Stephen George, Clerk to the Committee.

Constitutional Affairs Committee Draft Report

CA582

Title: The Social Charges (Means Assessment and Determination of Charges) (Wales) Regulations 2011

Procedure: Negative

Section 1 of the Social Care Charges (Wales) Measure 2010 gives local authorities in Wales a discretionary power to impose a reasonable charge upon adult recipients of non-residential social care services (a "service user"). These Regulations do not require a local authority to impose a charge when it provides or makes arrangements for the provision of a chargeable service; however, in cases where a local authority does determine to impose a charge upon the service user, the charging policy of that local authority must comply with the relevant provisions of these Regulations (and with any regulations made by the Welsh Ministers under section 16 of the Community Care (Delayed Discharges etc.) Act 2003).

Technical Scrutiny

Under Standing Orders 21.2 the Assembly is invited to pay special attention to the following instrument:-

There is a discrepancy between regulation 7 (1) (b) (iv) of the English and Welsh versions of the text. In regulation 7 (1) (b) (iv) the English version makes reference to the words "for services" in respect of the "details of the maximum reasonable charge," in accordance with regulation 5, whereas the Welsh version at regulation 7 (1) (b) (iv) omits to include the words "for services," and so it is not clear in respect of what the maximum reasonable charge should be imposed in accordance with regulation 5 of the Welsh version.

(Standing Order 21.2 (vi) that its drafting appears to be defective or it fails to fulfil statutory requirements; and Standing Order 21.2 (vii) that there appear to be inconsistencies between the meaning of its English and Welsh texts).

Merits Scrutiny

For points identified for reporting under Standing Order 21.3 in respect of this instrument see CLA(4)-01-11(p1).

Legal Advisers
Constitutional Affairs Committee

April 2011

The Government has responded as follows:

The Social Care Charges (Means Assessment and Determination of Charges) (Wales) Regulations 2011

The reporting point is accepted. The Government intends to bring forward amending legislation at the earliest opportunity and in any event within 3 months from the coming into force of the Regulations.

Explanatory Memorandum to:

- **The Social Care Charges (Means Assessment and Determination of Charges) (Wales) Regulations 2011 - Social Care, Wales 2011 No.962 (W.136);**

- **The Social Care Charges (Direct Payments) (Means Assessment and Determination of Reimbursement or Contribution) (Wales) Regulations 2011 - Social Care, Wales 2011 No. 963 (W.137);**

- **The Social Care Charges (Review of Charging Decisions) (Wales) Regulations 2011 – Social Care, Wales 2011 No. No.964 (W.138).**

This Explanatory Memorandum has been prepared by the Adult Social Services Policy Division of the Health and Social Services Directorate General and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 24.1.

Minister's Declaration
In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the regulations listed above. I am satisfied that the benefits outweigh the costs associated with them.

Gwenda Thomas AM,

Deputy Minister for Social Services

24 March 2011

Description

1. In relation to local authority charging for non-residential social services the respective Regulations will introduce from 11th April 2011 the following:

The Social Care Charges (Means Assessment and Determination of Charges) (Wales) Regulations 2011

- The classes of persons who may not be charged and the services for which a charge may not be made;
- That an authority's power to set a reasonable charge is subject to a maximum charge of £50 per week;
- The content and format of an invitation, and the responses to these, to request a means assessment to be issued to those receiving or to receive a service for which the authority makes a charge ;
- Where a means assessment is requested, sets out the process to be used including the financial safeguards that should be afforded to service users in those assessments;
- The procedure an authority should use in determining a charge and the effect of such a determination;

The Social Care Charges (Direct Payments) (Means Assessment and Determination of Reimbursement or Contribution) (Wales) Regulations 2011

- For those in receipt of direct payments to obtain the non-residential services they require, corresponding provision to that for direct service users outlined in the above Regulations;

The Social Care Charges (Review of Charging Decisions) (Wales) Regulations 2011

- A right to request a review of any decision to impose a charge for the services received. In relation to those in receipt of direct payments a corresponding right to request a review of any decision to impose a contribution or reimbursement for the direct payments they receive;
- The situations in which a request for a review may be made, the content and format of that request and the acknowledgement that an local authority must issue;
- The process an authority must use in considering such requests, the timescales for this and the factors an authority must take into account in determining them;
- The actions an authority must take once a decision has been made and the arrangements for the payment of any charge, contribution or reimbursement in dispute during the period of the review and subsequently.

Matters of special interest to the Constitutional Affairs Committee

2. In order to bring into force in Wales the above Regulations it has become necessary to breach the 21 day rule. Given the level of detail that these Regulations have of necessity needed to cover, their development has required extensive and prolonged engagement with stakeholders; both those representing local authorities and those representing service users. This was to ensure that they afforded service users the consistency of approach and financial safeguards required, while at the same time introducing arrangements which were practical for authorities to administer. This process has, therefore, been highly technical involving charging, financial and complaint officers from local government, as well as a range of individuals from the organisations representing older and disabled people. This has included ensuring that, in relation to

direct payments, the changes account for all of the categories of individuals who are eligible to receive direct payments. That category is being extended and has recently been the subject of separate Regulations laid in relation to direct payments which will also come into force on 11th April. As a result it has not been possible to table these Regulations relating to local authority charging for non-residential social services before now.

Legislative Background
3. The regulations are made by Welsh Ministers in exercise of the powers conferred upon them by sections 2(2), 3(1), 4(1)(d), 4(3)(b), 4(4), 5(2)(a), 5(4), 6(5), 7(2), 8(3), 9(4)(d), 10(4)(f), 11, 12 and 17(2) of the Social Care Charges (Wales) Measure 2010.

4. The three statutory instruments are subject to the negative procedure.

Purpose and Intended effect of the legislation
Policy Intention
5. Homecare and other non-residential social services are provided by local authorities to disabled and older people who are assessed as having care needs that require such services. Over 66,000 adults in Wales receive community based services each year upon which they rely to support their every day living. Local authorities presently have the discretion to charge for these services and around 14,000 service users annually are charged.

6. Independent research has identified that wide variations exist in almost every aspect of this local authority charging; in the services for which a charge is made; in the means assessments undertaken to establish a service user’s ability to pay a charge; in the allowances and disregards authorities have in their means assessments; in the level of charges for similar services; and in the way service users are informed of their charges and are able to have these reviewed if they wish. This has resulted in a wide range of differing processes, and a wide range in charge levels from relatively low amounts to unlimited charges, between authorities for the same services being provided. This has led to a perception of unequal and potentially unfair treatment of service users and confusion over the arrangements for charging that apply in any given local authority area.

7. As a consequence the Assembly Government has a “One Wales” commitment to obtain the legislative powers, and to then introduce, more consistency in local authority charging for these services so as to introduce a more level playing field between authorities for the benefit of service users. As a result following the making of the National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2008, last year Welsh Ministers obtained the powers to tackle this issue with the making of the Social Care Charges (Wales) Measure 2010. This allows Welsh Ministers via regulations and statutory guidance to introduce a new charging regime for non-residential social services so as to introduce more consistency in key elements of the charging process and in charges set themselves. The three statutory instruments covered by this Explanatory Memorandum each seek to implement respective parts of this new charging regime.

Effects

8. The three statutory instruments have differing effects:

The Social Care Charges (Means Assessment and Determination of Charges) (Wales) Regulations 2011

- Classes of persons who may not be charged and the services for which a charge may not be made – presently authorities have the discretion to charge any class of person for the service they receive but are advised by guidance not to charge those with a diagnosis of CJD given the harm they have already suffered. The guidance also advises them not to charge those who have been assessed as having an income below a set level linked to their personal circumstances and disability (referred to as a "buffer". This term is explained in more detail later). This is to protect service users with low incomes. The regulations seek to put both on a statutory basis. Authorities cannot charge for after care services provided in accordance with section 117 of the Mental Health At 1983. The regulations seek to add to the services that cannot be charged for by including transport to a day service where transport is provided or commissioned by an authority and where this, and the attendance at the day service, have been identified as a requirement of a person's care assessment. This is to put such individuals on a par with those older and disabled people who receive free bus transport through concessionary fares;

- Authority's power to set a reasonable charge subject to a maximum charge of £50 per week – At present authorities are free to set their charges for the services they provide at whatever level they consider reasonable. Some authorities operate a weekly maximum charge that a service user would be expected to pay, albeit that such maximums can still be substantial sums (eg £200 or £300 per week); many authorities do not operate a maximum charge. The regulations seek to introduce a Wales wide maximum charge of £50 per week for all of the services an individual receives which are provided by the enactments listed in section 13 of the Measure. This is to reduce the wide variations in weekly charge levels between authorities that service users are asked to pay, sometimes for the same services. The only exception to this would be those services which an individual receives which substitute for ordinary living costs, as such the provision of meals or laundry services, which would be outside of this maximum;

- Requirement for a local authority to issue an invitation to a potential service user, or an existing service user in specified circumstances, to request the authority undertakes a means assessment to determine how much, if anything, they will be required to pay for their services - There is currently no standard approach between local authorities in the way in which service users are engaged with the process of seeking assistance in the cost of meeting the charges for non-residential care services. These regulations require all local authorities to issue an invitation to a potential service user (or an existing service user in certain circumstances, such a change in the type or level of the services he or she requires) to seek an assessment of their financial means with a view to the authority making a determination as to that person's ability to pay the authority's standard (or any) charge for the provision of the services he or she has been assessed as requiring;

- Content and format of an invitation, and the response to this, to request a means assessment required to be issued to those receiving or to receive a service – At present authorities undertake a means assessment on those to receive a service for the first time, or where the service is to change, or the financial circumstances of the service user has changed. However, there is nothing governing how, when and in what format authorities go about this. Hence practice in relation to these varies between authorities for what is a consistent part of the charging process. Section 4 of the Measure places a duty on an authority to invite a person who is to receive a service for which an authority has decided to charge to request a means assessment, while section 9 of the Measure extends this duty where the circumstances of the service, or the financial circumstances, of an existing service user have changed and an authority wishes to replace a determination of an existing charge. The regulations seek to introduce a consistent format for these invitations in terms of the information provided to services users, in terms of them being in writing or in any other format appropriate to the communication needs of the service user, and in terms of allowing users to nominate a third party to act for them, or assist them, in this process. The regulations also seek to introduce a consistent 15 working days that a service user has to respond to such an invitation and to provide any documentation or information the authority considers they require to make a decision on a charge. They also seek to allow a service user to provide such information by means of a home visit should they wish, or to request additional time to provide documentation or information should they feel they require this. They also allow for an authority to proceed to undertake a means assessment on the basis of known information should a service user not respond to an invitation, or seek an extension of time and not respond after that has elapsed;

- Where a means assessment is requested, the process to be used including the disregards of capital and income that should be afforded the service user in these – Authorities are currently advised by guidance that when undertaking a means assessment they should disregard the value of a person's main residence and where they also take into account other forms of capital, they should be as least as generous to the service user in applying those as the allowances set out in the regulations governing residential care charging. Authorities are also advised to disregard in full all amounts received by the service user as earnings or savings credits so as to promote the independence of service users. The regulations seek to put all of these disregards on a statutory basis. They also seek to introduce a further disregard in relation to ex-gratia payments made to those who contract hepatitis C and/or HIV through contaminated blood or blood products, given the purpose of these payments is to compensate those affected for the harm they have suffered;

- The procedure to be used in determining a charge and the effect of such a determination – Authorities are currently advised by guidance to ensure any charge set for a service does not reduce a service user's remaining income below the amount of their Income Support, Employment and Support Allowance or Guarantee Pension Credit, plus a "buffer" of at least 35% of that amount. This is to ensure that after charging users have at least a minimum amount to meet their daily living costs. In addition, authorities are advised to allow at least a

further 10% of a service user's entitlement (to make at least 45% in total) as a contribution towards the additional livings costs a user will have as the result of a disability or medical condition. The regulations seek to put these financial safeguards for service users on a statutory basis. Where a service user is charged for the first time, or where an existing charge is to be amended, the regulations make it clear that an authority cannot impose that charge until the service user has been provided with a statement of that charge in accordance with section 10(4) of the Measure (which details the content and format of such statements);

The Social Care Charges (Direct Payments) (Means Assessment and Determination of Reimbursement or Contribution) (Wales) Regulations 2011

- These regulations make corresponding provision for those persons who are in receipt of direct payments to secure the provision of the non-residential social services they require, to that made for direct service users as outlined in the above mentioned regulations. This is so that persons who receive direct payments may benefit equally; provision is introduced for classes of persons and services for which a contribution or reimbursement from a direct payments can not be made or sought; such contributions or reimbursements being limited to a maximum of £50 per week; along with the arrangements governing the invitation, and responses to an invitation, to a means assessment where it is proposed that a contribution or reimburse is to be sought from a person's direct payment; and the arrangements governing the undertaking of the means assessment, the determination of a contribution or reimbursement and the effects of such a determination;

The Social Care Charges (Review of Charging Decisions) (Wales) Regulations 2011

- Introduces a right to request a review of any decision to impose a charge, contribution or reimbursement for the services received – Authorities currently use a range of methods for reviewing a charge, contribution or reimbursement, ranging from a decision made by a senior officer in an authority to a panel of senior officers and councillors. The procedure and timescales authority's use in processing reviews also vary so that no two review processes in operation are the same. The regulations therefore seek to create a right for a service user or direct payments recipient to request a review of a decision to impose a charge, contribution or reimbursement, in connection with the services they receive and to define the circumstances in which a review can be requested. They also confirm that a request can be made either orally or in writing and that should they wish, a requester can appoint a third party (such as a friend, relative or advocacy) to handle the review for them or to help them with any part of the review;

- The content and format of an acknowledgement of a request a local authority must issue – The regulations set out a consistent acknowledgement of a request for a review that an authority must issue. This is to ensure that all requesters are provided with similar information, in a consistent format and timescale. Hence the regulations specify the content of an acknowledgement (eg how the authority will conduct the review, providing a named contact in an authority to speak to about

the review if they wish), that it should be provided within 5 working days of receipt of a request and that it should be provided in writing and in any other format to meet the communication needs of the requester (eg Braille). It must also confirm what additional information or documentation an authority requires to consider the request and confirm that if a requester wishes, such information or documentation can be provided by means of a home visit by an appropriate officer of the authority. It should also inform requesters that they have 15 working days to provide any additional information or documentation sought. An acknowledgement must also inform a requester that during the period of the review, they are not obliged to pay their charge, contribution or reimbursement, but that should they choose not to do so, depending upon the outcome of the review they make be asked to make any arrears of payment;

- The process an authority must use in considering requests, the timescales involved and the factors that must be taken into account in determining them – If an authority can determine a review immediately (eg it is a mathematical error in the calculation of the charge) the regulations set out that an authority should do this working 5 working days so that the acknowledgement issued also becomes the determination of the review. If the requester has problems in providing requested additional information or documentation within the 15 working days allowed, the regulations allow for the requester to ask for an extension of this period and for authorities to grant reasonable requests for such extensions.

  The regulations place a duty on authorities to determine a review once they have sufficient information and documentation to do so and to implement its findings. A determination must be made within 10 working days of reaching this position and issued to a requester. Authorities also have a duty to appoint a member of members of its staff to deal with such reviews who must, in making a determination of a review, take into account certain specified factors. For example, the requirements of the Measure and regulations, the authority's charging policy, the requester's income and expenses and any circumstances that may affect the requester's ability to pay a charge, contribution or reimbursement. The regulations also place a duty on authorities to issue a statement of the charge, contribution or reimbursement to be levied should the outcome of the review lead to an amendment of these. Should the outcome of the review lead to an overpayment having been made, the regulations place a duty on authorities to refund such amounts in full within 10 working days of issuing the review's determination. Should it lead to an underpayment, authorities have the discretion to recovery an arrears if they wish but where they choose to do so, the regulations place a duty on them to ensure that this does not cause undue financial hardship to the requester and if it does, to offer the requester the option of repaying any amount in periodic instalments.

Consultation
9. The details of consultation undertaken are included in the Regulatory Impact Assessment below.

Regulatory Impact Assessment – Options, Costs and Benefits

The Social Care Charges (Means Assessment and Determination of Charges) (Wales) Regulations 2011

Option 1: Do Nothing
10. Not making these regulations would leave local authorities with substantial discretion as to the class of persons which they charged for the receipt of non-residential social services, as to the services for which a charge is made, as to how they undertake their means assessments to consider a charge and in the level of the charge set. Inconsistency and perceived inequity in such charging practices, procedures and charge levels would remain with nothing to prevent this situation worsening. Service users would not have a right to receive an invitation for a means assessment or to request one, and where means assessments took place there would be no legislation to govern the operation, content, frequency or timings of these. Service users, and their financial means, would continue to be treated differently by differing authorities in this process. The financial safeguards for service users on low incomes who are charged for their services would not be enshrined in legislation, with authorities free to set charge levels at substantially higher amounts than the £50 per week proposed by the regulations to the determent of service users' available income to meet their daily living costs.

Cost
11. There would be no new cost implication for local government from this option but the potential for a new cost implementation for service users should authorities choose to maximise charge income further from charging for these services.

Benefits
12. This option would provide no new benefits to recipients for non-residential social services but would allow local government, if it wished, to increase its income from this charging further.

Option 2: Make the Legislation
13. Making the legislation would create a reasonable balance between authorities retaining an element of discretion to determine their own charging policy for non-residential social services and protecting the users of the service. Authorities would still retain the discretion to change; to determine who to charge; the services for which it would make a charge; and in setting the level of that charge. What the regulations would do, however, is to set out certain categories of individuals who it would be unreasonable to charge at all; to set out services for which Ministers thought it was unreasonable to charge; to confirm forms of capital and income which Ministers consider ought to be excluded from the means assessment to aid users' ability to meet their daily living costs; and to introduce a Wales wide maximum charge to address the inequity of wide variations in charge levels across authorities for similar services. The regulations would also introduce an element of consistency across authorities in the means assessment and charging process, and in the provision of information to service users, so users in all parts of Wales would know what to expect when being charged. these.

Costs

14. Following a detailed costings exercise with authorities it is estimated that making these regulations, and the corresponding regulations for direct payments recipients below, would cost £10.1 million per annum in total in lost income to authorities. In line with the Partnership Agreement with local government, where the Assembly Government will compensate authorities for new financial burdens, this amount of funding has been included in the local government settlement for 2011-12 onwards.

Benefits

15. Local authorities would still be free to determine certain elements of their charging policies to match local circumstances and priorities, while at the same time financial protection being afforded to those services users with particular circumstances or low levels of income. The charging process would be clearer in, and more consistent between, authorities to aid both charging officers and service users alike. In addition, the introduction of a Wales wide maximum charge would remove the inequity of wide variations in charge levels across authorities for similar services.

The Social Care Charges (Direct Payments) (Means Assessment and Determination of Reimbursement or Contribution) (Wales) Regulations 2011

16. The options, costs and benefits in relation to these regulations are the same as for the regulations above in relation to means assessments and determinations of charges for direct service users. The only difference would be that the impacts, costs and benefits would be in relation to the contributions and reimbursements imposed by authorities on those in recipient of direct payments to meet their assessed care needs, as opposed to a direct charge for a service provided. Hence the impacts, costs and benefits are on the means assessments, determinations and level of contributions and reimbursements in similar ways to those which result in a direct charge for a direct service user.

The Social Care Charges (Review of Charging Decisions) (Wales) Regulations 2011

Option 1: Do Nothing

17. While all authorities undertake a review of charging decisions at a user's request, the procedures, processes, timescales and nature of these vary greatly between authorities, even for reviews on similar issues. Hence not making the regulations will maintain the status quo of some users having their review decided quickly by a senior officer in an authority, while others with a similar complaint will have a lengthy review process to encounter with the possibility of having to appear in front of a panel of officers and councillors to explain their case. Given that the client group who are charged for services are disabled and older people, many service users will find complex procedures confusing and appearing before panels intimidating. Hence there has been a clear message from service user representatives that a quicker, simpler and consistent review process was required.

Cost

18. There would be no new cost implication to local government from this option.

Benefits

19. This option would provide no new benefits to those who wish to have their charge, contribution or reimbursement reviewed. Local authorities would be able to continue to operate their individual review procedures in their areas.

Option 2: Make the Legislation
20. Making the legislation will introduce a clear, consistent review process across all authorities, irrespective of the nature of the complaint. It will enable service users to have clear, consistent information about how their request for a review will be dealt with, what information or documentation they need to provide in support of this and what will happen to their charge, contribution or reimbursement during the review period. It will set a timescale for the review so that service users and authorities know what needs to happen by when, and provide for authorities to determine reviews in a quicker, more consistent manner.

Cost
21. There would be no new cost implication to local government from this option. All authorities already undertake reviews and so the regulations merely introduce a change in the way these are undertaken as opposed to placing new burdens on authorities.

Benefits
22. Introducing a clear, consistent review process across all authorities will address the inequitable manner in which authorities currently handle requests for a review of a charge, contribution or reimbursement. Those that request such reviews will be better informed about the process and in many cases will get a decision in a less intrusive manner, and quicker timeframe, than at present

Consultation
23. Following the making of the Social Care Charges (Wales) Measure 2010, Ministers established three stakeholder working groups, all of which had both service user and local government representation upon. One considered the detail of the operational changes that would need to be introduced by the regulations in relation to means assessments and determination of charges, both in relation to direct service users and those in receipt of direct payments. One considered the detail of the operational changes that would need to be introduced by the regulations relating to reviews of charging decisions, while the remaining group considered the practical arrangements authorities would need to undertake in preparation for the implementation of the regulations. Advice from these groups informed the drafting of the three regulations now being made.

24. In addition, a public consultation was held on a draft of the resulting regulations which concluded in February this year. Some 26 responses were received which have informed the final regulations being made.

Competition Assessment
25. Not applicable.

Post Implementation Review
26. Arrangements are being made with local authorities to undertake, following implementation of the regulations, a review of their impacts. This will include information on the numbers of services users who have benefitted from them, in relation to the

impact that this has had on their charge levels, the income local authorities have lost as a result of their implementation and whether there have been any unintended consequences of their introduction. This information will inform any review of the regulations that may be necessary, as well as any change to the financial arrangements put in place with authorities that may be required.

W E L S H S T A T U T O R Y
I N S T R U M E N T S

2011 No. 962 (W. 136)

SOCIAL CARE, WALES

The Social Care Charges (Means Assessment and Determination of Charges) (Wales) Regulations 2011

EXPLANATORY NOTE

(This note is not part of the Regulations)

Section 1 of the Social Care Charges (Wales) Measure 2010 ("the Measure") gives local authorities in Wales a discretionary power to impose a reasonable charge upon adult recipients of non-residential social care services (a "service user").

These Regulations do not require a local authority to impose a charge when it provides or makes arrangements for the provision of a chargeable service ("chargeable service" is defined in section 13 of the Measure); however, in cases where a local authority does determine to impose a charge upon the service user, the charging policy of that local authority must comply with the relevant provisions of these Regulations (and with any regulations made by the Welsh Ministers under section 16 of the Community Care (Delayed Discharges etc) Act 2003).

Regulation 4 prescribes the classes of persons upon whom and services in respect of which no charge may be imposed by a local authority.

Regulation 5 prescribes that a local authority's power to determine a reasonable charge for a chargeable service, or combination of services is subject to a maximum reasonable charge of £50 per week; it also contains qualifications to this general proposition and specifies the steps to be taken by a local authority to calculate the amount of the charge which a service user will be liable to pay.

Regulations 6 to 16 detail the steps in the process of assessing a service user's financial means. They also specify the matters which a local authority must take into account when making an assessment of a service user's means and in making a determination as to the

ability of that person to pay a reasonable charge for the service or services provided.

Regulation 7 requires a local authority to issue an invitation to a service user to request a means assessment. Subsequent regulations make provision for the time in which information or documentation is to be supplied to a local authority (regulation 8), requests for an extension of time in which to provide such information or documentation (regulation 9), the consequences of failing to respond to an invitation to request a means assessment in full or at all (regulations 10 and 11), and the withdrawal of such a request (regulation 12).

Regulation 13 prescribes the circumstances in which a local authority is not under a duty to undertake an assessment of a service user's means.

Regulation 14 contains provision to which a local authority must give effect when undertaking an assessment of a service user's means in accordance with section 5(1) of the Measure.

Regulation 15 makes provision about the matters which a local authority must take into account when determining the ability of a service user to pay a reasonable charge for the chargeable services that are offered to, or provided for, that person.

Regulation 16 makes provision for the date from which a charge may be imposed.

Regulations 17 and 18 contain savings provision for assessments of means and determinations of a service user's ability to pay a charge made before the coming into force of these Regulations.

Regulations 19 and 20 contain transitional and transitory provision.

2011 No. 962(W. 136)

SOCIAL CARE, WALES

The Social Care Charges (Means Assessment and Determination of Charges) (Wales) Regulations 2011

Made *24 March 2011*

Laid before the National Assembly for Wales *29 March 2011*

Coming into force *11 April 2011*

The Welsh Ministers, in exercise of the powers conferred by sections 2(2), 3(1), 4(1)(d), 4(3)(b), 4(4), 5(2)(a), 5(4), 6(5), 7(2), 8(3), 9(4)(d), 10(4)(f) and 17(2) of the Social Care Charges (Wales) Measure 2010(**1**), make the following Regulations:

Title, commencement and application

1.—(1) The title of these Regulations is the Social Care Charges (Means Assessment and Determination of Charges) (Wales) Regulations 2011 and they come into force on 11 April 2011.

(2) These Regulations apply in relation to Wales.

Interpretation

2. In these Regulations—

"the Measure" *("y Mesur")* means the Social Care Charges (Wales) Measure 2010;

"assessable income" *("incwm asesadwy")* means that part of a service user's income in respect of which a local authority may make a determination in accordance with section 7 of the Measure; it does not include the income which a local authority must disregard in accordance with regulation 14;

(**1**) 2010 nawm 2 ("the Measure"). *See* section 17 of the Measure for the definition of "regulations".

“assessment of needs” *(“asesiad anghenion”)* means an assessment by a local authority of a service user’s need for community care services undertaken in accordance with section 47 of the National Health Service and Community Care Act 1990([1]) or section 1 of the Carers and Disabled Children Act 2000([2]) and “assessed as needing” *(“aseswyd bod arno angen”)* is to be read accordingly;

“basic entitlement” *(“hawlogaeth sylfaenol”)* means, in relation to—

(a) income support—

the personal allowance and any premiums to which a service user is entitled, but need not include the severe disability premium (“SDP”) where is it paid, and where a service user is a carer, includes any carer premium that person receives,

(b) employment and support allowance—

the personal allowance and any premiums and components to which a service user is entitled, but need not include the SDP where is it paid, and where a service user is a carer includes any carer premium that person receives,

(c) guarantee credit –

the personal allowance and any additional amount to which a service user is entitled, but need not include the additional amount added for severe disability where it is paid, and where a service user is a carer, includes any additional amount applicable for carers that person receives;

“day service” *(“gwasanaeth dydd”)* means a service provided by a local authority which meets a part of a service user’s assessed needs, which takes place away from that person’s home and which is intended to assist the person in meeting others, or taking up new or practising existing interests and includes work opportunities;

“direct payment” *(“taliad uniongyrchol”)* has the meaning given in regulations 8 and 9 of the Community Care, Services for Carers and Children’s Services (Direct Payments) (Wales) Regulations 2011;

(**1**) 1990 c.19.
(**2**) 2000 c.16.

"dual provision" *("darpariaeth ddeuol")* means that the assessed needs of a service user are being met—

(a) in part by a local authority providing or securing a service or services for that person, and

(b) in part by the person receiving a direct payment in order to secure the provision of another or other services;

"employment and support allowance" *("lwfans cyflogaeth a chymorth")* means either contributory employment and support allowance or income-related employment and support allowance in accordance with Part 1 of the Welfare Reform Act 2007(**1**);

"flat-rate charge" *("ffi unffurf")* means a fixed rate charge for a chargeable service received by a service user which is imposed by a local authority regardless of the means of that service user;

"guarantee credit" *("credyd gwarant")* is to be construed in accordance with sections 1 and 2 of the State Pension Credit Act 2002(**2**);

"home visiting facility" *("cyfleuster ymweliadau cartref")* means a visit (or visits) which are undertaken by an appropriate officer of a local authority to a service user's current place of residence, or at such other venue as the service user reasonably requests, for the purposes of gathering information to inform a means assessment for that person and for providing information and offering assistance in relation to that process;

"in writing" *("mewn ysgrifen")* means any expression consisting of words or figures that can be read, reproduced and subsequently communicated and may include information transmitted and stored by electronic means;

"income support" *("cymorth incwm")* means income support paid in accordance with section 124 of the Social Security Contributions and Benefits Act 1992;

"means assessment" *("asesiad modd")* means an assessment of the financial means of a service user undertaken in accordance with section 5(1) of the Measure and regulation 14 and "assessment of a service user's means" *("asesiad o fodd defnyddiwr gwasanaeth")* is to be read accordingly;

(**1**) 2007 c. 5.
(**2**) 2002 c. 16.

"net income" *(" incwm net")* means, the income that a service user has, or would have left after the deduction from that person's assessable income of the standard charge (or any other charge) imposed under these Regulations, for a service that has been offered to, or provided, for that person;

"provided" *("darparwyd")* in these Regulations includes making arrangements for the provision;

"relevant benefit" *("budd-dal perthnasol")* means—

(a) income support, or

(b) employment and support allowance, or

(c) guarantee credit;

"savings credit" *("credyd cynilion")* has the meaning given in sections 1 and 3 of the State Pension Credit Act 2002;

"service" *("gwasanaeth")* means a chargeable service(**1**), and where the context requires, chargeable services or a combination of chargeable services and "services" *("gwasanaethau")* and "combination of services" *("cyfuniad o wasanaethau")* are to be interpreted accordingly;

"service user" *("defnyddiwr gwasanaeth")* means an adult who has been offered, or who is receiving, a service provided by a local authority;

"working day" *("diwrnod gwaith")* means a day other than a Saturday, Sunday, Christmas Day, Good Friday or a Bank Holiday within the meaning of the Banking and Financial Dealings Act 1971(**2**).

Local authority – power to charge for services

3. If a local authority exercises its power to charge for a service in accordance with section 1 of the Measure (*general power to charge for care services*) it must give effect to the provisions of these Regulations.

Service users upon whom and services in respect of which a charge must not be imposed

4.—(1) A local authority must not impose a charge under section 1 of the Measure upon a service user who—

(a) has been offered or is receiving a service and who is suffering from any form of Creuzfeldt Jacob disease where that disease has been

(**1**) "Chargeable service" is defined in section 13 of the Measure.
(**2**) 1971 c.80.

clinically diagnosed by a registered medical practitioner;

(b) has been offered or is receiving a service provided as part of a package of after care services in accordance with section 117 of the Mental Health Act 1983 (*after care*)(**1**); or,

(c) has had a means assessment undertaken by a local authority and has been assessed as having an income of less than the total amount referred to regulation 15(2).

(2) A local authority must not impose a charge under section 1 of the Measure for any of the services specified in this paragraph—

(a) the provision of transport to attend a day service where the transport is provided by a local authority and where attendance at the day service and the provision of transport to enable such attendance are included as part of the service user's assessment of needs;

(b) the provision of a statement of information in accordance with section 10(4) of the Measure *(provision of information about charges)*.

(3) Nothing in this regulation affects the discretion of a local authority to specify additional categories of service user or services upon whom or in respect of which a charge may not be imposed.

(4) Regulations 5 to 16 do not apply to a service user referred to in sub-paragraphs (a) or (b) of paragraph (1).

Maximum reasonable charge for a service

5.—(1) A local authority must exercise the power in section 1(2) of the Measure *(to determine a reasonable charge for the provision of a service)* in accordance with the provisions of this regulation.

(2) Subject to paragraphs (3) and (4), the maximum amount that a local authority may determine to be a reasonable charge for the provision of a service or combination of services to a service user ("maximum reasonable charge") *("uchafswm ffi rhesymol")* is £50 per week.

(3) Subject to paragraph (4), where a service user has assessed needs which are met by way of dual provision £50 per week is the maximum of the aggregate of the amounts that a local authority may require the service user to pay in respect of that provision by way of—

(a) a charge, and

(b) a payment towards the cost of securing the provision of the service calculated in accordance with the Social Care Charges

(**1**) 1983 c. 20.

(Direct Payments) (Means Assessment and Determination of Reimbursement or Contribution) (Wales) Regulations 2011.

(4) When calculating the maximum reasonable charge that a service user may be liable to pay, a local authority—

(a) must disregard the charge for any service for which it imposes a flat-rate charge, and

(b) may impose the charges in respect of such a service in addition to the maximum reasonable charge.

Procedure for determining a charge

6.—(1) When calculating the amount that a service user pays or may be required to pay for the service received by or offered to that service user, a local authority must adopt the following procedure—

(a) calculate the amount of its reasonable costs for the service received by or offered to the service user;

(b) disregard from that total the amount of any charges for a service referred to in regulation 5(4);

(c) apply the maximum reasonable charge to this resulting amount where the resulting amount would otherwise exceed it and this, subject to sub-paragraph (d), is the amount of the charge that the service user may be required to pay;

(d) subject the amount calculated in accordance with sub-paragraph (c) to a determination of the service user's ability to pay a charge in accordance with section 7 of the Measure and regulation 15.

(2) The step referred to in paragraph (1)(d) will only be applied where—

(a) the service user has requested, and

(b) the local authority has undertaken,

an assessment of the service user's means in accordance with section 5(1) of the Measure and regulation 14.

Invitation to request a means assessment

7.—(1) Where a local authority is required by section 4 of the Measure *(invitation to request a means assessment)* or determines in accordance with paragraph (2) to issue an invitation to a service user to request an assessment of his or her means under section 5(1) of the Measure *(duty to carry out a means assessment)*, the local authority must ensure that the invitation contains full details of—

(a) the services that are being offered to, or provided for, the service user for which a charge is being considered;

(b) its charging policy, which must include the following—

(i) its policy in relation to which, if any, of the services it provides are subject to a charge,

(ii) details of the standard charge([1]) which may be imposed in relation to any such service,

(iii) details of any service for which a flat-rate charge is imposed, and

(iv) details of the maximum reasonable charge for services that may be imposed in accordance with regulation 5, or the maximum reasonable charge that the local authority applies, where that charge is lower;

(c) its means assessment process;

(d) its procedure for dealing with a means assessment for a service user who receives only services for which a flat-rate charge is imposed;

(e) the information and documentation that a service user is required to provide in order that an assessment of the service user's means can be undertaken;

(f) the time, as specified in regulation 8, within which a service user is required to supply the information and documentation referred to in sub-paragraph (e);

(g) the format in which it will accept the information and documentation referred to in sub-paragraph (e);

(h) any home visiting facility that it provides within its area;

(i) the consequences of failing to respond to the invitation in accordance with sub-paragraph (f);

(j) the named individuals within the authority whom a service user should contact should that person require additional information or assistance in respect of any of the processes attendant upon the issue of the invitation;

(k) a service user's right to appoint a third party to assist, or to act on his or her behalf, in respect of all or part of the means assessment process; and

(**1**) "Standard charge" is defined in section 7(4) of the Measure.

(l) the contact details of any organisation in its area which provides support or assistance of the type referred to in sub-paragraph (k).

(2) Where a local authority reasonably considers that one or more of the circumstances prescribed by section 9(4) of the Measure *(replacement by authority of determinations as to ability to pay)* applies, it must invite a service user to request a new assessment of his or her means under section 5(1) of the Measure with a view to its making a further determination of that person's ability to pay a charge in accordance with section 9 of the Measure and regulation 15.

(3) A local authority must provide a service user with the information referred to in paragraph (1) in writing, or in any other format that is appropriate to the communication needs of the service user(**1**).

Response to an invitation to request a means assessment

8.—(1) A service user or, subject to paragraphs (3) or (4), a service user's representative, must provide a response to the local authority within 15 working days (or such longer period as a local authority may reasonably allow in accordance with regulation 9) of the date the invitation was issued.

(2) A service user complies with the requirement set out in paragraph (1) if that person or that person's representative—

(a) requests that the local authority carries out an assessment of his or her means in accordance with section 5(1) of the Measure;

(b) requests assistance from any home visiting service that is available, if such assistance is required;

(c) provides the information that has been requested by the local authority in the format that the local authority has agreed to accept it;

(d) provides the documentation that has been requested by the local authority;

(e) requests an extension of time, where one is required, in which to provide the information or documentation (or both) that has been requested in accordance with regulation 7(1)(e), giving the reason or reasons why an extension of time is required.

(3) Where a service user has appointed a representative to act on his or her behalf, the service

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(**1**) For an explanation of the meaning of *"any format appropriate to the communication needs of the service user"*, please refer to the guidance published by the Welsh Ministers, entitled Introducing More Consistency in Local Authority Charging for Non-Residential Social Services.

user must provide the local authority with the following—

(a) the name and address of the representative,

(b) confirmation that the representative is willing to act on his or her behalf,

(c) details of the nature and extent of the representative's involvement in the means assessment process, and

(d) details of the nature and extent of the information that the local authority may share with his or her representative.

(4) Where a representative has been appointed to act on behalf of a service user by the Court of Protection or in accordance with the Enduring Powers of Attorney Act 1985(**1**) or the Mental Capacity Act 2005(**2**), the deputy or attorney so appointed must provide the local authority with—

(a) the original or a certified copy of the registered enduring power of attorney, or lasting power of attorney, or a certified copy of the appropriate order of the court, and

(b) documentation to prove the identity and address of the attorney or deputy and of the service user for whom he or she is acting.

(5) Unless the context otherwise requires, where a representative has been appointed in accordance with paragraph (3) or (4), any reference in this regulation or in regulations 9 to 13 to a service user, includes that person's representative.

(6) Any request made in accordance with paragraph (2) or appointment made in accordance with paragraph (3) may be made or communicated orally or in writing by a service user but must be confirmed by a local authority in writing, or in any other format that is appropriate to the communication needs of the service user.

Request for extension of time in which to provide information or documentation

9.—(1) A local authority must agree to any reasonable request for an extension of time made in accordance with regulation 8(2)(e).

(**1**) 1985 c. 29 ("the 1985 Act"). The Mental Capacity Act 2005 ("the 2005 Act") has replaced the 1985 Act, replacing enduring powers of attorney (although enduring powers of attorney made before 1st October 2007 will continue to be valid) with lasting powers of attorney. The 2005 Act permits the Court of Protection to appoint deputies to make decisions for persons who lack capacity under the 2005 Act. Deputies replace "receivers" (although any receiver appointed before 1st October 2007 will continue to retain their powers but will be treated as a deputy by the Office of the Public Guardian (which has replaced the Public Guardianship Office).

(**2**) 2005 c.9.

(2) If a service user requests an extension of time orally, a local authority may give its response to that request orally, but it must also confirm the response in writing or in any other format that is appropriate to the communication needs of the service user.

(3) When responding to a request for an extension of time a local authority must confirm whether or not the request is granted and if granted, must state the period of the extension.

(4) Where a local authority refuses a request for an extension of time, it must give reasons for its refusal of the request.

Failure to respond to an invitation to request a means assessment

10.—(1) Where a service user fails to respond to an invitation in accordance with regulation 8**,** a local authority may impose the standard charge for the service that has been offered, or which the service user is receiving, and in either case which is the subject of the invitation.

(2) A local authority's power to impose the standard charge in accordance with paragraph (1) is subject to the maximum reasonable charge prescribed in regulation 5.

(3) Where paragraph (1) applies, the charge imposed upon a service user will be payable from the date that a statement is provided by the local authority in accordance with section 10(4) of the Measure *(provision of information about charges)*.

(4) If a service user responds to an invitation to request a means assessment after a local authority has imposed the standard charge, or where relevant, the maximum reasonable charge—

(a) the local authority must proceed to undertake an assessment of the service user's means in accordance with section 5(1) of the Measure *(duty to carry out a means assessment)* and regulation 14 and make a determination in accordance with section 7 of the Measure *(determinations as to ability to pay)*(**1**) and regulation 15;

(b) the actions taken by a local authority under sub-paragraph (a) will not affect the liability of the service user to pay any charges that have been incurred from the date the statement referred to in paragraph (3) was provided; and

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(**1**) Section 7 of the Measure makes provision for a local authority to determine whether it is reasonably practicable for a service user to pay the standard (or any) charge for a service offered or provided to that service user by a local authority.

(c) the statement provided in accordance with section 10(4) of the Measure as a result of the assessment and determination referred to in sub-paragraph (a) ("the second statement") *("yr ail ddatganiad")* will replace the statement provided in accordance with paragraph (3) and the second statement will take effect from the date that it is provided.

(5) In these Regulations any statement, which a local authority is required to provide in accordance with section 10(4) of the Measure is, "provided" *("ddarparu")* on the date that it is issued by a local authority.

Failure to supply all relevant information and documentation

11.—(1) Where a service user has failed to—

(a) supply, or

(b) seek an extension of time in which to supply,

all the information and documentation reasonably requested by a local authority to enable it to undertake an assessment of the service user's means in accordance with section 5(1) of the Measure and regulation 14, the local authority may make an assessment of that service user's means on the basis of the partial information or partial documentation (or both) that has been supplied.

(2) Where paragraph (1) applies, the local authority may—

(a) make a determination in accordance with section 7 of the Measure and regulation 15;

(b) subject to the maximum reasonable charge prescribed in regulation 5, impose a charge upon the service user on the basis of its determination; and

(c) proceed to provide a statement in accordance with section 10(4) of the Measure.

(3) Where a charge is imposed in accordance with paragraph (2), that charge will be imposed from the date that the local authority provides the statement referred to in paragraph (2)(c).

Withdrawal of a request for a means assessment

12.—(1) A service user may withdraw a request for a means assessment by notifying a local authority of his or her decision at any time before the means assessment has been completed.

(2) A service user may notify a local authority of the decision to withdraw a request for a means assessment orally, in writing, or in any other format

that is appropriate to the communication needs of the service user.

(3) Where a request is withdrawn in accordance with this regulation, a local authority may, subject to the maximum reasonable charge prescribed by regulation 5, impose the standard charge for the service that was the subject of the invitation to request a means assessment.

(4) In any case where a service user notifies a local authority of the withdrawal of his or her request for a means assessment, the local authority must—

(a) acknowledge receipt of the notification in writing and in any other format that is appropriate to the communication needs of the service user;

(b) advise the service user that the withdrawal of this request does not preclude him or her from the submission of a further request for a means assessment in respect of the same or a different service; and

(c) advise the service user whether the standard charge, or the maximum reasonable charge prescribed in regulation 5, will be imposed in respect of the service offered or being received by the service user.

(5) Where a charge is imposed upon a service user in accordance with paragraph (3) it will be imposed from the date that the local authority provides a statement in accordance with section 10(4) of the Measure.

No duty to carry out a means assessment

13. A local authority is under no duty to carry out an assessment of the means of a service user who—

(a) receives only a service or combination of services for which the local authority applies a flat-rate charge, or

(b) fails to respond to an invitation to request a means assessment in accordance with regulation 8, or

(c) withdraws his or her request for a means assessment in accordance with regulation 12.

Means assessment process

14.—(1) Where a local authority carries out an assessment of a service user's means in accordance with section 5(1) of the Measure, it must ensure that the process of assessment that it employs gives effect to the requirements of this regulation.

(2) When undertaking a means assessment, if a local authority takes into account a service user's savings or capital, the local authority must—

(a) subject to sub-paragraph (b) and to paragraph (3), calculate the capital of a service user in accordance with Part 3 of the 1992 Regulations;

(b) disregard the value of a service user's main residence from its calculation of that person's capital.

(3) Nothing in paragraph (2) affects the discretion of a local authority when calculating a service user's capital to apply any criteria that are more generous to the service user than those as from time to time applied in the provisions referred to in paragraph (2)(a).

(4) When undertaking a means assessment, if a local authority takes into account a service user's income, the local authority must—

(a) assess what part of the service user's income properly constitutes "earnings" *("enillion")* in accordance with the definition of "earnings" in regulations 35 and 37 of the Housing Benefit Regulations 2006(**1**), or as the case may be, in regulations 35 and 37 of the Housing Benefit (Persons who have attained qualifying age for state pension credit) Regulations 2006(**2**);

(b) disregard in full those earnings;

(c) disregard in full any amount received by a service user in respect of savings credit; and

(d) disregard in full any payment received by a service user which is referred to in paragraph 24 of Schedule 3 to the 1992 Regulations (sums to be disregarded in the calculation of income other than earnings)(**3**).

(5) Nothing in paragraph (4) affects the discretion of a local authority when calculating a service user's income to apply any criteria that are more generous to the service user than the provisions in paragraph (4).

(6) In this regulation—

(**1**) S.I. 2006/213.

(**2**) S.I. 2006/214.

(**3**) Payments referred to in paragraph 24 of Schedule 3 to the National Assistance (Assessment of Resources) Regulation 1992 are described in paragraph 39 of Schedule 9 to the Income Support (General) Regulations 1987 (S.I. 1987/1967) (sums to be disregarded in the calculation of income other than earnings) as "any payment made under or by the Macfarlane Trust, the Macfarlane (Special Payments) Trust, the Macfarlane (Special Payments) (No.2) Trust …, the Fund, the Eileen Trust, MFET Limited or the Independent Living Fund (2006).".

"the 1992 Regulations" *("Rheoliadau 1992")* means the National Assistance (Assessment of Resources) Regulations 1992(**1**).

Determination as to a service user's ability to pay a charge

15.—(1) Where a local authority makes a determination as to a service user's ability to pay a charge in accordance with section 7 *(determinations as to ability to pay)* or section 9 of the Measure *(replacement by authority of determinations as to ability to pay)* it must give effect to the requirements of this regulation.

(2) A local authority must ensure when determining the charge to be imposed for a service offered to or being received by a service user, that it does not reduce the service user's net income—

(a) where the service user is in receipt of a relevant benefit, to an amount below the total of—

(i) the basic entitlement to the relevant benefit that is being received by that person, and

(ii) an amount of not less than 35% of that entitlement ("a buffer") *("clustog")*, and

(iii) an amount to compensate the service user for disability-related expenditure of not less than 10% of the amount referred to in paragraph (i); or

(b) where the service user is not in receipt of a relevant benefit, to an amount below the total of—

(i) the amount the local authority reasonably assesses, having regard to the person's age, circumstances and level of disability, would be equal to the service user's basic entitlement to a relevant benefit, and

(ii) a buffer of not less than 35% of the amount estimated in paragraph (i), and

(iii) an amount to compensate the service user for disability-related expenditure of not less than 10% of the amount referred to in paragraph (i).

(3) Nothing in this regulation affects the discretion of a local authority to increase the percentage of the buffer or the amount to compensate for any disability-related expenditure when making a determination in accordance with paragraph (1).

(**1**) S.I. 1992/2977.

Effect of a determination of a service user's ability to pay a charge

16.—(1) Where a local authority makes a determination in accordance with regulation 15 as to a service user's ability to pay a charge for a service which—

(a) is being offered to a service user for the first time; or

(b) is being provided for a service user, but for which a charge is being imposed for the first time,

it may not impose a charge until the date that a statement is provided in accordance with section 10(4) of the Measure.

(2) Where a local authority makes a further determination as to a service user's ability to pay a charge in accordance with regulation 7(2) it may not impose, or alter a charge until the date that a statement is provided in accordance with section 10(4) of the Measure.

(3) Where a statement referred to in paragraph (1) or (2) replaces a statement that has previously been provided in accordance with section 10(4) of the Measure ("the earlier statement") *("y datganiad cynharach")*, the earlier statement will continue to have effect until the date the subsequent statement is provided.

Saving

17. Where, immediately before the coming into force of these Regulations —

(a) an assessment of a service user's means, or

(b) a determination of the charge a service user is to pay,

has effect, such assessment or determination will continue to have effect notwithstanding that it was not made in accordance with the Measure and these Regulations.

18. Any assessment or determination referred to in regulation 17 will continue to have effect until replaced by an assessment or determination made in accordance with the Measure and these Regulations.

Transitional provision

19. Where before the coming into force of these Regulations a local authority has obtained information and documentation from a service user to enable it to—

(a) undertake an assessment of the service user's means, or

(b) make a determination of the charge the service user is to pay,

but the assessment has not been undertaken or the determination has not been made upon the coming into force of these Regulations, the local authority must undertake such an assessment in accordance with the provisions of section 5 of the Measure and regulation 14 or such a determination in accordance with the provisions of sections 7 or 9 of the Measure and regulation 15.

Transitory provision

20.—(1) Where an assessment has effect in accordance with regulation 18 a local authority—

(a) must apply the provisions of regulations 4, 5, 6 and 14 to such an assessment, notwithstanding that it was not undertaken in accordance with these Regulations, save that regulation 6(2) does not have effect,

(b) is not required to act in accordance with section 4 of the Measure or regulation 7, save that regulation 7(2) has effect,

(c) must carry out an assessment of a service user's means in accordance with section 5 of the Measure where each of the conditions in section 6 of the Measure are met and the service user has requested such an assessment, and

(d) must make a determination as to a service user's ability to pay a charge, in accordance with regulation 15, as though the assessment of the service user's means had been undertaken in accordance with section 7 or 9 of the Measure.

(2) Regulation 16(3) has effect in respect of any determination made in accordance with paragraph (1)(d) as though the earlier statement referred to in that regulation is a determination which has effect in accordance with regulation 18.

Gwenda Thomas

Deputy Minister for Social Services under authority of the Minister for Health and Social Services, one of the Welsh Ministers

24 March 2011

Jane Hutt AC/AM
Y Gweinidog dros Fusnes a'r Gyllideb
Minister for Business and Budget

Llywodraeth Cynulliad Cymru
Welsh Assembly Government

Lord Dafydd Elis-Thomas AM
Presiding Officer
National Assembly for Wales

29 March 2011

Dear Dafydd,

THE SOCIAL CARE CHARGES (MEANS ASSESSMENT AND DETERMINATION OF CHARGES) (WALES) REGULATIONS 2011

THE SOCIAL CARE CHARGES (DIRECT PAYMENTS) (MEANS ASSESSMENT AND DETERMINATION OF CHARGES) (WALES) REGULATIONS 2011

THE SOCIAL CARE CHARGES (REVIEW OF CHARGING DECISIONS) (WALES) REGULATIONS 2011

I am writing to inform you that in order to bring into force in Wales the above Regulations, all being made under provisions in the Social Care Charges (Wales) Measure 2010, it has become necessary to breach the 21 day rule. These Regulations were all made on 24 March and laid in Table Office on 29 March. They will come into force on 11 April 2011 to coincide with the changes to welfare benefits that the Department for Work and Pensions will make on that day, given the link between these and charging for social care.

These Regulations, when taken with the provisions on the face of the Measure, introduce a new regime in Wales in relation to the charging that local authorities undertake for providing non-residential social services. They introduce more consistency in this charging so as to fulfil the Assembly Government's "One Wales" commitment to make charging for these services "a more level playing field".

The Regulations and Measure make considerable changes to how local authorities may charge those who receive non-residential social services. Currently authorities have wide discretion regarding the services for which a charge may be made, the allowances and disregards of capital and income they operate in means assessments of service users to determine charges, and in the level of charges they set. This has led to differing charging policies operated by authorities in Wales, with wide variations between the services for which a charge is made, in the means assessments they undertake and in the charges they make. The Measure, while maintaining authorities' discretion to charge, allows Welsh Ministers by Regulation to set out a new framework where charging occurs to introduce more consistency. Therefore, the Regulations cover:

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The Social Care Charges (Means Assessment and Determination of Charges) (Wales) Regulations 2011

- The classes of persons who may not be charged and the services for which a charge may not be made;
- That an authority's power to set a reasonable charge is subject to a maximum charge of £50 per week;
- The content and format of an invitation, and the responses to these, to request a means assessment to be issued to a service user where a charge is planned;
- Where a means assessment is requested, the process to be used including the financial safeguards to be afforded service users;
- The procedure an authority should use in determining a charge;

The Social Care Charges (Direct Payments) (Means Assessment and Determination of Reimbursement or Contribution) (Wales) Regulations 2011

- For those in receipt of direct payments to obtain the non-residential social services they require, corresponding provision to that outlined above;

The Social Care Charges (Review of Charging Decisions) (Wales) Regulations 2011

- Introduces a right to request a review of any decision to impose a charge and in the case of those receiving direct payments, to impose a contribution or reimbursement for the direct payments they receive;
- The situations in which a request for a review may be made, the content and format of that request and the acknowledgement an authority must issue;
- The process an authority must use in considering such requests, the timescales for this and the factors an authority must take into account in determining them;
- The actions an authority must take once a decision has been made and the arrangements for the payment of any charge, contribution or reimbursement in dispute during the period of the review and subsequently.

Given the level of detail that these Regulations have of necessity needed to cover to achieve our aim of more consistency, their development has required extensive and prolonged engagement with stakeholders; both those representing local authorities and those representing service users. This was to ensure that they afforded service users the consistency of approach and financial safeguards required in such a new regime, while at the same time introducing arrangements which were practical for authorities to administer. This process has, therefore, been highly technical involving charging, financial and complaint officers from local government, as well as a range of individuals from the organisations representing older and disabled people.

Draft Regulations were subject to a public consultation which concluded on 4 February this year. Since then officials have been considering the responses in liaison with the stakeholder representatives mentioned above. This has included ensuring that, in relation to direct payments, the changes account for all of the categories of individuals who are eligible to receive direct payments. That category is being extended and has recently been the subject of separate Regulations laid in relation to direct payments which will also come into force on 11 April. As a result it has not been possible to lay these Regulations relating to local authority charging for non-residential social services before now.

A copy of this letter goes to Janet Ryder, Chair of the Constitutional Affairs Committee and to Stephen George, Clerk to the Constitutional Affairs Committee.

Jane Hutt

(CSI(4)-01-11

CA583

Constitutional Affairs Committee Draft Report

Title: The Social Care Charges (Direct Payments) (Means Assessment and Determination of Reimbursement or Contribution) (Wales) Regulations 2011

Procedure: Negative

Section 1 of the Social Care Charges (Wales) Measure 2010 gives local authorities in Wales a discretionary power to impose a reasonable charge upon adult recipients of non-residential social care services. The Regulations set out a number of provisions with which local authorities are required to comply when exercising this power.

Technical Scrutiny

Under Standing Orders 21.2 the Assembly is invited to pay special attention to the following instrument:-

1. Regulation 2 (1) (Page 5) – "basic entitlement" – as a result of paragraphs (a) and (b) severe disability premium may be disallowed where it is paid, the text incorrectly refers in both paragraphs to "where is it paid" which creates ambiguity. (Standing Order 21.2 (vi) –that its drafting appears to be defective or it fails to fulfil statutory requirements)

2. Regulation 2 (1) (Page 7) – "home visiting facility" means a visit or visits which are undertaken by an appropriate officer of a local authority to D's current **place of residence**. The Welsh text translates to …..**home or place of residence**. (Standing Order 21.2 (vii) – that there appear to be inconsistencies between the meaning of its English and Welsh texts)

3. Regulation 2 (1) (page 7) – "in writing". The English text refers to 'words or figures' however the welsh text refers to 'words and figures'.

4. Regulation 2 (1) (page 8) – "service user" means an adult who has been offered, or who is receiving, a service provided **or secured** by a local authority. The Welsh text omits the words **or secured.** (Standing Order21.2 (vii) – that there appear to be inconsistencies between the meaning of its English and Welsh texts)

5. Regulation 7 (4) (b) (page 11) – The English text provides that when issuing an invitation to request a means assessment, the invitation must contain full details of its charging policy which **must** include the information in sub-paragraph (1) – (v). The Welsh translation does not **require** such information to be included. (Standing Order21.2 (vii) – that there appear to be inconsistencies between the meaning of its English and Welsh texts)

6. Regulation 7 (4)(e) (page 12) – the English text refers to sub-paragraph (d), but the welsh text refers to (dd) instead of (ch). (Standing Order21.2 (vii) – that there appear to be inconsistencies between the meaning of its English and Welsh texts)

7. Regulation 7 (4) (i) – the English text refers to individuals in the plural. The Welsh text initially refers to individuals, but goes on to refer to single individual "gysylltu ag ef". (Standing Order 21.2 (vii) – that there appear to be inconsistencies between the meaning of its English and Welsh texts)

Merits Scrutiny

For points identified for reporting under Standing Order 21.3 in respect of this instrument see CLA(4)-01-11(p1).

Legal Advisers
Constitutional Affairs Committee

April 2011

The Government has responded as follows:

The Social Care Charges (Direct Payments) (Means Assessment and Determination of Reimbursement or Contribution) (Wales) Regulations 2011

The reporting points are accepted. The Government intends to bring forward amending legislation at the earliest opportunity and in any event within 3 months from the coming into force of the Regulations.

Explanatory Memorandum to:

- **The Social Care Charges (Means Assessment and Determination of Charges) (Wales) Regulations 2011 - Social Care, Wales 2011 No.962 (W.136);**

- **The Social Care Charges (Direct Payments) (Means Assessment and Determination of Reimbursement or Contribution) (Wales) Regulations 2011 - Social Care, Wales 2011 No. 963 (W.137);**

- **The Social Care Charges (Review of Charging Decisions) (Wales) Regulations 2011 – Social Care, Wales 2011 No. No.964 (W.138).**

This Explanatory Memorandum has been prepared by the Adult Social Services Policy Division of the Health and Social Services Directorate General and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 24.1.

Minister's Declaration
In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the regulations listed above. I am satisfied that the benefits outweigh the costs associated with them.

Gwenda Thomas AM

Deputy Minister for Social Services

24 March 2011

Description

1. In relation to local authority charging for non-residential social services the respective Regulations will introduce from 11th April 2011 the following:

The Social Care Charges (Means Assessment and Determination of Charges) (Wales) Regulations 2011

- The classes of persons who may not be charged and the services for which a charge may not be made;
- That an authority's power to set a reasonable charge is subject to a maximum charge of £50 per week;
- The content and format of an invitation, and the responses to these, to request a means assessment to be issued to those receiving or to receive a service for which the authority makes a charge ;
- Where a means assessment is requested, sets out the process to be used including the financial safeguards that should be afforded to service users in those assessments;
- The procedure an authority should use in determining a charge and the effect of such a determination;

The Social Care Charges (Direct Payments) (Means Assessment and Determination of Reimbursement or Contribution) (Wales) Regulations 2011

- For those in receipt of direct payments to obtain the non-residential services they require, corresponding provision to that for direct service users outlined in the above Regulations;

The Social Care Charges (Review of Charging Decisions) (Wales) Regulations 2011

- A right to request a review of any decision to impose a charge for the services received. In relation to those in receipt of direct payments a corresponding right to request a review of any decision to impose a contribution or reimbursement for the direct payments they receive;
- The situations in which a request for a review may be made, the content and format of that request and the acknowledgement that an local authority must issue;
- The process an authority must use in considering such requests, the timescales for this and the factors an authority must take into account in determining them;
- The actions an authority must take once a decision has been made and the arrangements for the payment of any charge, contribution or reimbursement in dispute during the period of the review and subsequently.

Matters of special interest to the Constitutional Affairs Committee

2. In order to bring into force in Wales the above Regulations it has become necessary to breach the 21 day rule. Given the level of detail that these Regulations have of necessity needed to cover, their development has required extensive and prolonged engagement with stakeholders; both those representing local authorities and those representing service users. This was to ensure that they afforded service users the consistency of approach and financial safeguards required, while at the same time introducing arrangements which were practical for authorities to administer. This process has, therefore, been highly technical involving charging, financial and complaint officers from local government, as well as a range of individuals from the organisations representing older and disabled people. This has included ensuring that, in relation to

direct payments, the changes account for all of the categories of individuals who are eligible to receive direct payments. That category is being extended and has recently been the subject of separate Regulations laid in relation to direct payments which will also come into force on 11th April. As a result it has not been possible to table these Regulations relating to local authority charging for non-residential social services before now.

Legislative Background

3. The regulations are made by Welsh Ministers in exercise of the powers conferred upon them by sections 2(2), 3(1), 4(1)(d), 4(3)(b), 4(4), 5(2)(a), 5(4), 6(5), 7(2), 8(3), 9(4)(d), 10(4)(f), 11, 12 and 17(2) of the Social Care Charges (Wales) Measure 2010.

4. The three statutory instruments are subject to the negative procedure.

Purpose and Intended effect of the legislation

Policy Intention

5. Homecare and other non-residential social services are provided by local authorities to disabled and older people who are assessed as having care needs that require such services. Over 66,000 adults in Wales receive community based services each year upon which they rely to support their every day living. Local authorities presently have the discretion to charge for these services and around 14,000 service users annually are charged.

6. Independent research has identified that wide variations exist in almost every aspect of this local authority charging; in the services for which a charge is made; in the means assessments undertaken to establish a service user's ability to pay a charge; in the allowances and disregards authorities have in their means assessments; in the level of charges for similar services; and in the way service users are informed of their charges and are able to have these reviewed if they wish. This has resulted in a wide range of differing processes, and a wide range in charge levels from relatively low amounts to unlimited charges, between authorities for the same services being provided. This has led to a perception of unequal and potentially unfair treatment of service users and confusion over the arrangements for charging that apply in any given local authority area.

7. As a consequence the Assembly Government has a "One Wales" commitment to obtain the legislative powers, and to then introduce, more consistency in local authority charging for these services so as to introduce a more level playing field between authorities for the benefit of service users. As a result following the making of the National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2008, last year Welsh Ministers obtained the powers to tackle this issue with the making of the Social Care Charges (Wales) Measure 2010. This allows Welsh Ministers via regulations and statutory guidance to introduce a new charging regime for non-residential social services so as to introduce more consistency in key elements of the charging process and in charges set themselves. The three statutory instruments covered by this Explanatory Memorandum each seek to implement respective parts of this new charging regime.

Effects

8. The three statutory instruments have differing effects:

The Social Care Charges (Means Assessment and Determination of Charges) (Wales) Regulations 2011

- Classes of persons who may not be charged and the services for which a charge may not be made – presently authorities have the discretion to charge any class of person for the service they receive but are advised by guidance not to charge those with a diagnosis of CJD given the harm they have already suffered. The guidance also advises them not to charge those who have been assessed as having an income below a set level linked to their personal circumstances and disability (referred to as a "buffer". This term is explained in more detail later). This is to protect service users with low incomes. The regulations seek to put both on a statutory basis. Authorities cannot charge for after care services provided in accordance with section 117 of the Mental Health At 1983. The regulations seek to add to the services that cannot be charged for by including transport to a day service where transport is provided or commissioned by an authority and where this, and the attendance at the day service, have been identified as a requirement of a person's care assessment. This is to put such individuals on a par with those older and disabled people who receive free bus transport through concessionary fares;

- Authority's power to set a reasonable charge subject to a maximum charge of £50 per week – At present authorities are free to set their charges for the services they provide at whatever level they consider reasonable. Some authorities operate a weekly maximum charge that a service user would be expected to pay, albeit that such maximums can still be substantial sums (eg £200 or £300 per week); many authorities do not operate a maximum charge. The regulations seek to introduce a Wales wide maximum charge of £50 per week for all of the services an individual receives which are provided by the enactments listed in section 13 of the Measure. This is to reduce the wide variations in weekly charge levels between authorities that service users are asked to pay, sometimes for the same services. The only exception to this would be those services which an individual receives which substitute for ordinary living costs, as such the provision of meals or laundry services, which would be outside of this maximum;

- Requirement for a local authority to issue an invitation to a potential service user, or an existing service user in specified circumstances, to request the authority undertakes a means assessment to determine how much, if anything, they will be required to pay for their services - There is currently no standard approach between local authorities in the way in which service users are engaged with the process of seeking assistance in the cost of meeting the charges for non-residential care services. These regulations require all local authorities to issue an invitation to a potential service user (or an existing service user in certain circumstances, such a change in the type or level of the services he or she requires) to seek an assessment of their financial means with a view to the authority making a determination as to that person's ability to pay the authority's standard (or any) charge for the provision of the services he or she has been assessed as requiring;

- Content and format of an invitation, and the response to this, to request a means assessment required to be issued to those receiving or to receive a service – At present authorities undertake a means assessment on those to receive a service for the first time, or where the service is to change, or the financial circumstances of the service user has changed. However, there is nothing governing how, when and in what format authorities go about this. Hence practice in relation to these varies between authorities for what is a consistent part of the charging process. Section 4 of the Measure places a duty on an authority to invite a person who is to receive a service for which an authority has decided to charge to request a means assessment, while section 9 of the Measure extends this duty where the circumstances of the service, or the financial circumstances, of an existing service user have changed and an authority wishes to replace a determination of an existing charge. The regulations seek to introduce a consistent format for these invitations in terms of the information provided to services users, in terms of them being in writing or in any other format appropriate to the communication needs of the service user, and in terms of allowing users to nominate a third party to act for them, or assist them, in this process. The regulations also seek to introduce a consistent 15 working days that a service user has to respond to such an invitation and to provide any documentation or information the authority considers they require to make a decision on a charge. They also seek to allow a service user to provide such information by means of a home visit should they wish, or to request additional time to provide documentation or information should they feel they require this. They also allow for an authority to proceed to undertake a means assessment on the basis of known information should a service user not respond to an invitation, or seek an extension of time and not respond after that has elapsed;

- Where a means assessment is requested, the process to be used including the disregards of capital and income that should be afforded the service user in these – Authorities are currently advised by guidance that when undertaking a means assessment they should disregard the value of a person's main residence and where they also take into account other forms of capital, they should be as least as generous to the service user in applying those as the allowances set out in the regulations governing residential care charging. Authorities are also advised to disregard in full all amounts received by the service user as earnings or savings credits so as to promote the independence of service users. The regulations seek to put all of these disregards on a statutory basis. They also seek to introduce a further disregard in relation to ex-gratia payments made to those who contract hepatitis C and/or HIV through contaminated blood or blood products, given the purpose of these payments is to compensate those affected for the harm they have suffered;

- The procedure to be used in determining a charge and the effect of such a determination – Authorities are currently advised by guidance to ensure any charge set for a service does not reduce a service user's remaining income below the amount of their Income Support, Employment and Support Allowance or Guarantee Pension Credit, plus a "buffer" of at least 35% of that amount. This is to ensure that after charging users have at least a minimum amount to meet their daily living costs. In addition, authorities are advised to allow at least a

further 10% of a service user's entitlement (to make at least 45% in total) as a contribution towards the additional livings costs a user will have as the result of a disability or medical condition. The regulations seek to put these financial safeguards for service users on a statutory basis. Where a service user is charged for the first time, or where an existing charge is to be amended, the regulations make it clear that an authority cannot impose that charge until the service user has been provided with a statement of that charge in accordance with section 10(4) of the Measure (which details the content and format of such statements);

The Social Care Charges (Direct Payments) (Means Assessment and Determination of Reimbursement or Contribution) (Wales) Regulations 2011

- These regulations make corresponding provision for those persons who are in receipt of direct payments to secure the provision of the non-residential social services they require, to that made for direct service users as outlined in the above mentioned regulations. This is so that persons who receive direct payments may benefit equally; provision is introduced for classes of persons and services for which a contribution or reimbursement from a direct payments can not be made or sought; such contributions or reimbursements being limited to a maximum of £50 per week; along with the arrangements governing the invitation, and responses to an invitation, to a means assessment where it is proposed that a contribution or reimburse is to be sought from a person's direct payment; and the arrangements governing the undertaking of the means assessment, the determination of a contribution or reimbursement and the effects of such a determination;

The Social Care Charges (Review of Charging Decisions) (Wales) Regulations 2011

- Introduces a right to request a review of any decision to impose a charge, contribution or reimbursement for the services received – Authorities currently use a range of methods for reviewing a charge, contribution or reimbursement, ranging from a decision made by a senior officer in an authority to a panel of senior officers and councillors. The procedure and timescales authority's use in processing reviews also vary so that no two review processes in operation are the same. The regulations therefore seek to create a right for a service user or direct payments recipient to request a review of a decision to impose a charge, contribution or reimbursement, in connection with the services they receive and to define the circumstances in which a review can be requested. They also confirm that a request can be made either orally or in writing and that should they wish, a requester can appoint a third party (such as a friend, relative or advocacy) to handle the review for them or to help them with any part of the review;

- The content and format of an acknowledgement of a request a local authority must issue – The regulations set out a consistent acknowledgement of a request for a review that an authority must issue. This is to ensure that all requesters are provided with similar information, in a consistent format and timescale. Hence the regulations specify the content of an acknowledgement (eg how the authority will conduct the review, providing a named contact in an authority to speak to about

the review if they wish), that it should be provided within 5 working days of receipt of a request and that it should be provided in writing and in any other format to meet the communication needs of the requester (eg Braille). It must also confirm what additional information or documentation an authority requires to consider the request and confirm that if a requester wishes, such information or documentation can be provided by means of a home visit by an appropriate officer of the authority. It should also inform requesters that they have 15 working days to provide any additional information or documentation sought. An acknowledgement must also inform a requester that during the period of the review, they are not obliged to pay their charge, contribution or reimbursement, but that should they choose not to do so, depending upon the outcome of the review they make be asked to make any arrears of payment;

- The process an authority must use in considering requests, the timescales involved and the factors that must be taken into account in determining them – If an authority can determine a review immediately (eg it is a mathematical error in the calculation of the charge) the regulations set out that an authority should do this working 5 working days so that the acknowledgement issued also becomes the determination of the review. If the requester has problems in providing requested additional information or documentation within the 15 working days allowed, the regulations allow for the requester to ask for an extension of this period and for authorities to grant reasonable requests for such extensions.

  The regulations place a duty on authorities to determine a review once they have sufficient information and documentation to do so and to implement its findings. A determination must be made within 10 working days of reaching this position and issued to a requester. Authorities also have a duty to appoint a member of members of its staff to deal with such reviews who must, in making a determination of a review, take into account certain specified factors. For example, the requirements of the Measure and regulations, the authority's charging policy, the requester's income and expenses and any circumstances that may affect the requester's ability to pay a charge, contribution or reimbursement. The regulations also place a duty on authorities to issue a statement of the charge, contribution or reimbursement to be levied should the outcome of the review lead to an amendment of these. Should the outcome of the review lead to an overpayment having been made, the regulations place a duty on authorities to refund such amounts in full within 10 working days of issuing the review's determination. Should it lead to an underpayment, authorities have the discretion to recovery an arrears if they wish but where they choose to do so, the regulations place a duty on them to ensure that this does not cause undue financial hardship to the requester and if it does, to offer the requester the option of repaying any amount in periodic instalments.

Consultation
9. The details of consultation undertaken are included in the Regulatory Impact Assessment below.

Regulatory Impact Assessment – Options, Costs and Benefits

The Social Care Charges (Means Assessment and Determination of Charges) (Wales) Regulations 2011

Option 1: Do Nothing

10. Not making these regulations would leave local authorities with substantial discretion as to the class of persons which they charged for the receipt of non-residential social services, as to the services for which a charge is made, as to how they undertake their means assessments to consider a charge and in the level of the charge set. Inconsistency and perceived inequity in such charging practices, procedures and charge levels would remain with nothing to prevent this situation worsening. Service users would not have a right to receive an invitation for a means assessment or to request one, and where means assessments took place there would be no legislation to govern the operation, content, frequency or timings of these. Service users, and their financial means, would continue to be treated differently by differing authorities in this process. The financial safeguards for service users on low incomes who are charged for their services would not be enshrined in legislation, with authorities free to set charge levels at substantially higher amounts than the £50 per week proposed by the regulations to the determent of service users' available income to meet their daily living costs.

Cost

11. There would be no new cost implication for local government from this option but the potential for a new cost implementation for service users should authorities choose to maximise charge income further from charging for these services.

Benefits

12. This option would provide no new benefits to recipients for non-residential social services but would allow local government, if it wished, to increase its income from this charging further.

Option 2: Make the Legislation

13. Making the legislation would create a reasonable balance between authorities retaining an element of discretion to determine their own charging policy for non-residential social services and protecting the users of the service. Authorities would still retain the discretion to change; to determine who to charge; the services for which it would make a charge; and in setting the level of that charge. What the regulations would do, however, is to set out certain categories of individuals who it would be unreasonable to charge at all; to set out services for which Ministers thought it was unreasonable to charge; to confirm forms of capital and income which Ministers consider ought to be excluded from the means assessment to aid users' ability to meet their daily living costs; and to introduce a Wales wide maximum charge to address the inequity of wide variations in charge levels across authorities for similar services. The regulations would also introduce an element of consistency across authorities in the means assessment and charging process, and in the provision of information to service users, so users in all parts of Wales would know what to expect when being charged. these.

Costs

14. Following a detailed costings exercise with authorities it is estimated that making these regulations, and the corresponding regulations for direct payments recipients below, would cost £10.1 million per annum in total in lost income to authorities. In line with the Partnership Agreement with local government, where the Assembly Government will compensate authorities for new financial burdens, this amount of funding has been included in the local government settlement for 2011-12 onwards.

Benefits
15. Local authorities would still be free to determine certain elements of their charging policies to match local circumstances and priorities, while at the same time financial protection being afforded to those services users with particular circumstances or low levels of income. The charging process would be clearer in, and more consistent between, authorities to aid both charging officers and service users alike. In addition, the introduction of a Wales wide maximum charge would remove the inequity of wide variations in charge levels across authorities for similar services.

The Social Care Charges (Direct Payments) (Means Assessment and Determination of Reimbursement or Contribution) (Wales) Regulations 2011

16. The options, costs and benefits in relation to these regulations are the same as for the regulations above in relation to means assessments and determinations of charges for direct service users. The only difference would be that the impacts, costs and benefits would be in relation to the contributions and reimbursements imposed by authorities on those in recipient of direct payments to meet their assessed care needs, as opposed to a direct charge for a service provided. Hence the impacts, costs and benefits are on the means assessments, determinations and level of contributions and reimbursements in similar ways to those which result in a direct charge for a direct service user.

The Social Care Charges (Review of Charging Decisions) (Wales) Regulations 2011

Option 1: Do Nothing
17. While all authorities undertake a review of charging decisions at a user's request, the procedures, processes, timescales and nature of these vary greatly between authorities, even for reviews on similar issues. Hence not making the regulations will maintain the status quo of some users having their review decided quickly by a senior officer in an authority, while others with a similar complaint will have a lengthy review process to encounter with the possibility of having to appear in front of a panel of officers and councillors to explain their case. Given that the client group who are charged for services are disabled and older people, many service users will find complex procedures confusing and appearing before panels intimidating. Hence there has been a clear message from service user representatives that a quicker, simpler and consistent review process was required.

Cost
18. There would be no new cost implication to local government from this option.

Benefits

19. This option would provide no new benefits to those who wish to have their charge, contribution or reimbursement reviewed. Local authorities would be able to continue to operate their individual review procedures in their areas.

Option 2: Make the Legislation
20. Making the legislation will introduce a clear, consistent review process across all authorities, irrespective of the nature of the complaint. It will enable service users to have clear, consistent information about how their request for a review will be dealt with, what information or documentation they need to provide in support of this and what will happen to their charge, contribution or reimbursement during the review period. It will set a timescale for the review so that service users and authorities know what needs to happen by when, and provide for authorities to determine reviews in a quicker, more consistent manner.

Cost
21. There would be no new cost implication to local government from this option. All authorities already undertake reviews and so the regulations merely introduce a change in the way these are undertaken as opposed to placing new burdens on authorities.

Benefits
22. Introducing a clear, consistent review process across all authorities will address the inequitable manner in which authorities currently handle requests for a review of a charge, contribution or reimbursement. Those that request such reviews will be better informed about the process and in many cases will get a decision in a less intrusive manner, and quicker timeframe, than at present

Consultation
23. Following the making of the Social Care Charges (Wales) Measure 2010, Ministers established three stakeholder working groups, all of which had both service user and local government representation upon. One considered the detail of the operational changes that would need to be introduced by the regulations in relation to means assessments and determination of charges, both in relation to direct service users and those in receipt of direct payments. One considered the detail of the operational changes that would need to be introduced by the regulations relating to reviews of charging decisions, while the remaining group considered the practical arrangements authorities would need to undertake in preparation for the implementation of the regulations. Advice from these groups informed the drafting of the three regulations now being made.

24. In addition, a public consultation was held on a draft of the resulting regulations which concluded in February this year. Some 26 responses were received which have informed the final regulations being made.

Competition Assessment
25. Not applicable.

Post Implementation Review
26. Arrangements are being made with local authorities to undertake, following implementation of the regulations, a review of their impacts. This will include information on the numbers of services users who have benefitted from them, in relation to the

impact that this has had on their charge levels, the income local authorities have lost as a result of their implementation and whether there have been any unintended consequences of their introduction. This information will inform any review of the regulations that may be necessary, as well as any change to the financial arrangements put in place with authorities that may be required.

WELSH STATUTORY INSTRUMENTS

2011 No. 963 (W. 137)

SOCIAL CARE, WALES

The Social Care Charges (Direct Payments) (Means Assessment and Determination of Reimbursement or Contribution) (Wales) Regulations 2011

EXPLANATORY NOTE

(This note is not part of the Regulations)

Section 1 of the Social Care Charges (Wales) Measure 2010 ("the Measure") gives local authorities in Wales a discretionary power to impose a reasonable charge upon adult recipients of non-residential social care services, which are directly provided or secured by the local authority ("service users"). The Welsh Ministers have made Regulations under the Measure, the Social Care Charges (Means Assessment and Determination of Charges) (Wales) Regulations 2011 ("the Charges Regulations"), with which local authorities are required to comply when exercising this power.

Section 12 of the Measure gives the Welsh Ministers a discretionary power to make provision in regulations which correspond to the provision for a service user (made in the Measure and in the Charges Regulations) for the adult recipient of direct payments ("D") who receives such payments to secure the provision of services for himself or herself in accordance with the Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2011, made under section 57 of the Health and Social Care Act 2001.

These Regulations do not require a local authority to seek any payment (whether by way of reimbursement or contribution) from D towards the cost of securing the provision of the service, or combination of services when it makes a direct payment to the D to enable that person to secure the provision of a "chargeable service"; however, in cases where a local authority does require D to make a payment towards the cost of

securing such a service, the local authority must comply with the relevant provisions of these Regulations and any regulations made by the Welsh Ministers under section 16 of the Community Care (Delayed Discharges etc) Act 2003.

Regulation 4 prescribes the circumstances in which a local authority may not require any payment from D towards the cost of securing the provision of a service.

Regulation 5 prescribes that a local authority's power to determine the "reasonable amount" that D may be required to pay towards the cost of securing a service is subject to a maximum reasonable amount of £50 per week. It also contains qualifications to this general proposition and it specifies the steps to be taken by a local authority to calculate the amount of the payment which D may be liable to pay.

Regulations 6 to 16 detail the steps in the process of assessing D's financial means; they also specify the matters which a local authority must take into account when assessing D's means and when making a determination as to D's ability to pay a reasonable amount towards the cost of securing the service that he or she has been assessed as needing.

Regulation 7 requires a local authority to issue an invitation to D to request a means assessment. Subsequent regulations make provision for the time in which information or documentation must be supplied to a local authority (regulation 8), requests for an extension of time in which to provide information or documentation (regulation 9), the consequences of failing to respond to an invitation to request a means assessment in full or at all (regulations 10 and 11) and the ability of D to withdraw a request (regulation 12).

Regulation 13 imposes a duty upon a local authority to carry out an assessment of D's financial means in prescribed circumstances and regulation 14 sets out those circumstances.

Regulation 15 sets the circumstances in which a local authority is under no duty to carry out a means assessment.

Regulation 16 contains provision to which a local authority must give effect when undertaking an assessment of D's means.

Regulation 17 makes provision for the matters that a local authority must take into account when determining the ability of D to pay a reasonable amount towards securing the services that D has been assessed as requiring.

Regulation 18 makes provision for the date from which payment of a reimbursement or contribution may be required.

Regulation 19 contains requirements about the information that a local authority must provide in any statement it issues to D.

Regulations 20 and 21 contain savings provision for assessments of means and determinations of ability to pay towards the cost of securing a service made before the coming into force of these Regulations.

Regulations 22 and 23 contain transitional and transitory provision.

WELSH STATUTORY INSTRUMENTS

2011 No. 963 (W. 137)

SOCIAL CARE, WALES

The Social Care Charges (Direct Payments) (Means Assessment and Determination of Reimbursement or Contribution) (Wales) Regulations 2011

Made 24 March 2011

Laid before the National Assembly for Wales 29 March 2011

Coming into force 11 April 2011

The Welsh Ministers, in exercise of the powers conferred by sections 12 and 17(2) of the Social Care Charges (Wales) Measure 2010(**1**), make the following Regulations:

Title, commencement and application

1.—(1) The title of these Regulations is the Social Care Charges (Direct Payments) (Means Assessment and Determination of Reimbursement or Contribution) (Wales) Regulations 2011 and they come into force on 11 April 2011.

(2) These Regulations apply in relation to Wales.

Interpretation

2.—(1) In these Regulations—

"the 2001 Act" *("Deddf 2001")* means the Health and Social Care Act 2001(**2**);

"the Measure" *("y Mesur")* means the Social Care Charges (Wales) Measure 2010;

(**1**) 2010 nawm 2 ("the Measure"). *See* section 17 of the Measure for the definition of "regulations".

(**2**) 2001 c. 15.

"the 2011 Regulations" *("Rheoliadau 2001")* means the Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2011;

"assessable income" *("incwm asesadwy")* means that part of D's income in respect of which a local authority may make a determination in accordance with regulation 17; it does not include the income which a local authority is required to disregard in accordance with regulation 16;

"assessment of needs" *("asesiad anghenion")* means an assessment by a local authority of D's need for community care services undertaken in accordance with section 47 of the National Health Service and Community Care Act 1990(**1**) or section 1 of the Carers and Disabled Children Act 2000(**2**) and "assessed as needing" *("aseswyd bod arno angen")* is to be read accordingly;

"basic entitlement" *("hawlogaeth sylfaenol")* means, in relation to—

(a) income support—

the personal allowance and any premiums to which D is entitled, but need not include the severe disability premium ("SDP") where is it paid, and where D is a carer, includes any carer premium that person receives,

(b) employment and support allowance—

the personal allowance and any premiums and components to which D is entitled, but need not include the SDP where is it paid, and where D is a carer includes any carer premium that person receives,

(c) guarantee credit—

the personal allowance and any additional amount to which D is entitled, but need not include the additional amount added for severe disability where it is paid, and where D is a carer, includes any additional amount applicable for carers that person receives;

"charge" *("ffi")* is the amount that a local authority may require a service user to pay for a service which the authority provides or secures in accordance with section 1(1) of the Measure *(general power to charge for care services)*;

"D" *("D")* means an adult who is prescribed for the purposes of —

(**1**) 1990 c. 19.
(**2**) 2000 c.16.

(a) section 57(1) of the 2001 Act, by regulation 3 of the 2011 Regulations (prescribed descriptions of persons under section 57(1) of the 2001 Act – community care services and services for carers); and

(b) section 57(1A) of the 2001 Act, by regulation 4 of the 2011 Regulations (prescribed descriptions of persons under section 57(1A) of the 2001 Act – community care services), and

in either case, who has been offered, who is receiving or, in the case of a person described in paragraph (b), in respect of whom a suitable person is receiving, a direct payment for securing the provision of a service;

"day service" *("gwasanaeth dydd")* means a service, which meets a part of D's assessed needs, which takes place away from that person's home and which is intended to assist the person in meeting others, in taking up new or practising existing interests and includes work opportunities;

"direct payment" *("taliad uniongyrchol")* has the meaning given in regulations 8 and 9 of the 2011 Regulations and any reference to a direct payment includes, where the context requires any part or parts of that payment;

"dual provision" *("darpariaeth ddeuol")* means that D's assessed needs are being met—

(a) in part by a local authority providing or securing a service or services for that person, and

(b) in part by D receiving a direct payment in order to secure the provision of another or other services;

"employment and support allowance" *("lwfans cyflogaeth a chymorth")* means either contributory employment and support allowance or income-related employment and support allowance in accordance with Part 1 of the Welfare Reform Act 2007(**1**);

"flat-rate charge" *("ffi unffurf")* means a fixed rate charge for a chargeable service received by a service user which is imposed by a local authority regardless of the means of the service user;

(**1**) 2007 c. 5.

"guarantee credit" *("credyd gwarant")* is to be construed in accordance with sections 1 and 2 of the State Pension Credit Act 2002(**1**);

"home visiting facility" *("cyfleuster ymweliadau cartref")* means a visit (or visits) which are undertaken by an appropriate officer of a local authority to D's current place of residence, or at such other venue as D reasonably requests, for the purposes of gathering information to inform a means assessment for that person and for providing information and offering assistance in relation to that process;

"in writing" *("mewn ysgrifen")* means any expression consisting of words or figures that can be read, reproduced and subsequently communicated and may include information transmitted and stored by electronic means;

"income support" *("cymhorthdal incwm")* means income support paid in accordance with section 124 of the Social Security Contributions and Benefits Act 1992(**2**);

"means assessment" *("asesiad modd")* means an assessment of D's financial means undertaken in accordance with regulations 13 and 16 and "assessment of D's means" *("asesiad o fodd D")* is to be read accordingly;

"net income" *("incwm net")* means, the income that D has, or would have left after the deduction from that person's assessable income of the standard amount (or any other amount) required under these Regulations by way of a payment towards the cost of securing the service for which a direct payment is, or will be, received;

"relevant benefit" *("budd-dal perthnasol")* means—

(a) income support; or

(b) employment and support allowance; or

(c) guarantee credit;

"savings credit" *("credyd cynilion")* has the meaning given in sections 1 and 3 of the State Pension Credit Act 2002;

"service" *("gwasanaeth")* means a chargeable service and, where the context requires, chargeable services or a combination of chargeable services and "services" *("gwasanaethau")* and "combination of services" *("cyfuniad o wasanaethau")* are to be interpreted accordingly;

(**1**) 2002 c. 16.
(**2**) 1992 c.4.

"service user" *("defnyddiwr gwasanaeth")* means an adult who has been offered, or who is receiving, a service provided or secured by a local authority;

"standard amount" *("swm safonol")* means the amount which D would be required to pay towards securing the provision of a service if no assessment of that person's means or determination of the service user's ability to pay under these Regulations has effect;

"suitable person" *("person addas")* means a person appointed in accordance with regulation 9 of the 2011 Regulations to consent to and to receive a direct payment on behalf of D in accordance with regulation 4 of those Regulations;

"working day" *("diwrnod gwaith")* means a day other than a Saturday, Sunday, Christmas Day, Good Friday or a Bank Holiday within the meaning of the Banking and Financial Dealings Act 1971(**1**).

(2) In these Regulations, any reference to D "paying" *("yn talu")* or making a "payment" *("taliad")* of an amount (towards the cost of securing the provision of a service) is to be interpreted as including a reference to the paying or the making of a payment by way of reimbursement or contribution(**2**).

Direct payments – local authority determination of the amount of a reimbursement or contribution

3. Where a local authority makes a determination, in accordance with regulation 10(4) or 11(4) of the 2011 Regulations as to what amount or amounts (if any) it is reasonably practicable for D to pay towards the cost of securing the provision a service, it must give effect to—

(a) the provisions of these Regulations; and

(b) any regulations made by the Welsh Ministers under section 16 of the Community Care (Delayed Discharges etc) Act 2003(**3**) *(free provision of services in Wales).*

Persons and services in respect of which reimbursement or contribution must not be required

4.—(1) A local authority must not require or seek any payment towards the cost of securing the

(**1**) 1971 c.80.

(**2**) "Reimbursement" and "contribution" are defined in section 12(5) of the Measure.

(**3**) 2003 c.5.

provision of a service in accordance with the 2011 Regulations from D who —

(a) has been offered or is receiving a direct payment to secure the provision of a service, and who is suffering from any form of Creuzfeldt Jacob disease where that disease has been clinically diagnosed by a registered medical practitioner;

(b) has been offered or is receiving a direct payment to secure the provision of a service, which forms part of a package of after care services in accordance with section 117 of the Mental Health Act 1983 (*after care)*(**1**);

(c) has had a means assessment undertaken by a local authority and been assessed as having a net income of less than the total amount referred to in regulation 17(2).

(2) A local authority may not seek any reimbursement or contribution for that part of a direct payment which is intended to meet the reasonable cost of transport to attend a day service, where attendance at the day service and the provision of transport to enable such attendance is included in D's needs assessment.

(3) A local authority must not seek to recover any amount from D towards the costs of the provision of a statement of information provided in accordance with regulation 19.

(4) Nothing in this regulation affects the discretion of a local authority to specify additional categories of D or services from whom or in respect of which payment of an amount may not be required or sought.

(5) Regulations 5 to 19 do not apply to the persons referred to in sub-paragraphs (a) or (b) of paragraph (1).

Maximum reasonable amount of a reimbursement or contribution payable

5.—(1) Subject to paragraphs (3) and (4), the maximum amount that a local authority may determine to be a reasonable amount for D to pay towards the cost of securing the provision of a service ("maximum reasonable amount") *("uchafswm rhesymol")* is £50 per week.

(2) Subject to paragraphs (3) and (4), where D has assessed needs which are met by way of dual provision £50 per week is the maximum of the aggregate of the amounts that a local authority may require D to pay in respect of that provision by way of—

(a) a charge, and

(b) a payment.

(**1**) 1983 c. 20.

(3) When calculating the maximum reasonable amount that D may be required to pay, a local authority—

(a) must disregard the cost of securing any service for which it imposes a flat-rate charge, and

(b) may impose the charges in respect of such a service in addition to the maximum reasonable amount.

(4) Where D receives a direct payment to enable the purchase of equipment, which would otherwise be provided by a local authority, the local authority—

(a) must disregard the cost of the purchase of the equipment when calculating the maximum reasonable amount that D may be may required to pay, and

(b) may require D to pay an amount in excess of and in addition to the maximum reasonable amount towards the cost of securing the equipment.

Procedure for determining a payment

6.—(1) When determining the amount of any payment that D pays, or may be required to pay, towards the cost of securing a service, a local authority must adopt the following procedure—

(a) calculate the amount of its reasonable cost of securing the provision of the service for which D is or will receive a direct payment;

(b) disregard from that total the amount of any charge or payment referred to in regulation 5(3) and (4);

(c) disregard the reasonable costs of securing the provision of transport to attend a day service, where the requirement to attend such a service is included in D's needs assessment;

(d) apply the maximum reasonable amount to this resulting amount where the resulting amount would otherwise exceed it and this, subject to sub-paragraph (e), is the amount that the local authority may require D to pay;

(e) subject the amount calculated in accordance with sub-paragraph (d) to a determination of D's ability to make a payment in accordance with regulation 17.

(2) The step referred to in paragraph (1)(e) will only be applied where—

(a) D has requested a means assessment; and

(b) a means assessment has been undertaken by the local authority,

in accordance with these Regulations.

Invitation to request a means assessment

7.—(1) A local authority must issue an invitation to D to request an assessment of his or her means in accordance with regulation 13—

(a) if it is reasonably practicable to do so, when the authority offers to make a direct payment to D, or where relevant, to a suitable person;

(b) if it has not been reasonably practicable to give an invitation as mentioned in sub-paragraph (a), as soon as reasonably practicable after the offer was made;

(c) if an invitation has not been given under sub-paragraph (a) or (b) prior to the making of the first direct payment to D, or where relevant, to a suitable person, as soon as reasonably practicable after the first direct payment is made.

(2) If a local authority reasonably considers that one or more of the conditions set out in paragraph (3) applies, it must invite D to request a new assessment of his or her means in accordance with regulations 13 and 16 with a view to its making a further determination of D's ability to make a payment in accordance with regulation 17.

(3) The conditions referred to in paragraph (2) are—

(a) there is an increase, or proposed increase, in the amount of the payment which D is required to make as a result in a change to the local authority's charging policy;

(b) there is a change in D's financial circumstances;

(c) there has been a change in the cost of providing a service for which D has been assessed as needing; or

(d) a mistake was made when a determination was made in accordance with regulation 17.

(4) Where a local authority is required by paragraph (1), or determines in accordance with paragraph (2), to issue an invitation to D or, where relevant, to a suitable person, to request an assessment of D's means in accordance with regulations 13 and 16, it must ensure that the invitation contains full details of—

(a) the services which D has been assessed as requiring and for which a direct payment is being considered;

(b) its charging policy, which must include the following—

(i) its policy in relation to which, if any, of the services for which a direct payment may be provided D may be required to

make a payment of an amount towards the cost of securing those services,

(ii) details of the standard amount which D may be required to pay towards the cost of securing any such service,

(iii) details of any service which the local authority secures or provides and for which it may require a service user to pay a charge in accordance with section 1(1) of the Measure *(general power to charge for care services)*,

(iv) details of any service for which the local authority requires a service user to pay a flat-rate charge, and

(v) details of the maximum reasonable amount which may be required or sought in accordance with regulation 5**,** or the maximum reasonable amount that the local authority applies, where that amount is lower;

(c) its means assessment process;

(d) the information and documentation that D or, where relevant, a suitable person, is required to provide in order that an assessment of D's means can be undertaken;

(e) the time, as specified in regulation 8, within which D or, where relevant, a suitable person, is required to supply the information and documentation referred to in sub-paragraph (d);

(f) the format in which it will accept the information and documentation referred to in sub-paragraph (d);

(g) any home visiting facility that it provides within its area;

(h) the consequences of failing to respond to the invitation in accordance with sub-paragraph (e);

(i) the named individuals within the authority whom D or, where relevant, a suitable person, should contact should that person require additional information or assistance in respect of any of the processes attendant upon the issue of the invitation;

(j) the right of D or, where relevant, a suitable person, right to appoint a third party to assist, or to act on his or her behalf, in respect of all or part of the means assessment process; and

(k) the contact details of any organisation in its area which provides support or assistance of the type referred to in sub-paragraph (j).

(5) A local authority must provide D or, where appropriate, a suitable person with the information

referred to in paragraph (1) in writing, or in any other format that is appropriate to the communication needs of that person(**1**).

Response to an invitation to request a means assessment

8.—(1) D, or subject to paragraph (3) or (4), D's representative, must provide a response to the local authority within 15 working days (or such longer period as a local authority may reasonably allow in accordance with regulation 9) of the date the invitation was issued.

(2) D complies with the requirement set out in paragraph (1) if that person or that person's representative—

(a) requests that the local authority carries out a means assessment in accordance with regulations 13 and 16;

(b) requests assistance from any home visiting facility that is provided by the local authority, where such assistance is required;

(c) provides the information that has been requested by the local authority in the format that the local authority has agreed to accept it;

(d) provides the documentation that has been requested by the local authority;

(e) requests an extension of time, where one is required, in which to provide the information or documentation (or both) that has been requested in accordance with regulation 7(4)(d), giving the reason or reasons why an extension of time is required.

(3) Where D has appointed a representative to act on his or her behalf, D must provide the local authority with the following—

(a) the name and address of the representative,

(b) confirmation that the representative is willing to act on his or her behalf,

(c) details of the nature and extent of the representative's involvement in the means assessment process, and

(d) details of the nature and extent of the information the local authority may share with his or her representative.

(4) Where a suitable person has been appointed in accordance with regulation 9 of the 2011 Regulations (direct payments under section 57(1A) of the 2001

(**1**) For an explanation of the meaning of *"any format appropriate to the communication needs of that person"*, please refer to the guidance published by the Welsh Ministers, entitled Introducing More Consistency in Local Authority Charging for Non-Residential Social Services.

Act), that person must provide confirmation of his or her name and address to the local authority.

(5) Unless the context otherwise requires, where a representative has been appointed in accordance with paragraph (3) or (4), any reference in this regulation or in regulations 9 to 15 to D, includes that person's representative.

(6) Any request made in accordance with paragraph (2) or appointment made in accordance with paragraph (3) may be made or communicated orally or in writing by D but must be confirmed by a local authority in writing or in any other format that is appropriate to the communication needs of the service user.

Request for extension of time in which to provide information or documentation

9.—(1) A local authority must agree to any reasonable request for an extension of time made in accordance with regulation 8(2)(e).

(2) If D requests an extension of time orally, a local authority may give its response to that request orally, but it must also confirm the response in writing, or in any other format that is appropriate to D's communication needs.

(3) When responding to a request for an extension of time a local authority must confirm whether or not the request is granted and if granted, must state the period of the extension.

(4) Where a local authority refuses a request for an extension of time, it must give reasons for its refusal of the request.

Failure to respond to an invitation to request a means assessment

10.—(1) Where D fails to respond to an invitation in accordance with regulation 8, a local authority may determine that D is required to pay the standard amount towards the cost of securing the service which was the subject of the invitation.

(2) A local authority's power to require D to pay the standard amount in accordance with paragraph (1) is subject to the maximum reasonable amount prescribed in regulation 5.

(3) Where paragraph (1) applies, D will be required to pay the standard amount imposed by the local authority from the date that a statement is provided by the local authority in accordance with regulation 19.

(4) If D responds to an invitation to request a means assessment after a local authority has determined, in accordance with paragraph (1), to require D to pay the

standard amount or, where relevant, the maximum reasonable amount—

(a) the local authority must proceed to undertake an assessment of D's means in accordance with regulations 13 and 16 and to make a determination of D's ability to pay in accordance with regulation 17;

(b) the actions taken by the local authority under sub-paragraph (a) will not affect the liability of D to pay any amount or amounts which he or she has been required to pay towards the cost of securing a service from the date that the statement referred to in paragraph (3) was provided; and

(c) the statement provided in accordance with regulation 19 as a result of the assessment and determination referred to in sub-paragraph (a) ("the second statement") *("yr ail ddatganiad")* will replace the statement provided in accordance with paragraph (3) and the second statement will take effect from the date that it is provided.

Failure to supply all relevant information and documentation

11.—(1) Where D has failed to—

(a) supply, or

(b) seek an extension of time in which to supply,

all the information and documentation reasonably requested by a local authority under regulation 7, the local authority may make an assessment of D's means on the basis of the partial information or partial documentation (or both) that has been supplied.

(2) Where paragraph (1) applies, the local authority may—

(a) make a determination in accordance with regulation 17;

(b) subject to the maximum reasonable amount prescribed in regulation 5, require D to pay an amount on the basis of its determination; and

(c) proceed to provide a statement in accordance with regulation 19.

(3) Where a local authority determines that D is required to pay an amount towards the cost of securing the provision of a service in accordance with paragraph (2), D will be required to pay that amount from the date that the local authority provides the statement referred to in paragraph (2)(c).

Withdrawal of a request for a means assessment

12.—(1) D may withdraw a request for a means assessment by notifying a local authority at any time before the means assessment has been completed.

(2) D may notify the local authority of the decision to withdraw a request for a means assessment orally, in writing, or in any other format that is appropriate to D's communication needs.

(3) Where a request is withdrawn in accordance with this regulation, a local authority may, subject to the maximum reasonable amount prescribed by regulation 5, require D to pay the standard amount towards the cost of securing the service that was the subject of the invitation to request a means assessment.

(4) In any case where D notifies a local authority of the withdrawal of a request for a means assessment, the local authority must—

(a) acknowledge receipt of the notification in writing and in any other format that is appropriate to D's communication needs;

(b) advise D that the withdrawal of this request does not preclude the submission of a further request for a means assessment in respect of the same or a different service; and

(c) advise D whether it will require payment of the standard amount, or the maximum reasonable amount prescribed by regulation 5, towards the cost of securing the service for which the direct payment is, or may be made.

(5) Where D is required to pay an amount towards the cost of securing a service in accordance with paragraph (3), D will be required to pay the amount from the date that the local authority provides a statement in accordance with regulation 19.

Duty to carry out a means assessment

13.—(1) Where each of the conditions in regulation 14 is met, a local authority must carry out an assessment of D's means if D requests such an assessment.

(2) But a local authority is under no duty to carry out a means assessment under these Regulations in the circumstances prescribed by regulation 15.

Conditions giving rise to the duty to carry out a means assessment

14.—(1) The conditions referred to in regulation 13(1) are set out in the following paragraphs of this regulation.

(2) Condition 1 is that D is—

(a) offered a direct payment; or

(b) receiving a direct payment,

to secure the provision of a service.

(3) Condition 2 is that D requests that the local authority which made the offer to pay, or is making the direct payment, carries out a means assessment in accordance with these Regulations.

(4) Condition 3 is that D provides the authority with any information or documents in D's possession or under his or her control, which the authority reasonably requires in order to carry out a means assessment.

No duty to carry out a means assessment

15. A local authority is under no duty to carry out an assessment of the means of D—

(a) in respect of whom the following circumstances apply—

(i) a determination made by the authority in accordance with regulation 17 has effect,

(ii) D, who is the subject of the determination, requests that the authority carries out a means assessment in accordance with regulations 13 and 16,

(iii) the request relates to a service to which the determination relates, and

(iv) the authority reasonably considers that there has been no relevant change of circumstance since the determination was made; or

(b) who has been assessed as needing, or who is receiving a service or combination of services for which the local authority applies a flat-rate charge; or

(c) who fails to respond to an invitation to request a means assessment in accordance with regulation 8; or

(d) who withdraws his or her request for a means assessment in accordance with regulation 12.

Means assessment process

16.—(1) Where a local authority carries out an assessment of D's means in accordance with regulation 13, it must ensure that any process of assessment that it employs gives effect to the requirements of this regulation.

(2) When undertaking a means assessment, if a local authority takes into account D's savings or capital the local authority must—

(a) subject to sub-paragraph (b) and to paragraph (3), calculate D's capital in accordance with

the provisions of Part 3 of the 1992 Regulations (treatment of capital);

(b) disregard the value of D's main residence from its calculation of the capital of that person.

(3) Nothing in paragraph (2) affects the discretion of a local authority, when calculating D's capital, to apply any criteria that are more generous to D than those from time to time applied in the provisions referred to in paragraph (2)(a).

(4) When undertaking a means assessment, if a local authority takes into account D's income, the local authority must—

(a) assess what part of the D's income properly constitutes "earnings" *("enillion")* in accordance with the definition "earnings" in regulations 35 and 37 of the of the Housing Benefit Regulations 2006(**1**), or as the case may be, in regulations 35 and 37 of the Housing Benefit (Persons who have attained qualifying age for state pension credit) Regulations 2006(**2**);

(b) disregard in full those earnings;

(c) disregard in full any amount received by D in respect of savings credit; and

(d) disregard in full any payment received by D which is referred to in paragraph 24 of Schedule 3 to the 1992 Regulations (sums to be disregarded in the calculation of income other than earnings)(**3**).

(5) Nothing in paragraph (4) affects the discretion of a local authority when calculating D's income to apply any criteria that are more generous to D than the provisions of paragraph (4).

(6) In this regulation—

"the 1992 Regulations" *("Rheoliadau 1992")* means the National Assistance (Assessment of Resources) Regulations 1992(**4**).

Determination as to D's ability to pay

17.—(1) Where a local authority has carried out an assessment of D's means in accordance with

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(**1**) S.I. 2006/213.

(**2**) S.I. 2006/214.

(**3**) Payments referred to in paragraph 24 of Schedule 3 to the National Assistance (Assessment of Resources) Regulation 1992 are described in paragraph 39 of Schedule 9 to the Income Support (General) Regulations 1987 (S.I. 1987/1967) (sums to be disregarded in the calculation of income other than earnings) as "any payment made under or by the Macfarlane Trust, the Macfarlane (Special Payments) Trust, the Macfarlane (Special Payments) (No.2) Trust…the Fund, the Eileen Trust, MFET Limited or the Independent Living Fund (2006).".

(**4**) S.I. 1992/2977.

regulations 13 and 16, the authority must, in the light of that assessment—

(a) determine whether it is reasonably practicable for D to pay the standard amount towards the cost of securing the provision of the service; and

(b) if the authority determines that it is not reasonably practicable for D to pay the standard amount, subject to the maximum reasonable amount prescribed by regulation 5, determine the amount (if any) which it is reasonably practicable for that person to pay towards the cost of securing the provision of the service.

(2) A local authority must ensure that any amount that it requires D to pay towards the cost of securing the provision of a service does not reduce D's net income—

(a) where D is in receipt of a relevant benefit, to an amount below the total of—

(i) the amount of D's basic entitlement to the relevant benefit that is being received by that person,

(ii) an amount of not less than 35% of the entitlement referred to in paragraph (i) ("a buffer") *("clustog")*, and

(iii) an amount to compensate for D's disability-related expenditure of not less than 10% of the entitlement referred to in paragraph (i); or

(b) where D is not in receipt of a relevant benefit, an amount below the total of —

(i) the amount the local authority reasonably assesses, having regard to D's age, circumstances and level of disability, would be equal to that person's basic entitlement to a relevant benefit,

(ii) a buffer of not less than 35% of that amount estimated in paragraph (i) , and

(iii) an amount to compensate for D's disability-related expenditure of not less than 10% of the amount estimated in paragraph (i).

(3) Nothing in this regulation affects the discretion of a local authority to increase the percentage of the buffer or the amount to compensate for any disability-related expenditure when making a determination in accordance with paragraph (1).

Effect of a determination as to D's ability to pay

18.—(1) Where a local authority makes a determination in accordance with regulation 17 in

the circumstances described in paragraph (2), it may not require any payment to be made until the date that a statement is provided in accordance with regulation 19.

(2) The circumstances referred to in paragraph (1) are where a service user—

(a) has been assessed as requiring a service for the first time; or

(b) is currently securing the provision of a service, but in respect of which service D is being required to pay towards the cost of its provision for the first time.

(3) Where a local authority makes a further determination as to D's ability to pay in accordance with regulation 7(2), it may not require any payment to be made or alter the amount of any payment that is being made until the date that a statement is provided in accordance with regulation 19.

(4) Where the statement referred to in paragraphs (1) or (3) replaces a statement that has previously been provided in accordance with regulation 19 ("the earlier statement") *("y datganiad cynharach")*, the earlier statement will continue to have effect until the date the subsequent statement is provided.

Statement of information about charges

19.—(1) Where a local authority has required D to make a payment of an amount (or altered the amount of the payment) towards the cost of securing the provision of a service, it must provide D with a statement in writing, and in any other accessible format that D reasonably requests.

(2) Any statement provided by a local authority in accordance with this regulation must contain—

(a) a description of the service in respect of which D is being required to pay towards securing the provision;

(b) details of the standard amount which a local authority requires D to pay towards the cost of securing the service;

(c) if the amount of the payment that D is being required to pay is not the standard amount, details of the amount of the payment required;

(d) an explanation of how the amount that D is being required to pay has been calculated (including details of any means assessment undertaken in accordance with these Regulations); and

(e) details of D's right to challenge or complain about the amount of the payment, or the clarity with which the statement is expressed.

(3) A statement provided in accordance with this regulation must be provided to D—

(a) free of charge; and

(b) within twenty-one days of the date on which the decision to require (or alter) the amount of the payment was made.

(4) In these Regulations a statement is "provided" *("ddarparu")* on the date that it is issued by a local authority.

Saving

20. Where immediately before the coming into force of these Regulations—

(a) an assessment of D's means, or

(b) a determination of the amount it is reasonably practicable for D to pay towards the cost of securing a service,

has effect, such assessment or determination will continue to have effect notwithstanding that it was not made in accordance with these Regulations.

21. Any assessment or determination referred to in regulation 20 will continue to have effect until replaced by an assessment or determination made in accordance with these Regulations.

Transitional provision

22. Where before the coming into force of these Regulations a local authority has obtained information and documentation from D to enable it to—

(a) undertake an assessment of D's means, or

(b) make a determination of the amount it is reasonably practicable for D to pay towards the cost of securing the provision of a service,

but the assessment has not been undertaken or the determination has not been made upon the coming into force of these Regulations, the local authority must undertake such an assessment in accordance with the provisions of regulation 16 or make such a determination in accordance with the provisions of regulation 17.

Transitory provision

23.—(1) Where an assessment has effect in accordance with regulation 21, a local authority—

(a) must apply the provisions of regulations 4, 5, 6 and 16 to such an assessment, notwithstanding that it was not undertaken in

accordance with these Regulations, save that regulation 6(2) does not have effect,

(b) is not required to act in accordance with regulation 7 save that regulation 7(2) has effect,

(c) must carry out an assessment of D's means in accordance with regulations 13 and 16 where each of the conditions in regulation 14 are met and D has requested such an assessment, and

(d) must make a determination as to the amount that D is able to pay towards the cost of securing the provision of a service, in accordance with regulation 17, as though the assessment of D's means had been undertaken in accordance with regulations 13 and 16.

(2) Regulation 18(4) has effect in respect of any determination made in accordance with paragraph (1)(d) as though the earlier statement referred to in that regulation is a determination which has effect in accordance with regulation 21.

Gwenda Thomas

Deputy Minister for Social Services under authority of the Minister for Health and Social Services, one of the Welsh Ministers

24 March 2011

Jane Hutt AC/AM
Y Gweinidog dros Fusnes a'r Gyllideb
Minister for Business and Budget

Llywodraeth Cynulliad Cymru
Welsh Assembly Government

Lord Dafydd Elis-Thomas AM
Presiding Officer
National Assembly for Wales

29 March 2011

Dear Dafydd,

THE SOCIAL CARE CHARGES (MEANS ASSESSMENT AND DETERMINATION OF CHARGES) (WALES) REGULATIONS 2011

THE SOCIAL CARE CHARGES (DIRECT PAYMENTS) (MEANS ASSESSMENT AND DETERMINATION OF CHARGES) (WALES) REGULATIONS 2011

THE SOCIAL CARE CHARGES (REVIEW OF CHARGING DECISIONS) (WALES) REGULATIONS 2011

I am writing to inform you that in order to bring into force in Wales the above Regulations, all being made under provisions in the Social Care Charges (Wales) Measure 2010, it has become necessary to breach the 21 day rule. These Regulations were all made on 24 March and laid in Table Office on 29 March. They will come into force on 11 April 2011 to coincide with the changes to welfare benefits that the Department for Work and Pensions will make on that day, given the link between these and charging for social care.

These Regulations, when taken with the provisions on the face of the Measure, introduce a new regime in Wales in relation to the charging that local authorities undertake for providing non-residential social services. They introduce more consistency in this charging so as to fulfil the Assembly Government's "One Wales" commitment to make charging for these services "a more level playing field".

The Regulations and Measure make considerable changes to how local authorities may charge those who receive non-residential social services. Currently authorities have wide discretion regarding the services for which a charge may be made, the allowances and disregards of capital and income they operate in means assessments of service users to determine charges, and in the level of charges they set. This has led to differing charging policies operated by authorities in Wales, with wide variations between the services for which a charge is made, in the means assessments they undertake and in the charges they make. The Measure, while maintaining authorities' discretion to charge, allows Welsh Ministers by Regulation to set out a new framework where charging occurs to introduce more consistency. Therefore, the Regulations cover:

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The Social Care Charges (Means Assessment and Determination of Charges) (Wales) Regulations 2011

- The classes of persons who may not be charged and the services for which a charge may not be made;
- That an authority's power to set a reasonable charge is subject to a maximum charge of £50 per week;
- The content and format of an invitation, and the responses to these, to request a means assessment to be issued to a service user where a charge is planned;
- Where a means assessment is requested, the process to be used including the financial safeguards to be afforded service users;
- The procedure an authority should use in determining a charge;

The Social Care Charges (Direct Payments) (Means Assessment and Determination of Reimbursement or Contribution) (Wales) Regulations 2011

- For those in receipt of direct payments to obtain the non-residential social services they require, corresponding provision to that outlined above;

The Social Care Charges (Review of Charging Decisions) (Wales) Regulations 2011

- Introduces a right to request a review of any decision to impose a charge and in the case of those receiving direct payments, to impose a contribution or reimbursement for the direct payments they receive;
- The situations in which a request for a review may be made, the content and format of that request and the acknowledgement an authority must issue;
- The process an authority must use in considering such requests, the timescales for this and the factors an authority must take into account in determining them;
- The actions an authority must take once a decision has been made and the arrangements for the payment of any charge, contribution or reimbursement in dispute during the period of the review and subsequently.

Given the level of detail that these Regulations have of necessity needed to cover to achieve our aim of more consistency, their development has required extensive and prolonged engagement with stakeholders; both those representing local authorities and those representing service users. This was to ensure that they afforded service users the consistency of approach and financial safeguards required in such a new regime, while at the same time introducing arrangements which were practical for authorities to administer. This process has, therefore, been highly technical involving charging, financial and complaint officers from local government, as well as a range of individuals from the organisations representing older and disabled people.

Draft Regulations were subject to a public consultation which concluded on 4 February this year. Since then officials have been considering the responses in liaison with the stakeholder representatives mentioned above. This has included ensuring that, in relation to direct payments, the changes account for all of the categories of individuals who are eligible to receive direct payments. That category is being extended and has recently been the subject of separate Regulations laid in relation to direct payments which will also come into force on 11 April. As a result it has not been possible to lay these Regulations relating to local authority charging for non-residential social services before now.

A copy of this letter goes to Janet Ryder, Chair of the Constitutional Affairs Committee and to Stephen George, Clerk to the Constitutional Affairs Committee.

Jane Hutt

Constitutional Affairs Committee Draft Report

CA593

Title: The Reporting of Prices of Milk Products (Wales) Regulations 2011

Procedure: **Negative**

These Regulations revoke and replace the Reporting of Prices of Milk Products (Wales) Regulations 2005. They require a sample of milk processors to provide information on the prices at which they sell milk products after processing, to the Welsh Assembly Government, for onward transmission by the Department for Environment, Food and Rural Affairs to the European Commission.

Technical Scrutiny

Under Standing Orders 21.2 the Assembly is invited to pay special attention to the following instrument:-

Regulation 4 (1) provides that any person who fails to comply with a notice served by Welsh Ministers under regulation 2 (1) is guilty of an offence. Regulation 3 (1) rather than regulation 2 (1) provides for the Welsh Ministers to serve such a notice. Regulation 2 (1) does not exist.

(Standing Order 21.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirements)

Merits Scrutiny

For points identified for reporting under Standing Order 21.3 in respect of this instrument see CLA(4)-01-11(p1).

Legal Advisers
Constitutional Affairs Committee

April 2011

The Government has responded as follows:

The Reporting of Prices of Milk Products (Wales) Regulations 2011

The Government considers the technical scrutiny point of the CAC to be a typographical error and one appropriate for amendment on publication which will take place by the end of May 2011. Support for the Government's response is as follows:

1. The explanatory note to the Regulations makes it clear that failure to comply with the notice requirements contained in the Regulations is an

offence and that such notices must be served under regulation 3. Whenever there is ambiguity in the body of the Regulations, the explanatory notes though not legally binding would be used to assist the reader in reaching an interpretation.

2. There is no regulation 2(1) in the Regulations. Taken in the context that notices are served under regulation 3 and that it is an offence under regulation 4 to fail to comply with such a notice, it is unlikely that the incorrect citation of regulation 2(1) can mean anything other than that it is a typographical error which should have cited regulation 3(1).

3. Bennion's publication is the recognised legal authority on statutory interpretation. An example given in Bennion's of when it is accepted practice for the courts to apply a construction to statutory instruments in order to rectify any error and to give practical effect to the legislator's intention is when there is a typographical error.

Summary of Government's response

The insertion of regulation 2(1) in place of what should have read regulation 3(1) is a clear typographical error which can be appropriately amended on publication. This is supported by the reasons stated in 1 – 3 above.

Explanatory Memorandum to Reporting of Prices of Milk Products (Wales) Regulations 2011

This Explanatory Memorandum has been prepared by the Department for Rural Affairs and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 24.1

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Reporting of Prices of Milk Products (Wales) Regulations 2011.

Elin Jones
Minister for Rural Affairs
29 March 2011

1. Description

New European requirements relating to Member States notifications to the Commission in the milk and milk products sector necessitate revoking and replacing of the existing domestic legislation in Wales. to bring it up to date . The replacement Regulations require a sample of milk processors to provide information on the prices at which they sell milk products after processing, to the Welsh Assembly Government, for onward transmission by the Department for Environment, Food and Rural Affairs to the European Commission.

The Regulation also requires Member States to take steps to ensure that dairy processors provide them with information on prices in the time scales required. These Regulations have penalties for processors who fail to do so.

This Statutory Instrument replaces the Reporting of Prices of Milk Products (Wales) Regulations 2005 (SI 2005/2907). The new Instrument will:

- incorporate references to Commission Regulation (EU) No 479/2010 which lays down the detailed rules for the implementation of Council Regulation 1234/2007 as regards notifications to the Commission in the milk and milk products sector and which repeals and replaces Commission Regulation (EC) No 562/2005.
- provide definitions of milk products and milk processor

2. Matters of Special Interest to the Constitutional Affairs Committee

None

3. Legislative background

The Welsh Ministers, are designated for the purposes of making regulations under section 2(2) of the European Communities Act 1972 by virtue of the European Communities (Designation)(No 5) Order 2010 (SI 2010/2690) in relation to the common agricultural policy of the European Union.

These Regulations make provision for a purpose mentioned in section 2(2) of the European Communities Act 1972, and it appears to the Welsh Ministers that it is expedient for the references to a European Union instrument, in these regulations, to be construed as references to that European Union instrument as amended from time to time.

The Welsh Ministers make the Regulations in exercise of the powers conferred upon them by s2(2) of and paragraph 1A of Schedule 2 to, the European Communities Act 1972.

4. Purpose & intended effect of the legislation

This Statutory Instrument will revoke and remake the 2005 Regulations such that it refers to the new Commission Regulation (EU) No 479/2010.

Article 2 of "Commission Regulation (EU) No 479/2010 laying down rules for the implementation of Council Regulation (EC) No 1234/2007 as regards Member States' notifications to the Commission in the milk and milk products sector" requires Member States to report the prices of raw milk and certain milk products at specified intervals, and repeals Commission Regulation (EC) No 562/2005 which made similar provisions. This price information is used by the Commission when calculating refund and aid amounts which form part of the common organisation of the market in dairy products.

Commission Regulation (EU) No 479/2010 repealed and replaced Commission Regulation (EC) No 562/2005 because the 2005 Regulation had already been amended and further amendments were required, notably to update references to other EU legislation. The new Commission Regulation includes some changes to the production thresholds over which the prices of products must be reported and the timing of reports.

This Statutory Instrument updates this reference and also provides definitions of milk products and 'milk processor' The definitions are as follows:

- 'milk processor' means a person operating an establishment which manufactures milk products
- 'milk products' means those products listed in Article 2(3)(a) of, and Annexes 1.A and 1.B to the Commission Regulation

5. Consultation

The EU legislation has direct effects in Wales and is already in force and the Welsh Statutory Instrument must reflect those changes. Consultation on the legislation is not considered appropriate as there is no scope for variation. As

this Statutory Instrument will not result in increased impact on the voluntary or private sectors, consultation was not deemed necessary.

6. Regulatory Impact Assessment

A full regulatory impact assessment on the effect on the costs of business was prepared in respect of the 2005 Regulations.

WELSH STATUTORY INSTRUMENTS

2011 No. 1009 (W. 149)

AGRICULTURE, WALES

The Reporting of Prices of Milk Products (Wales) Regulations 2011

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations revoke and replace the Reporting of Prices of Milk Products (Wales) Regulations 2005 ("the 2005 Regulations") which made provision in Wales for the implementation of article 6 of Commission Regulation (EC) No 562/2005 (OJ No L95, 14.4.2005, p.11) laying down rules for the implementation of Council Regulation (EC) No 1255/1999 as regards communications between the Member States and the Commission in the milk and milk products sector as amended from time to time.

Commission Regulation (EC) No 562/2005 was repealed from 1 August 2010 and replaced by Commission Regulation (EU) No 479/2010 laying down rules for the implementation of Council Regulation (EC) No 1234/2007 as regards Member States notifications to the Commission in the milk and milk products sector as amended from time to time. Council Regulation (EC) No 1255/1999 was repealed from 1 July 2008 and replaced by Commission Regulation (EC) No 1234/2007.

These Regulations require milk processors to provide the Welsh Ministers with such information relating to the prices of certain milk products, as they may require by notice (regulation 3). Failure to comply with such a requirement is an offence punishable on summary conviction by a fine not exceeding level 5 on the standard scale (regulation 4).

A full regulatory impact assessment on the effect on the costs of business was prepared in respect of the 2005 Regulations and copies of this can be obtained from the Welsh Assembly Government, Cathays Park, Cardiff, CF10 3NQ. A further full regulatory impact assessment has not been produced for this instrument

as no impact on the private or voluntary sectors is foreseen.

WELSH STATUTORY INSTRUMENTS

2011 No. 1009 (W. 149)

AGRICULTURE, WALES

The Reporting of Prices of Milk Products (Wales) Regulations 2011

Made	*29 March 2011*
Laid before the National Assembly for Wales	*31 March 2011*
Coming into force	*21 April 2011*

The Welsh Ministers, are designated(**1**) for the purposes of making regulations under section 2(2) of the European Communities Act 1972(**2**) in relation to the common agricultural policy of the European Union.

These Regulations make provision for a purpose mentioned in section 2(2) of the European Communities Act 1972, and it appears to the Welsh Ministers that it is expedient for the references to a European Union instrument, in these Regulations, to be construed as references to that European Union instrument as amended from time to time.

The Welsh Ministers make the following Regulations in exercise of the powers conferred upon them by section 2(2) of, and paragraph 1A of Schedule 2 to, the European Communities Act 1972.

Title, commencement and application

1. The title of these Regulations is the Reporting of Prices of Milk Products (Wales) Regulations 2011. They come into force on 21 April 2011 and apply in relation to Wales.

Interpretation

(**1**) S.I. 2010/2690.

(**2**) 1972 c.68. Paragraph 1A was inserted into Schedule 2 by section 28 of the Legislative and Regulatory Reform Act 2006 (c.51).

2. In these Regulations—

"Commission Regulation" *("Rheoliad y Comisiwn")* means Commission Regulation (EU) No. 479/2010 laying down rules for the implementation of Council Regulation (EC) No 1234/2007 as regards Member States' notifications to the Commission in the milk and milk products sector(**1**) as amended from time to time;

"milk processor" *("proseswr llaeth")* means a person operating an establishment which manufactures milk products; and

"milk products" *("cynhyrchion llaeth")* means those products listed in Article 2(3)(a) of, and Annexes 1.A and 1.B to the Commission Regulation.

Provision of information on prices of milk products

3.—(1) A milk processor must provide to the Welsh Ministers such information relating to the prices of milk products as the Welsh Ministers may by notice require for the purposes of Articles 2 and 3 of the Commission Regulation.

(2) The notice referred to under paragraph (1) may require the milk processor to provide the information requested on a regular basis, and may specify when and in what format the information must be provided.

Offences

4.—(1) Any person who fails to comply with a notice referred to in regulation 2(1) is guilty of an offence, and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(2) Where a body corporate is guilty of an offence under paragraph (1) and the offence is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of—

(a) any director, manager, secretary or other similar person of the body corporate, or

(b) any person who was purporting to act in any such capacity,

that person is guilty of the offence as well as the body corporate.

(3) For the purposes of paragraph (2) "director" in relation to a body corporate whose affairs are managed by its members, means a member of the body corporate.

Revocation

(**1**) OJ No L 135, 2.6.2010, p.26 as last amended by Commission Regulation (EU) No 1041/2010 (OJ No L 299, 17.11.2010, p.4).

5. The Reporting of Prices of Milk Products (Wales) Regulations 2005([1]) are revoked.

Elin Jones
Minister for Rural Affairs, one of the Welsh Ministers

29 March 2011

([1]) S.I. 2005/2907 (W.206).

Constitutional Affairs Committee Draft Report

CA594

Title: The Care Homes (Wales) (Miscellaneous Amendments) Regulations 2011

Procedure: **Negative**

These Regulations amend the Care Homes (Wales) Regulations 2002 to make it a requirement that the person who manages a care home possesses a minimum level of qualification to undertake that role and that such a person is registered with the Care Council for Wales. They also make consequential amendments to the Registration of Social Care and Independent Health Care (Wales) Regulations 2002.

Technical Scrutiny

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

Merits Scrutiny

The Assembly is invited to pay special attention to these regulations under Standing Order 21.3(ii) as giving rise to an issue of public policy likely to be of interest to the Assembly:

In the light of recent public concerns about the management and operation of care homes providing services for adults, Assembly Members may wish to note that these Regulations introduce new arrangements to make it a legal requirement that all managers of care homes for adults register with the Care Council for Wales in order to undertake that role.

This instrument was laid during the third Assembly and it has not been possible to report on it within the usual 20-day timescale. Further information about this is set out in the report (laid document reference CR-LD8540) by the former Constitutional Affairs Committee laid on 31 March 2011.

Legal Advisers
Constitutional Affairs Committee

June 2011

Explanatory Memorandum to the Care Homes (Wales) (Miscellaneous Amendments) Regulations 2011

This Explanatory Memorandum has been prepared by the Adult Social Services Policy Division of the Health and Social Services Directorate General and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 24.1

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Care Homes (Wales) (Miscellaneous Amendments) Regulations 2011. I am satisfied that the benefits outweigh any costs.

Gwenda Thomas AM,
Deputy Minister for Social Services
29 March 2011

Description
1. The Care Homes (Wales) (Miscellaneous Amendments) Regulations 2011 will come into force on 1st June 2011. They will require all managers of care homes providing services to adults to be registered with the Care Council for Wales in order to practise in that role; both homes providing accommodation with personal care and those providing accommodation with nursing and personal care.

Matters of special interest to the Constitutional Affairs Committee
2. None.

Legislative Background
3. The Care Council for Wales was established by the Care Standards Act 2000. Section 56 specifies that the Council - *shall maintain a register of (a) social workers; and (b) social care workers of any other description specified by the appropriate Minister by order*. By virtue of section 121 of the Act and schedule 11, paragraph 30 to the Government of Wales Act 2006, the appropriate Minister is the Welsh Ministers. The power to make such an order must be exercised by statutory instrument.

4. To make the registration of managers of care homes for adults mandatory, the Care Homes (Wales) Regulations 2002 and the Registration of Social Care and Independent Care (Wales) Regulations 2002 will need to be amended to require that care providers only employ managers who are registered with the Care Council for Wales. The Welsh Ministers have power to make and amend regulations in relation to establishments and agencies registered under Part II of the Care Standards Act 2000 by virtue of section 22 of the Act.

5. This Statutory Instrument follows the negative resolution procedure.

Purpose and Intended Effect of the Legislation
Policy Objective
6. To develop the social care workforce in terms of its professional recognition, and it working to a consistent set of standards and conduct, Ministers have pursued the mandatory registration of workers with the Care Council for Wales. This is in a similar way to which healthcare workers are required to register with the regulatory body applicable to their particular profession. At present registration with the Care Council is a mandatory requirement for social workers, social work students and managers and care workers in registered care homes for children.

7. The Deputy Minister for Social Services announced that having implemented these requirements successfully, registration would now be extended to managers of care homes providing services for adults. To achieve this the regulations governing the operation of care homes, the Care Homes (Wales) Regulations 2002, will need to be amended to require that such persons are registered with the Care Council to operate in this role. In addition, to register with the Care Council individuals will need to possess a minimum level of qualifications to undertake a manager’s role.

8. Registration with the Care Council will be required by all care home managers irrespective of any other registration with a professional regulatory body they may hold. For example, nurses in homes providing nursing care will be registered with the Nursing and Midwifery Council to undertake their clinical duties and will regulated by that body in performing such clinical duties. Registration with the Care Council will ensure individuals managing a care home for adults are regulated in that role by one body consistently and equitably, irrespective of any other role they may perform in a home. This is to avoid a situation where managers are regulated in differing ways by differing regulatory bodies depending upon what clinical role they may also be performing in a home and which professional regulatory body regulates that clinical role. In the case of nurses registered with the Nursing and Midwifery Council to provide nursing in homes providing nursing care for adults but who also manage that home, the Care Council will develop a regulation protocol with the Nursing and Midwifery Council to be used in instances where an issue of concern or conduct arises involving an individual performing a dual manager/nurse role in home providing nursing care.

Effects

9. The new legislation will implement regulations to make it a legal requirement for all managers of care homes for adults to register with the Care Council for Wales in order to perform that role. Registration will:

- ensure a consistent approach, irrespective of any other role they might fulfil in a home. This provides clarity for managers in terms of which model of care, codes of practice and conduct, and qualifications they require in order to practise in that role;
- ensure equality of treatment in respect of professional regulation of that role irrespective of any other role they may be undertaking. This removes the potential for managers to be treated differently in professional regulatory terms by different bodies, and hence the potential for legal challenge, purely because of the body with which they are registered;
- support the Assembly Government's recognition and commitment to the social care profession and provide part of the mechanism to develop this in relation to residential care;
- provide a clear, consistent, regulatory position in relation to managers of care homes for adults which allows the Care and Social Services Inspectorate for Wales the ability to use its full range of enforcement powers should any such issues arise.

10. This new legislation will become effective on 1st June 2011. After this date it will be an offence for a registered provider to employ a manager who is not registered with the Care Council for Wales and an offence for an individual to hold the position of manager without such registration. There is a transitional arrangement for those managers appointed before 1st June who do not hold the required qualifications necessary for registration. For those individuals only there will be a period of grace until 1st October 2011 (or such later date as the Welsh Minister) to attain the required qualifications and to register.

Consultation
11. Details of the consultation undertaken are included in the RIA.

Regulatory Impact Assessment – Options, Costs and Benefits

Impact of the Proposed Changes
12. Implementing legislation will make it a legal requirement that all managers of care homes for adults register with the Care Council for Wales in order to undertake that role.

Option 1: Do Nothing
13. It would not be possible to implement the Assembly Government's policy intentions to continue to raise standards of practice and recognise professionalism in the social care workforce and further enhance the protection and safeguarding of vulnerable adults.

Cost
14. There would be no new cost implications from this option.

Benefits
15. There would be no benefits from this option.

Option 2: Make the Legislation
16. Implementing the regulations will make mandatory the Assembly Government's policy intention to continue to raise standards of practice to help promote and recognise professionalism in the social care workforce and further enhance the protection and safeguarding of vulnerable adults.

Costs
17. There are no known additional costs for local government or providers as a result of introducing legislation. A cost will apply to the individual applying for registration in the form of an annual membership fee.

Benefits
18. Registration will support the Assembly Government's recognition and commitment to the social care profession. It will ensure that all managers have attained the relevant qualifications needed to manager a care home for adults and will provide managers with clarity in terms of which model of care, codes of practice and conduct they require to practise in that role. It will aid consistency and clarity in the regulation of managers. Ultimately registration will aid the protection of vulnerable adults in care settings.

Consultation
19. A public consultation was held on a draft of the regulations to be made. In addition, all registered care homes for adults were consulted on the content of the SI together with key stakeholders and representative bodies within the health and social care sector. This included organisations representing care providers, individuals working in the sector and those commissioning services in the sector. The consultation was published on the Assembly Government's website. As the regulations are limited, of a technical nature and focus on a

specific group of the social care workforce, the Deputy Minister for Social Services agreed to a shorter consultation period than usual of 4 weeks.

20. 79 responses were received to the consultation. 63 of these confirmed they understood the requirements set out in the draft regulations and had no comments to offer upon them The remaining 16 respondents either commented on the policy intentions behind the draft regulations (eg why was registration required?) or expressed concerns over the ability to comply with the requirements relating to registration with the Care Council within the timeframe stipulated within the draft regulations.

21. As an outcome of an evaluation of the responses, the Deputy Minister agreed to a slight amendment to the final regulations in respect of the timeframe to comply with the requirement to register with the Care Council to allow a slightly longer period of time to meet this requirement.

Competition Assessment
23. Not applicable.

Summary
24. The regulations will extend the Assembly Government's commitment to and recognition of the social care workforce in Wales by ensuring all managers for care homes providing services to adults are registered with the same professional body that ensures that a person is suitably qualified to manage a care home and against which they can be regulated. Registration will provide a clear regulatory framework which individuals should work within and against which they can be regulated. In turn this will help enhance further the protection of vulnerable adults in all residential care settings.

WELSH STATUTORY INSTRUMENTS

2011 No. 1016 (W.153)

SOCIAL CARE, WALES

The Care Homes (Wales) (Miscellaneous Amendments) Regulations 2011

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Care Homes (Wales) Regulations 2002 to make it a requirement that the person who manages a care home possesses a minimum level of qualification to undertake that role and that such a person is registered with the Care Council for Wales.

They also make consequential amendments to the Registration of Social Care and Independent Health Care (Wales) Regulations 2002.

WELSH STATUTORY INSTRUMENTS

2011 No. 1016 (W. 153)

SOCIAL CARE, WALES

The Care Homes (Wales) (Miscellaneous Amendments) Regulations 2011

Made *29 March 2011*

Laid before the National Assembly for Wales *31 March 2011*

Coming into force *1 June 2011*

The Welsh Ministers, in exercise of the powers conferred by sections 12(2), 22(1), 22(2)(a) and 118(5) to (7) of the Care Standards Act 2000(**1**) and having consulted such persons as they consider appropriate(**2**) make the following Regulations:

Title, commencement and application

1.—(1) The title of these Regulations is the Care Homes (Wales) (Miscellaneous Amendments) Regulations 2011 and they come into force on 1 June 2011.

(2) These Regulations apply in relation to Wales.

Interpretation

2.In these Regulations—

"the principal Regulations" *("y prif Reoliadau")* means the Care Homes (Wales) Regulations 2002(**3**);

(**1**) 2000 c.14 ("the Act"). These powers are exercisable by the "appropriate Minister", this term is defined in section 121(1) of the Act in relation to Wales, as the National Assembly for Wales. The functions of the National Assembly for Wales under the Act were transferred to the Welsh Ministers by paragraph 30 of Schedule 11 to the Government of Wales Act 2006 (c.32). *See* section 121(1) of the Act for the definitions of "prescribed" and "regulations".

(**2**) *See* section 22(9) of the Act for the requirement to consult.

(**3**) S.I. 2002/324.

"the Registration Regulations" *("y Rheoliadau Cofrestru")* means the Registration of Social Care and Independent Health Care (Wales) Regulations 2002(**1**).

Amendment of the principal Regulations

3.—(1) The principal Regulations are amended in accordance with the following provisions of this regulation.

(2) In regulation 2 (interpretation), insert in the appropriate place in the alphabetical order—

""required qualification" *("cymhwyster angenrheidiol")* means a qualification contained in a list maintained by the Welsh Ministers for the purposes of these Regulations;".

(3) In regulation 7 (fitness of registered provider)—

(a) for paragraph (3)(c) substitute the following—

"(c) full and satisfactory information or documentation is available in relation to him or her in respect of the relevant matters specified in paragraph (4).";

(b) renumber the existing provision in paragraph (4) and (5) as paragraph (5) and (6) respectively;

(c) after paragraph (3) insert the following—

"(4) The matters referred to in paragraph (3) are—

(a) where the individual manages or intends to manage the care home—

(i) except where paragraph (5) applies, in respect of each of the matters specified in paragraphs 1 to 6 of Schedule 2;

(ii) where paragraph (5) applies—

(aa) in respect of each of the matters specified in paragraphs 1 and 3 to 6 of Schedule 2, and

(bb) notification has been received under section 113E(4)(a) of the Police Act 1997 that the individual is not included on a specified adults' list (within the meaning of section 113E of that Act)(**2**);

(b) where the individual does not manage or intend to manage the care home—

(**1**) S.I. 2002/919.
(**2**) 1997 c.50.

(i) except where paragraph (5) applies, in respect of each of the matters specified in paragraphs 1 to 5 and 6 of Schedule 2;

(ii) where paragraph (5) applies—

(aa) in respect of each of the matters specified in paragraphs 1, 3 to 5 and 6 of Schedule 2, and

(bb) notification has been received under section 113E(4)(a) of the Police Act 1997 that the individual is not included on a specified adults' list (within the meaning of section 113E of that Act).".

(4) For paragraph (3) of regulation 8 (appointment of manager), substitute—

"(3) If the registered provider intends to manage the care home, that individual must—

(a) comply with the requirements specified in regulation 9 (fitness of registered manager); and

(b) forthwith give notice to the appropriate office of the Welsh Assembly Government of the date on which such management is to begin.".

(5) In regulation 9 (fitness of registered manager)—

(a) in paragraph (2)—

(i) in sub-paragraph (b)(ii), for "skills and experience" substitute "qualifications, skills and experience", and

(ii) in sub-paragraph (c), for "paragraph (3)" in each place it occurs, substitute "paragraph (7)";

(b) renumber the existing provision in paragraph (3) as paragraph (7);

(c) after paragraph (2) insert—

"(3) Subject to paragraph (4), a reference to qualifications, skills and experience includes a requirement that the person must possess a required qualification.

(4) Where a person, who does not hold a required qualification, was appointed as the manager of a care home before 1 June 2011, that person is not fit to manage a care home unless he or she obtains a required qualification not later than—

(a) 1 October 2011; or

(b) such later date as the Welsh Ministers agree is reasonable in all the circumstances.

(5) Nothing in paragraph (3) or (4) affects any requirement for a manager to possess other qualifications, skills or experience relevant to the matters set out in paragraph (2)(b).

(6) A person is not fit to manage a care home unless the person is registered as a manager of a care home with the Care Council for Wales not later than—

(a) 1 October 2011; or

(b) such later date as the Welsh Ministers agree is reasonable in all the circumstances.".

(6) In regulation 19 (fitness of workers)—

(a) in paragraph (2)(d)(i), for "1 to 6" substitute "1 to 5 and 6";

(b) in paragraph (2)(d)(ii), for "1 and 3 to 6" substitute "1, 3 to 5 and 6";

(c) in paragraph (5)(a) for "3 to 6", substitute "3 to 5 and 6".

(7) In Schedule 2 (information and documents to be available in respect of persons carrying on, managing, or working at, a care home)—

(a) in paragraph 5, after "relevant" insert "or required";

(b) after paragraph 5, insert—

"(5A) Where relevant, documentary evidence of registration with the Care Council for Wales.".

Amendment of the Registration Regulations

4.—(1) The Registration Regulations are amended in accordance with the following provisions of this regulation.

(2) In Schedule 1 (information to be supplied on an application for registration as a person who carries on an establishment or agency), in Part 1 (information about the applicant)—

(a) after paragraph 1(b), insert—

"(ba) where the establishment is a care home, whether the applicant is registered with the Care Council for Wales and, if so, details of his or her registration;";

(b) after paragraph 2(c), insert—

"(ca) where the establishment is a care home, whether the responsible individual is registered with the Care

Council for Wales and, if so, details of his or her registration;”.

(3) In Schedule 3 (information and documents to be supplied on an application for registration as the manager of an establishment or agency), in Part 1 (information), after paragraph 2A, insert—

“(2B) Where the establishment is a care home, details of the applicant’s registration with the Care Council for Wales.”.

Gwenda Thomas

Deputy Minister for Social Services, under authority of the Minister for Health and Social Services, one of the Welsh Ministers

29 March 2011

EXPLANATORY MEMORANDUM TO

THE WATER INDUSTRY (SCHEMES FOR ADOPTION OF PRIVATE SEWERS) REGULATIONS 2011

2011 No. [XXXX]

1. This explanatory memorandum has been prepared by the Department for Environment Food and Rural Affairs and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument requires statutory sewerage undertakers to use their existing voluntary powers to adopt sewerage assets as part of the public sewerage system for which they are responsible, to take ownership of all private sewers and lateral drains (that part of a drain serving a single property which is outside of the property boundary) that connect to the public sewerage system as at 1 July 2011.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 Statutory sewerage undertakers currently have a duty under section 94 of the Water Industry Act 1991 to provide, maintain and extend a system of public sewers in their areas. This instrument seeks to implement the coalition Government's decision to utilise for the first time provisions in the Water Industry Act (section 105A) to transfer to sewerage undertakers, the ownership of private sewerage assets that connect to the public sewerage system, and to alleviate the burden of responsibility for maintenance that currently generally falls to the owners of the premises served by them.

5. Territorial Extent and Application

5.1 This instrument applies in England and Wales.

6. European Convention on Human Rights

The Secretary of State for Environment, Food and Rural Affairs has made the following statement regarding Human Rights:

In my view the provisions of the Water Industry (Schemes for Adoption of Private Sewers) Regulations 2011 are compatible with the Convention rights.

7. Policy background

- What is being done and why

7.1 The Water Industry Act 1991 places statutory sewerage undertakers under a duty to provide, maintain and extend a system of public sewers as to ensure that the area is and continues to be effectually drained. Whilst the 1991 Act provides for the voluntary adoption as part of the public sewerage system of sewers and lateral drains that connect to it, it is not a requirement and an extensive system of private sewerage has developed since 1937. Prior to that the Public Health Act 1936 legislated for sewerage undertakers to be responsible for sewers in existence at 1 October 1937 as public assets.

It has been estimated that up to 50% of properties in England and Wales are connected to a private sewer in one form or another. The public sewerage system currently comprises some 323,000km of public sewers. Following transfer water and sewerage companies will in addition have a statutory duty to maintain some 220,000km of former private sewers and lateral drains.

Owners of private sewers are often unaware of their liabilities until a problem arises: repairs can be expensive, recovering the costs from all owners can be very difficult; access for repairs to land owned by others e.g. highways is difficult for private citizens. Local Authorities not infrequently have to intervene. Owners of these sewers subsidise those whose sewers predate 1936 by virtue of paying the same for their sewerage whether their properties are connected direct to the public sewerage system or via a private sewer. Lack of integration of the sewerage network also has implications for the ability of the sewerage undertakers to adapt to increased demand arising from housing growth and climate change.

Support for the proposed transfer of ownership among private sewer owners is widespread. There is concern in the drainage repair industry about future procurement arrangements for repair work following transfer. However, while the market for drainage repair work will change, with work being allocated by sewerage undertakers rather than property owners, the amount of work will remain the same in the short to medium term and business may increase as sewerage undertakers set about the repair and maintenance of transferred assets.

Consolidation

7.2 None.

8. Consultation outcome

8.1 In 2003 the then Government undertook consultation on the problems of private sewer ownership and explored alternative solutions. Responses revealed strong support

for transfer from industry and local authorities. Some 81 per cent of respondents expressed support for transfer of ownership to either local authorities or to sewerage undertakers and 90 per cent of those supporting a change of ownership thought that sewerage undertakers should assume ownership. Alternative management arrangements were considered but dismissed as unviable. Insurance was not considered to be a satisfactory alternative as policy coverage varied and property deeds are often unspecific about ownership of private sewers. The then Government concluded that transfer of ownership offered the only comprehensive solution.

Further research by Defra and a Steering Group of key stakeholders explored customers' views, estimated the costs and bill impacts of transfer and developed implementation options and further questions for consultation in 2007. Members of the group included Ofwat, Water UK, CCWater, Welsh Assembly Government, Communities and Local Government (formerly ODPM), local authority representatives, insurance industry representatives, housebuilding industry representatives, drainage industry representatives and the Environment Agency.

The 2007 consultation paper presented a number of different implementation options ranging from an overnight automatic transfer of all private sewers and laterals to 'on application' options. Each option had different implications for the costs of transfer. 89 per cent of respondents considered automatic overnight transfer to be the most workable solution. Subsequent consultation in 2010 sought views on draft regulations for implementation of this option. The Government's response to and summary of consultation responses was published by Defra on 30 March and is available on Defra's website.

9. Guidance

9.1 Defra is developing informal guidance in association with the water industry and other key its stakeholders as part of a comprehensive communication strategy designed to ensure a consistent, clear and practicable approach is taken to implementation. The communication strategy will aim to make clear to private sewer owners, sewerage undertakers, enforcement bodies, local authorities and other interested parties including drainage contractors and insurance companies, the extent and process of transfer.

10. Impact

10.1 The impact on business, charities or voluntary bodies is largely confined to the private drainage repair industry, which will be affected by a change in the process of procurement for new work. It is expected that the amount of work in maintaining and repairing currently private drainage will remain roughly constant and there may inevitably be a change in the market focus for some private drainage contractors operating in this sector, who may wish to enter into arrangements with WaSCs or their sub-contractors rather than receiving work direct from private owners. Drainage contractors will continue

to provide a service to householders in respect of drains serving single properties that are within the property boundary and of entirely independent sewerage systems which will not transfer. Sewerage undertakers will become responsible for the maintenance of a significantly enlarged system of public sewers but the cost of this will be recoverable through charges to the generality of their sewerage customers.

10.2 The impact on the public sector is limited to the benefit derived by local authorities who will no longer be responsible as owners of private sewers serving their own property stock for the maintenance the sewers and in a reduction in the extent of the private sewerage system over which they will have responsibility for enforcement of repair in the interests of public health.

10.3 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on www.legislation.gov.uk..

11. Regulating small business

11.1 The legislation does not apply to small business but representatives of the drainage contracting industry were among the representatives on the Steering Group that helped develop the transfer proposals.

12. Monitoring & review

12.1 Costs and benefits need to be reviewed in the longer term, after 10 years or two Ofwat price reviews. Customer experience will be reviewed after three years to evaluate expected removal of householder burdens. Paragraphs 127 – 134 of the Final Stage Impact Assessment contain further detail of the monitoring and review arrangements that already exist.

12.2 The regulations contain a sunset clause.

13. Contact

Ian Macdonald/Phil Terry at the Defra Tel: 020 7238 5350/5062 or email: ian.macdonald@defra.gsi.gov.uk or phil.terry@defra.gsi.gov.uk can answer any queries regarding the instrument.

Title: **Impact Assessment of the transfer of private sewers and lateral drains to statutory water and sewerage companies** **Lead department or agency:** Defra **Other departments or agencies:** Ofwat and the Welsh Assembly Government	Impact Assessment (IA) **IA No:** DEFRA 1333 **Date:** 17/01/2011 **Stage:** Final **Source of intervention:** Domestic **Type of measure:** Secondary legislation **Contact for enquiries:** Phil Terry 020 7238 5062

Summary: Intervention and Options

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

The 1936 Public Health Act resulted in sewers serving pre-1937 properties becoming public sewers but made no provision to ensure the same for those built after that date. The result is that owners of post-1937 property unfairly cross-subsidise the maintenance of sewers serving those built before that date. Most home owners are unaware of their liability for private sewer maintenance and when undertaken it tends to be reactive and piecemeal with little thought to planned maintenance. The joint ownership of private sewers can also result in disputes and responsibilities can prove hard to enforce. This disparate ownership also results in a lack of integrated management of the overall sewerage system.Government intervention is needed to redress the failure caused by the 1936 Act.

What are the policy objectives and the intended effects?

The policy objective is to ensure better maintenance and replacement of what are currently privately owned lateral drains and sewers leading to less environmental pollution, fewer public health threats, fewer concerns and complaints by houseowners and businesses at what are perceived as unfair costs of repair, with fewer disputes leading to local authority intervention. Longer term the goal is to lead to a better managed sewerage network of higher standard that has lower maintenance costs and is more resilient and effective.

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

Options consulted on included do nothing, transfer ownership to local authorities, transfer management only, legislating to enforce standards on private owners, extending insurance policy coverage, and issuing guidance to existing owners and enforcement bodies. Opinion favoured transfer of ownership to WASCs as a cheaper, more effective, and more comprehensive solution. This was welcomed by the Pitt Review and associated powers were taken in the Flood and Water Management Act 2010. Phasing the transfer, and transfer on application was considered but rejected, the last because of the complexities of shared ownership, and phasing was more complex with no additional benefits. A big bang transfer was the chosen option. We have considered three sub-options relating to the timeframe of capex expenditure on upgrading the private sewer pipes and (separately) the associated pumping stations. The best NPV is provided by the chosen option – phasing capex for sewers over 10 years and pumping stations over 5 years.

Will the policy be reviewed? It will be reviewed. **If applicable, set review date:** 10/2014 **What is the basis for this review?** PIR **If applicable, set sunset clause date:**	
Are there arrangements in place that will allow a systematic collection of monitoring information for future policy review?	Yes

Select Signatory Sign-off For final proposal stage Impact Assessments:

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) the benefits justify the costs.

Signed by the responsible SELECT SIGNATORY: .... Date: ....

Summary: Analysis and Evidence Policy Option 1

Description:

Automatic, unconditional, overnight transfer of private sewers to WaSCs in England and Wales

Price Base Year 9/10	PV Base Year 9/10	Time Period Years 40	Net Benefit (Present Value (PV)) (£m)		
			Low: - £76m	**High:** £623m	**Best Estimate: £161m**

COSTS (£m)	Total Transition (Constant Price)	Ye	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	£1267m	15	£172m	**£4590m**
High	£428m		£172m	**£3891m**
Best Estimate	£957m		£172m	**£4353m**

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

Key costs are upfront capital expenditure (capex) and annual costs to be borne by WaSCs, with capex in particular being highly uncertain. These costs will be passed through to WaSC customers under Ofwat's regulatory mechanisms. Ofwat estimates that indicative costs may equate to an average £5 p.a. increase on all sewerage bills from 2011 rising to £8 by 2019, with a range of £3 - £14 across WaSCs. Liabilities and costs are transferred from private owners.

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

Potential loss of business for micro drainage repair firms. Where applicable, landlords who have granted easements for private sewers will lose right to have those sewers moved at no expense to themselves.

BENEFITS (£m)	Total Transition (Constant Price)	Ye	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	n/a	n/a	£221m	**£4514m**
High	n/a		£221m	**£4514m**
Best Estimate	n/a		£221m	**£4514m**

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

Estimated £165m p.a. average cost avoided for private maintenance of private sewer owners. Householders will save £10m of time (rising over time) due to a reduction in blockages after transfer. Estimated £42m p.a. saving for private maintenance and replacement of pumping stations. £4m p.a. benefit from receipt of GSS payments (The Guaranteed Standards Scheme (GSS) entitles customers to payment in recognition of the failure of WaSCs to meet specified levels of service).

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

Social benefits to all from WaSCs' more efficient and long term strategic operation of assets, from fewer blockages, less consequent pollution, fewer health hazards, & higher health & safety standards in pumping stations. Removal of liability, distress & sense of unfairness from private sewer & lateral owners.

Key assumptions/sensitivities/risks **Discount rate (%)** *

Wide range around indicative figures to be assumed. Length of sewers & laterals to transfer fairly certain. Ofwat advises no.of pumping stations, condition and remedial expenditure for pipework & pumping stations is very uncertain, as assets have not been surveyed. Cost range captures most sensitive values (cost pump station upgrades, proportion of sewerage network requiring upgrade). Peak capital expenditure may occur later than assumed.

* All figures are discounted over 40 years using an initial rate of 3.5% dropping to 3% after 30 years (HM Treasury's recommended discount rate)

Direct impact on business (Equivalent Annual) £m):			In scope of OIOO?	Measure qualifies as
Costs: £203m	**Benefits:** £0m	**Net:** - £203m	Yes	IN

Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?	England and Wales				
From what date will the policy be implemented?	01/10/11				
Which organisation(s) will enforce the policy?	Defra, WAG and Ofwat				
What is the annual change in enforcement cost (£m)?	nil				
Does enforcement comply with Hampton principles?	Yes				
Does implementation go beyond minimum EU requirements?	No				
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)	**Traded:** **n/a**		**Non-traded:** **n/a**		
Does the proposal have an impact on competition?	Yes				
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?	**Costs:** n/a		**Benefits:** n/a		
Distribution of annual cost (%) by organisation size (excl. Transition) (Constant Price)	**Micro**	**< 20**	**Small**	**Medium**	**Large** 100%
Are any of these organisations exempt?	No	No	No	No	No

Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on…?	Impact	Page ref within IA
Statutory equality duties[1] Statutory Equality Duties Impact Test guidance	No	38
Economic impacts		
Competition Competition Assessment Impact Test guidance	No	35
Small firms Small Firms Impact Test guidance	Yes	36
Environmental impacts		
Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance	No	38
Wider environmental issues Wider Environmental Issues Impact Test guidance	No	38
Social impacts		
Health and well-being Health and Well-being Impact Test guidance	No	39
Human rights Human Rights Impact Test guidance	No	39
Justice system Justice Impact Test guidance	No	39
Rural proofing Rural Proofing Impact Test guidance	No	39
Sustainable development Sustainable Development Impact Test guidance	No	39

[1] Public bodies including Whitehall departments are required to consider the impact of their policies and measures on race, disability and gender. It is intended to extend this consideration requirement under the Equality Act 2010 to cover age, sexual orientation, religion or belief and gender reassignment from April 2011 (to Great Britain only). The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

Evidence Base (for summary sheets) – Notes
Use this space to set out the relevant references, evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Please fill in **References** section.

References
Include the links to relevant legislation and publications, such as public impact assessments of earlier stages (e.g. Consultation, Final, Enactment) and those of the matching IN or OUTs measures.

No.	Legislation or publication
1	IA for Decision to Transfer (March 2007): http://www.defra.gov.uk/environment/quality/water/industry/sewers/existing/index.htm
2	IA for Consultation on Implementation Options (July 2007): http://www.defra.gov.uk/environment/quality/water/industry/sewers/existing/index.htm
3	IA for Government Decision to Proceed with Transfer (November 2008): http://www.defra.gov.uk/environment/quality/water/industry/sewers/existing/index.htm
4	IA for August 2010 Consultation on Draft Regulations: http://www.defra.gov.uk/corporate/consult/private-sewers/100826-private-sewers-condoc-ia.pdfhttp://www.defra.gov.uk/environment/quality/water/industry/sewers/existing/index.htm

+ Add another row

Evidence Base
Ensure that the information in this section provides clear evidence of the information provided in the summary pages of this form (recommended maximum of 30 pages). Complete the **Annual profile of monetised costs and benefits** (transition and recurring) below over the life of the preferred policy (use the spreadsheet attached if the period is longer than 10 years).
The spreadsheet also contains an emission changes table that you will need to fill in if your measure has an impact on greenhouse gas emissions.

Annual profile of monetised costs and benefits* - (£m) constant prices

	Y_0	Y_1	Y_2	Y_3	Y_4	Y_5	Y_6	Y_7	Y_8	Y_9
Transition costs										
Annual recurring cost										
Total annual costs										
Transition benefits										
Annual recurring benefits										
Total annual benefits										

* For non-monetised benefits please see summary pages and main evidence base section

Microsoft Office Excel Worksheet

Evidence Base (for summary sheets)

One In One Out

1. The Regulation is within scope of the in/out process. We have assessed the pass-through (which will happen automatically through Ofwat's regulatory mechanisms) as an indirect benefit to business, rather than a direct benefit. The policy thus has an equivalent annual net direct cost to business (EANCB) of £203m. Detail of this calculation is at paragraphs 120-122.

Scope of Impact Assessment

2. This is the 'Final Stage' Impact Assessment (IA) on the transfer of existing private sewers and lateral drains (laterals) into the ownership of the statutory, privatised and regulated Water and Sewerage Companies (WaSCs). It has been developed using the policy cycle toolkit from the BIS BRE website. The Government made a statement to Parliament in September 2010 that, subject to approval of the regulations needed to effect it, it would transfer ownership of private sewers from October 2011, based on an 'automatic overnight' approach. The transfer will apply to England and Wales to those sewers and laterals connected to the public sewerage system.

3. The implementation stage IA of March 2010 accompanied the consultation on draft regulations for transfer conducted between 26 August and 18 November 2010. Prior to that the following Impact Assessments had been prepared, signed off and published as follows:
   - February 2007, RIA on decision to transfer;
   - July 2007, implementation options IA published with consultation;
   - December 2008, final proposal IA published with decision on preferred implementation option (overnight transfer on 1 October 2011).

4. The Government consulted in Aug 2010 on draft regulations and proposals for schemes for the transfer of private sewers to WaSCs. The consultation produced no fresh evidence for the IA, consequently this IA does not contain new or revised analysis compared to that published alongside the August 2010 consultation paper, beyond updating the PV base year and satisfying the new requirements for IAs regarding direct impacts on business.

5. The 2010 NAO review of new policies across government assessed the March 2010 version of the IA. It was rated 'green' overall, indicating that the degree of analysis was considered proportionate for that stage.

What problems are being addressed and why has intervention been necessary?

6. Current ownership arrangements result in difficulties for private sewer and lateral drain owners and a lack of integrated management of the sewerage system as a whole.

7. This ownership liability can result in considerable distress, which arises when problems occur on private sewerage systems. The distress expressed by owners includes:
   - Failure of house purchase searches to identify the existence of private sewers and subsequent lack of understanding of extent of responsibility among property owners,
   - Inadequate maintenance arrangements put in place by developers,
   - Pressure from some drainage repair companies to agree to works being undertaken when problems arise on private pipe work,
   - Lack of certainty and consistency around the extent of household insurance cover,
   - The cost and extent of cover provided by specialist insurance,

- The affordability, for elderly people, of even minor work such as blockage clearance,
- Difficulty in recovering costs from others,
- Problems with accessibility.

8. Paragraph 11 explains how private sewer owners in effect cross-subsidise the upkeep of public sewers serving owners of properties whose sewers have been adopted. Paragraphs 89-96 include discussion of the non-monetised benefits, many of which will address the distress caused to owners of private sewers.

9. Sewers by definition are drainage pipes that serve more than one property and drains are pipes that serve a single property. A lateral drain (throughout this document referred to as a lateral) is the section of pipe work serving a single property which extends beyond the property boundary. Private sewers and laterals are sewers and laterals that have not been adopted by WaSCs as part of the public sewerage system for the maintenance of which they are thereafter responsible under the Water Industry Act 1991.

10. Most properties are served by private laterals and many also by private sewers. Although the Public Health Act 1936 declared all private sewers in existence at 1 October 1937 to be vested in the then statutory sewerage undertakers as public sewers, the Act did not make specific provision for the automatic adoption as public sewers of those built after that date. Some sewers built subsequently have been adopted voluntarily by sewerage undertakers as public sewers, but this has been the exception rather than the rule. As a result there is widespread variation in the circumstances of property owners, with some jointly responsible for extensive runs of private sewers and others who are not. Laterals have not, until legislation changed in 2003, been adoptable as public assets at all. The consequence is that property owners often unknowingly have responsibility for private sewers and laterals that are in third party land, sometimes under roads, and over which they have little control or powers to access.

11. Whether served by private sewers and laterals or not, all property owners ultimately connected to the public sewerage system pay the same for the provision of their sewerage service. This inequity means that those served by private sewers and laterals cross-subsidise the upkeep of public sewers serving owners of pre-1936 properties and are also responsible for the maintenance and repair of the private sewers and laterals serving their own property. The overall sewerage system suffers as a result from a lack of integrated management. The privately owned pipe work, forming a part of it, in general receives only a minimum of reactive maintenance to deal with a problem when it arises.

12. Sewerage failures can be unpleasant and polluting; all sewers and drains have a finite design life and numerous problems occur each year across England (and Wales). Current arrangements often lead to problems on the private system including: a lack of awareness among owners about their responsibilities, establishing shared ownership and responsibility for maintenance, unwillingness of owners or occupiers to accept their responsibility and contribute towards the cost of repairs to shared sewers, the cost of, and organising repairs – sewers and lateral drains can lie under the public highway for example, difficulties in getting private sewers adopted by WaSCs and sewage flooding & pollution.

13. There are approximately 323,000km of public sewers in England and Wales which are the responsibility of WaSCs. Approximately 184,000km of private sewers and 36,000km of private laterals connect to and affect the public system, but are not the responsibility of WaSCs and have no planned operational regime (lengths obtained from Ofwat, 2008). A further total of some 208,00km of private sewers and laterals, comprising a combination of connections to private sewage treatment works, cess pits, septic tanks and surface water drainage direct to a watercourse, do not connect to the public sewerage system at all and are

not included in the proposals for transfer. The consultants Atkins estimated that 39 per cent of properties paying sewerage charges are served by private sewers (Atkins undertook the original evidence base for Defra's review). We estimate that around 80% of properties have at least a lateral connection to the public network. Private sewers may, and lateral drains will, run outside the boundaries of the properties they serve. UKWIR and Ofwat have previously estimated that over 13,500km of lateral drains lie under public highways in England and Wales (There are also lengths of private sewer under highways due to failed adoption agreements, for example, although these cannot be quantified), and in extremes, they are recorded to lie under railway lines.

14. Private sewers are thought to be in a worse condition with a higher blockage rate than public sewers. UK Water Industry Research (UKWIR) and Ofwat estimate that there are around 428,000km of private sewers, lateral drains and (non-transferring) drains in England and Wales. Information gathered by Defra and based on data from drain service companies, estimates that there are 2.2 million blockages per year on the entire private network at an estimated annual rate of 5.1 blockages per km. A previous Ofwat estimate indicated a rate of blockages of 2.8 per km on the public sewers referred to as "Section 24" (of the Public Health Act 1936) sewers, which are generally small diameter sewers, comparable to private sewer pipes (Dealing With Sewer Blockages, WRc, Ref: PT 1082/02775-0, December 1995). (Length is not the only, or even main, driver of the number of incidents, but we have no adequate alternative data on quality or state of repair.) Sample CCTV surveys of the internal condition grade of private sewers, focusing on problem locations, revealed twice the incidence of pipes classified as "Collapse likely in foreseeable future", as is typically found in the public sewer network(Review of Existing Private Sewers and Drains in England and Wales Consultation Paper" for Defra and Welsh Assembly Govt, July 2003).

15. This is supported by outputs reported by Mouchel in a 2010 research project that indicate that the blockage rates on private sewers might be as high as 7.85 per kilometre of pipe per year, including rapidly declining level of service from the equivalent of 5.1 identified in the 2008 IA. As water companies report blockage rates on their adopted public sewers, improvements in reducing these can be seen since privatisation in 1989, and currently stand at 0.5 blockages per kilometre of pipe per year, with a range between companies of 0.24 to 0.89.

16. By contrast water companies reported 154,700 blockages on the public sewerage system in 2008. This is a rate of 0.5 blockages per kilometre of pipe per year. The unadopted network therefore seems to be operating at a value 10 times worse than the adopted network. Part of the reason for this is that if the home owner doesn't get satisfactory service from one independent drainage contractor, another is simply appointed on a reactive basis, and so on. There is no effective monitoring or regulatory reporting on private sewers as there is for public sewers. It is therefore reasonable to expect that adopting water companies will apply monitoring and efficiencies to limit the number/frequency of repeat visits before alternate measures are taken to bring about a permanent solution.

17. The mechanisms by which sewer blockages occur is complex, but often results from the home-owner using the system in a manner it was not designed to do. The most obvious of these is flushing nappies down a toilet, which subsequently causes a blockage in the pipework further on. The growth in 'flushable' products, domestic waste macerators for retro-fitting to kitchen sinks and the general push to reduce water consumption all combine to impact the plug flow nature in the upper limbs of a sewerage system more acutely than those sewers serving many properties where more continuous flow aids the sustained movement of solids. Climatic changes, such as periods of low rainfall, also correlate with increased sewer flooding incidents due to blockages in public sewers. When averaged over a 15 year period, reporting on the public sewerage network identified that almost 60% of sewer flooding incidents were attributable to 'other causes' like sewer blockages, rather than a lack of hydraulic capacity to manage flows. Purely on flow characteristics, blockage problems are

much more likely to increase where pipes are smaller and a wider set of demands are made on them by the lower number of household they serve.

18. Currently, drainage repair companies responding to private owner call-outs probably undertake more repeated rodding and jetting at sites of recurring blockages than is desirable for effective management, and they tend to focus piecemeal patch repairs to private sewers on the immediate problem location. Repairs and other interventions upon repeat call outs are not always carried out by the same independent drainage contractor, which impedes the accumulation of knowledge about the past repair history and problems on the wider local network. Drainage repair contractors can typically provide less long term problem-solving, involving detailed asset examination and diagnosis, and asset upgrading or replacement, than is expected from WaSCs, post-transfer. WaSCs have appropriate Codes of Practice for maintaining systems, for example, setting maximum jetting pressures proportionate to the pipe material and structural integrity, and equivalent codes and information are probably not applied by all independent drainage contractors.

Why is Government intervention needed?

19. Current market failures prevent a comprehensive solution solely through individual action and market forces.

Market failures

20. **Ill-defined property rights**: most home owners are unaware of their legal liabilities for private sewers and laterals (there is no comprehensive reliable record of where these assets lie or who is served by them, and it is not evident when buying a property). The Home Information Pack (HIP) provides purchasers with better information than they used to get but is not explicit on the issue and does not help existing private sewer owners. (In cases where a private sewer is identified through a HIP, owners may perceive that it will be more difficult to sell their property.) Even a surveying exercise to map the assets, costed at around £1bn, would not resolve the problems of shared assets and externalities.

21. **Under-maintenance of "merit good" by private owners**: private sewers deteriorate and perform worse than equivalent public sewers. Well maintained sewers have public health and environmental externalities and benefits: society would probably choose that sewers be maintained to a higher level than private owners achieve. Private owners are typically short-term utility-maximisers who react - if at all - to immediate failures, and take into account only private benefits and costs. Private sewers and laterals do not benefit from the strategic approach to data collection and investment in their maintenance or repair that applies in the public system. Blockages are more likely to recur and less likely to be completely resolved than when networks are managed by WaSCs. Even if HIPs provide better information, and if general guidance were issued on responsibilities for private sewer owners, there is still no mechanism or incentive for private sewer owners to manage the network strategically for the long term, to the standard that society would choose.

22. **Externalities among joint owners**: a sewer's run may, for example, serve 6 properties. Owner five may cause a blockage that only affects owners one, two, three and four upstream of the blockage. Owners five and six, downstream of the blockage may be unwilling to contribute to the cost of repair and owner five may be unwilling to allow entry onto his property to effect the necessary repairs. The shared responsibility may be hard to enforce and free-riders may persist, even with better information provision.

Government and other failures

23. **Private sewer owners are cross subsidising others**. Charges for sewerage services must be paid as part of the water and sewerage bill by everyone whose property connects to the

public sewerage system (the average annual sewerage bill is about £180). When a problem occurs for customers served entirely by the public network, the relevant WaSC carries out appropriate remedial work. But customers served by a private sewer up to the point it connects with a public sewer pay the same annual charge, effectively cross-subsidising non-private sewer costs, and also bear the responsibility and risk of meeting extra (possibly significant and unexpected) costs to maintain the 'private' section of the overall sewerage facility their property receives.

24. **Private sewer failures can affect public sewers (externality)**: incurring costs and inconvenience for WaSCs and their customers.

Other issues for private sewer owners

25. Public health is at the heart of the sewerage system which itself is a direct and intentional result of public health legislation (Public Health Act 1875, Public Health Act 1936). The IA does not however seek to suggest that the (non-monetised) public health benefits justify the transfer. Under the current system (ie the baseline for the IA) public health is protected - through intervention by Environmental Health Officers at the cost of the Local Authority when the private owner fails to take responsibility. The proposed transfer of public sewers will continue to protect public health and will in the long run do so at at lower cost. This is included in t he best estimate NPV of £161m. Inasmuch as the sewers will be better maintained there will be a slightly reduced risk to public health compared with the baseline. But this is not monetarised, is likely to be small, and is not a primary driver for this proposal.

26. Recent research conducted for UKWIR indicates that there were 3,956 internal and 31,509 external sewage flooding incidents reported as part of regulatory duties in 2008 arising from problems in the adopted public sewerage system. While these incidents are beyond the control of individual householders, the unreported numbers of sewage flooding associated with un-adopted sewers is likely to be significantly more and proportionate to the 14 fold higher incidence of sewers blockages in the un-adopted sewers. Since the first year of regulatory reporting for sewer flooding in 1991/2, investment by water and sewerage companies on the adopted public sewerage network has delivered an 80% reduction in the number of sewer flooding incidents. The inconvenience, distress and expense (including the aftermath in terms of reinstatement and securing and funding insurance cover) should not be underestimated

27. Private sewer owners may simply not be able to afford the costs of repairs or maintenance to private sewers and drains and achieving co-ordination between a number of owners can prove difficult. Emergency blockage clearance (estimated from industry sources) may cost in the region of £100 – £280 (price range is based on standard emergency drain clearance - Industry prices vary according to factors such as date, time and location of callout) and is often urgent and unexpected. Rehabilitation costs can be greater. One residents' association letter in December 2004 highlighted costs of £10,000 for repairs to a stretch of private sewer, and the associated difficulty in getting contributions from 57 owning properties to recover the costs.

28. Few private sewer owners have the technical capability or experience to effectively deal with the problem or procure cost-effective remedial work. This problem is exacerbated by laterals that lie under public land or highways because work may involve digging up the road.

29. While some private sewer owners may be able to claim for the cost of repairs to their assets on an insurance policy, insurers usually only provide cover for accidental damage: wear and tear and other coverage gaps exist. All WaSCs offer some form of insurance cover for their customers, many of which are 'drainage policies' from one particular provider of insured home repair solutions and emergency services. This 'Drainage Cover' is available for 'drainage pipes' and includes those outside the property boundary – i.e. lateral drains. It also

includes drains on private land to which owners have the 'legal right of access'. The policy does not however offer cover for private sewers.

30. Some home insurance policies can offer cover for pipes for which their owner is 'legally responsible', which could include private sewers, but the extent of cover varies from policy to policy. However, policies will generally only offer cover in the event of accidental damage, not wear and tear. Owners of private sewers or laterals with existing problems may find that taking out specific cover for their assets is prohibitively expensive if there is a history of difficulties.

31. Private sewer owners can apply to their WaSC to have their sewer adopted. However, adoption is at the WaSC's discretion and the owner will most likely have to first rectify deficiencies at their own expense. Where private sewers have been constructed from sub-standard materials, or lie on a gradient too shallow for effective drainage, re-laying may be required, and the costs involved in such a process can be prohibitively high.

32. Currently, private sewers are not monitored for flooding because they are not the responsibility of WaSCs (and their location is often unknown) and private sewer owners are not eligible for GSS payments where flooding has occurred on their private sewer or lateral drain. The Government sets guaranteed standards of service that water and sewerage customers are entitled to receive from their WaSC. The guaranteed standards scheme (GSS) sets out the standards and the levels of GSS payment companies can make and is monitored by Ofwat. WaSCs make GSS payments when their level of service drops below certain standards for services ranging from making and keeping appointments to dealing with sewer flooding.

33. Many participants in a customer survey carried out as part of this review who believed they were served by the **public system** also viewed current arrangements as unfair. Without intervention someone currently entirely on the public system may move and find themselves served by a private sewer (see Annex A to November 2008 IA for more detail).

Will the current situation be resolved over time?

34. Private sewers and drains are finite assets; as they come to the end of their life the need for repair may increase, in turn increasing the risk to public health and the environment as problems of establishing ownership and sharing responsibilities continue to cause delay to the resolution of structural problems. As private sewers deteriorate over time and more problems occur, it is likely that complaints about the current arrangements will increase. In this IA, figures are based on the assumption of a rise in the rate of blockages on private sewers of 0.5% per year, which may be conservative (see discussion in paragraph 80).

35. In particular, problems on private sewers constructed from pitch-fibre pipes – used extensively in the 1960s for small-bore pipes – are likely to increase in the short-term (20 – 30 years) due to their design life of around 50 years. However, in the longer-term, with the replacement of pitch-fibre pipes with superior materials as required, these problems will eventually be eradicated. Atkins' research discovered that up to 50,000 properties per year suffer problems relating to pitch-fibre pipes. A rough, top-end estimate (based on data from the Pitch Fibre Pipe Association) suggests that there are currently 78,000km of pitch-fibre pipes (Figures based on production stats (tons per annum) for 1952-1974. Not all of the pipes manufactured will be used on sewer infrastructure; e.g. pitch-fibre was also used for electricity ducting under highways.).

36. Climate change is likely to increase burdens on the wider sewerage network, a large part of which does not benefit from any planned operational regime (see annex A to November 2008 IA for more information).

37. In summary, sewerage failures can be unpleasant and polluting; all sewers and drains have a finite design life and numerous problems occur each year across England (and Wales). Current arrangements often lead to problems on the private system including: a lack of awareness among owners about their responsibilities, establishing shared ownership and responsibility for maintenance, unwillingness of owners or occupiers to accept their responsibility and to contribute towards the cost of repairs to shared sewers, the cost of, and organising repairs – sewers and lateral drains can lie under the public highway for example, difficulties in getting private sewers adopted by WaSCs and sewage flooding & pollution.

38. The powers available to Ofwat do not help deal with the main problems that individual ownership of private sewers and laterals may bring and no other legislative or non-regulatory change to WaSC or local authority responsibilities which would is proposed. Conversely maintenance responsibilities can be enforced on owners by local authorities. WaSCs currently do not have to assume responsibility for private sewers or laterals and have no incentive to do so.

What policy options had been considered?

39. Four implementation options were considered and consulted upon in July 2007 (http://www.defra.gov.uk/environment/quality/water/industry/sewers/existing/index.htm)

    1. Automatic overnight transfer from a set date
    2. Automatic transfer but phased in some way
    3. Transfer without conditions, on application by owner(s)
    4. Transfer on application by owner(s) but with conditions

40. Consultation responses strongly supported option 1 (with extremely limited support for any other option – one to two per cent of respondents). This approach, automatic overnight transfer, was selected by the Government (see annex B of the November 2008 IA) and should deliver the following benefits, over and above the other options:

    - A comprehensive and more straightforward solution to the problems;
    - Clarity on roles and responsibilities for the maintenance of the sewerage network; and
    - The least added administrative burden on WaSCs and other businesses.

The chosen implementation method

41. This IA looks only at the costs and benefits deriving from the proposal for automatic overnight transfer of existing sewers and laterals. A separate IA will accompany proposals for a design and construction standard for new sewers that will be automatically adopted by WaSCs. These proposals are to be the subject of a separate consultation to be published this spring. This complementary work will ensure a coherent package to prevent the problems addressed by the transfer of existing private sewers developing again over time.

42. An approach that tackles existing and future sewers and laterals will have two major outcomes:

    - The current regime for ownership and responsibility for sewerage will be greatly simplified. Property owners will only be responsible for pipework that lies within their land and serves only their own property. All property owners paying a sewerage bill will be on the same footing.

    - The wider sewerage network will benefit from a long term integrated management strategy that prioritises action and investment according to risk, which should provide much greater efficiency of effort, environmental stewardship, and expenditure, at a time when the network faces increasing demands. Following transfer, a WaSC will be

able to collect data across locality (using independent contractors as necessary) and will be able to build up an informed picture of what is failing, where and when, and will plan when rehabilitation rather than patch repair is the best economic option.

43. The transfer of all existing private sewers and laterals **connecting to the public network** will take place on 1 October 2011. Some of these will have private pumping stations at some point(s) along their length. The ownership transfer of the pumping stations will occur at a later date but no later than 1 October 2016. This is because the location of some pumping stations is uncertain and they may need a comprehensive assessment, e.g. for health and safety purposes.

44. As set out in Annex B, paragraph 15, of the November 2008 IA, the Government agreed with consultation responses that commercial properties should be included in transfer and the data in this IA includes commercial properties.

45. Transfer of private sewers and laterals will be automatic to ensure that all assets are transferred at one time (1 October 2011) and WaSC ownership and maintenance responsibilities for the transferred assets is established in one step. From this point, all WaSC customers receiving a sewerage bill will now have their sewers and laterals maintained by their WaSC. Private drains (i.e. those serving individual properties) that lie inside the property boundary will remain the responsibility of the property owner as is currently the case for unadopted sewers and provide a continuing market for the independent sector (but see also paragraph 7 of the small firms assessment).

46. WaSCs have highlighted that private pumping stations may have health and safety issues as well as problems with their overflow consents and mechanical and electrical systems. Some may be inaccessible, for instance located in garages and gardens and may take power supplies from existing domestic arrangements. They present operating concerns over and above sewers and laterals and therefore consideration had to be given to how to treat these. WaSCs will have a five year period to locate and assess pumping stations and Ofwat's cost estimates in this IA assume that this is done and some pumping stations pass to WaSCs in steps over 2011/12 – 2015/16, until the deadline for automatic, overnight transfer passes on October 2016.

47. The costs and benefits analysis assessed 3 options for phasing necessary upfront capital expenditure (Capex) required to upgrade the transferring assets. This is to compensate for under-investment in maintenance due to informational problems and diseconomies of scale from private ownership. Work undertaken by some WaSCs suggests that the private sewers they will inherit may be in better condition than originally anticipated and Ofwat have accepted this in their costs assumptions, reducing the estimated proportion requiring upgrade from 7.5% to 2.5%. This IA assumes that almost all the Capex (95%) can reasonably be projected to arise in the first ten years, rather than five years after transfer (as assumed in the 2008 IA http://www.defra.gov.uk/environment/quality/water/industry/sewers/existing/index.htm)) as a legacy of problems are resolved. Sub-serviceable standard private sewers will be upgraded once failures are identified, when it will likely be cost effective to upgrade significant proportions of these networks in one go. Ofwat consider 10 years sufficient time to upgrade the sewerage network, in this cost effective manner. Furthermore, the time frame has not been extended beyond this, as WaSCs have a statutory duty under section 94 of the Water Industry Act 1991 to effectually drain their area of appointment. Extending the time horizon of the Capex, and therefore the time taken to upgrade private sewer network, beyond a 10 year period is unlikely to be compatible with a reasonable approach to complying with this duty.

48. This projection is not applied to pumping stations. They are assets with a significantly shorter life span (typically 20 years as opposed to potentially over 100 for sewers) and the consequences of performance failures can be more immediate and pronounced than sewers.

Allowing more than five years to elapse between the transfer of sewers and pumping stations would create a perverse incentive – e.g. if a ten year period was selected, private owners may not have to carry out routine maintenance for the entire ten years in expectation of transfer, so that when transfer eventually happens WaSCs inherit pumping stations in worse condition, requiring greater upfront expenditure. This would represent an exaggerated re-distributed cost. This may lead to additional external costs from environmental damage or damage to neighbouring locations, which will not be factored in by owners of pumping stations when considering whether to maintain this infrastructure.

49. As this is an automatic transfer, the existing appeal mechanisms under the 1991 Water Industry Act will apply to allow owners of sewers, laterals and pumping stations or other affected parties to appeal against transfer to Ofwat.

Sectors and groups affected

50. The groups affected by the proposed option include: Private sewer owners (e.g. households, businesses, local authorities, housing associations, and other property owners such as government, NGOs, and institutions); WaSCs, who are currently responsible for public sewers; WaSCs' customers; insurance companies; drain repair businesses; Regulators e.g. Ofwat, Environment Agency; Consumer bodies e.g. CCWater; and Government.

Human rights

51. We have taken advice on the risk of legal challenge to the proposed scheme, especially on certain issues concerning the compatibility of our policy with Article 1 of Protocol 1 of the European Convention on Human Rights (the protection of property rights). The advice is that a properly made and administered adoption scheme is unlikely to contravene human rights. In particular, sufficient mechanisms exist in the Water Industry Act 1991 to accommodate a landowner's current right to have a sewer removed or moved where he has granted an easement, such that a divesting of the right would not contravene human rights. Those mechanisms include a provision for the award of compensation. In any event, any interference with property rights may be objectively justified in the circumstances.

Assessment of Baseline

Baseline Costs

52. This IA does not address proposals for new build standards or incorporate any costs or benefits that would derive from them. Mandatory adoption of new sewers connecting to the public sewerage system is provided for under the Flood and Water Management Act 2010. This will prevent a repeat of the problems addressed by transfer. Mandatory adoption will require adherence to design and construction standards to be published by the Secretary of State and a separate IA looking at the specific costs of mandatory standards for adoption is being prepared to accompany forthcoming proposals for consultation on this issue.

Assessment of Proposed Option (option 1): Automatic overnight transfer

Summary of Competition Assessment and Small Firms Impact Test
(The assessments are available at annexes 2 and 3)

53. Competition Assessment - a transfer of private sewer ownership is likely to change the market structure in the independent drain repair industry insofar as the customers for drain repair services will cease to be private sewer owners and will become WaSCs. Possible impacts on competition in the drain repair industry include:
    - The amount of work available to drain repair companies direct from householders is likely to decrease. However, approximately 50 per cent of the private sewerage

and drainage that connects to the public system will remain in private ownership. But it is highly likely that WaSCs will need to contract out to the drain repair industry some of their extra work on transferred assets, and this will include a backlog of maintenance which in the short term will increase business;

- Competition for contract work from WaSCs and properly managed procurement procedures could increase, which could improve take-up of accredited training and work schemes and which could in turn drive up standards – offering more certainty to householders of the standard of maintenance work undertaken;
- Some smaller businesses may be less able (eg fail to meet required standards) to compete for WaSC contracts and may cease trading or merge with other businesses;
- No reduction in the level of employment within the market is anticipated in the short to medium term, although the need to deal with a backlog of maintenance may have the opposite effect. Over time, in total, we estimate that there will be upwards of 500,000 fewer blockages and call outs as the network quality improves.

54. Small Firms Impact Test – we expect that the amount of work in maintaining and repairing currently private drainage will remain roughly constant in the short to medium term, although it will decline in the longer term, and there may inevitably be a change in the market focus for private drainage contractors, who may wish to enter into arrangements with WaSCs or their sub-contractors. Drainage within property boundaries will remain the responsibility of householders, and repair and maintenance work associated with that will continue. We acknowledge that when new arrangements are better known more householders may call their WaSC in the first instance. WaSCs and independent drainage contractors will need to reach agreement on arrangements which cater effectively for 'first response' calls and payment.

Summary of main analysis

55. As stated at paragraph 4, this IA does not contain new or revised analysis compared to that published alongside the August 2010 consultation paper, beyond updating the PV base year and satisfying the new requirements for IAs regarding direct impacts on business.

56. The transfer of private sewers and pumping stations results generally in a transfer of costs from private owners to WaSCs. Costs in this IA are defined as the costs to water companies of upgrading and maintaining private sewers and pumping stations. Benefits are defined as the avoided costs to households and commercial properties of maintaining private sewers and pumping stations once transfer takes place. This analysis facilitates the estimation of the increase in bills to all households and commercial properties due to the policy. This results in a net decrease in annual costs of maintaining private sewers and pumping stations due to improved management but also an increase in initial capital expenditure (capex) to upgrade previously unmaintained assets, to circumvent private property issues, e.g. moving pumping station control panels located in houses and garages, and to rationalise the network, e.g. replacing extraneous groupings of pumping stations with more appropriate sewer runs.

57. The benefits of improved management are realised in the longer term whereas the one-off increased capex costs occur mostly within 10 years. The appropriate time horizon in the green book encourages the use of the longest living capital asset in this analysis but this may be in excess of 100 years as significant parts of sewerage network are Victorian. Ofwat appraisal of infrastructure investment for Price Review is generally undertaken over a 100yr time horizon. We have assumed a 40 year period time horizon for this analysis, net benefits become positive after year 32.

58. With the inclusion of previously non-monetised benefits the 2008 IA estimated benefits of >£49m after 60 years. Our current analysis suggests that the preferred option would generate benefits of £435m over a 60 year period. However, a more appropriate comparison may be that the current analysis suggests that the preferred option has positive net benefits after 32 years, and net benefits of £150m after 40 years.

Summary of options analysis

59. In the 2010 consultation stage IA further options analysis was presented. Given the uncertainty regarding the costs this focused on phasing the capital expenditure programme over a longer period. Three options for delivery of option 1 were examined:

i. An update of the November 2008 IA analysis, i.e. capex for sewers over 5 years and the transfer of pumping stations after 5 years
ii. Phasing capex for sewers over 10 years and the transfer of pumping stations after 10 years
iii. Phasing capex for sewers over 10 years and the transfer pumping stations after 5 years

60. The analysis suggested that the difference in Net Benefits of the options is relatively small over a 40 year analysis. Net Benefits as published in the 2010 IA are (2008/09 PV base year): Option 1(i) £87m, Option 1(ii) £145m and Option 1 (iii) £150m. Option 1 (iii) is preferred.

61. Upper and Lower Bound analysis of option 1 (iii) was undertaken and Ofwat provided an appropriate uncertainty range on the most uncertain variables, i.e. the costs of pumping station upgrading and the proportion of network requiring upgrading. These values provide a useful upper and lower bound of costs to be estimated. See also paragraphs 108-110.

Background to costs

62. The IA looks at the best available evidence on all parameters, and relies on reasonable and prudent assumptions. Best available cost estimates and data relating to WaSCs have been provided by the independent economic regulator, Ofwat, in March 2010[1]. The figures build on previous private sewers' cost work undertaken by Atkins and WRc/UKWIR (see Technical Annexes to IAs referenced in the Summary Sheets).

63. Uncertainty over the extent and condition of private sewers means that WaSCs cannot provide Ofwat with full and accurate data from which to calculate levels of funding in future price determinations. To obtain greater accuracy, an extensive survey and mapping exercise would be required. UKWIR initially estimated that this might cost £450m. The figure has since been revised to around £1bn. It is not proposed to undertake this mapping, and spending even a fraction of the estimated costs on a more limited survey is unlikely to represent value for money in terms of information. Ofwat's current estimates of the financial costs to WaSCs are therefore based on the best available, albeit indicative, assumptions. The actual expenditure associated with the ownership and maintenance of private sewers will be revealed over time as companies respond to faults, and build up pictures of the transferred assets.

[1] In this IA, Ofwat's analysis of Infrastructure Renewal Expenditure, planned and reactive maintenance, GSS payment data, actual expenditure figures, and sewer lengths are drawn from the annual June Returns supplied by the regulated water and sewerage companies for 2006-07 and 2007-08. Estimates of the number of pumping stations provided and the costs of upgrading pumping stations are based upon averages of data provided to Ofwat from Water Companies.

64. There is uncertainty around the figures presented. If costs prove to be higher or lower than indicated here, it is likely that benefits (costs avoided) will be higher or lower too: higher costs imply a worse condition, or more extensive network, of the assets transferring. This suggests that in the absence of transfer a higher level of blockages would arise. Benefits would thus also be higher since the avoided costs of the associated repair, time, pollution, and health and safety issues would be greater.

65. The capex takes place in the first ten years with the residual upgrade costs over the next five years.

Capex estimates

66. Ofwat's estimates of one-off capex were updated for the 2010 IA due to new data provided by WaSCs. The updated Ofwat figures show one- off £957m capex (undiscounted). The two key drivers of these changes are the increasing number of pumping stations estimated and a decreasing proportion of the sewerage network requiring immediate replacement. Pumping station numbers increased significantly from initial estimates of 5,000 to a new central estimate to around 22,000. Also, data provided by WaSCs to Ofwat estimating costs per upgrade increased from £18k to £25k (2009/10 prices). However the estimated proportion of the sewerage network requiring replacement has fallen, based upon data provided from WaSCs to Ofwat, from 7.5% to 2.5%, reducing capex requirements. Finally efficiency estimates have been provided directly by Ofwat for this analysis, these result in minor efficiency gains increasing to 2.3% and 3.2% cost saving for private sewers and pumping stations capex respectively over 10 years, compared to previous estimates of 15% efficiency gains.

Infrastructure renewals expenditure (IRE),Maintenance non infrastructure (MNI) and Pump Replacement expenditure

67. Estimates suggest annual expenditure of £121m per year (undiscounted), averaged over a 40 year period. This includes IRE of £79m, MNI of £41m and replacement capital expenditure of around £1m averaged over 40 years. Replacement capital expenditure estimates have been provided by Ofwat. It is assumed that the number of pumps will not decrease leading to a conservative cost estimate, as it may be expected where WaSCs, because of better information and economies of scale, could either amalgamate pumps or decommission pumps, where alternative sewerage connections are available. Efficiency savings provided directly from Ofwat build up to 3.2% per year, previously estimated to build to 16% per year.

Planned and reactive maintenance

68. The other component of the £172m WaSC annual average cost (undiscounted) is planned and reactive maintenance (or opex) on the pipe network, which is estimated at an annual average of £50m over 40 years. These incorporate additional costs of GSS payments protecting home owners against sewer flooding (note that since the benefits to home owners of receiving GSS payments are also included, GSS payments are treated as a transfer in the analaysis). Efficiency savings provided by Ofwat build up to 10% over a 10 year period.

69. Ofwat advises that no additional administration and management costs for these new assets need to be considered, as they will be negligible.

Table 1 - Estimated undiscounted expenditure by WASCs, £m 2009/10 price base, after efficiencies. (Similar discounted figures are shown in Table 3, below.)

	5 year totals				First 20 years	Annual average spend		
	2011-12 – 2015-16	**2016-17 – 2020-21**	**2021-22 – 2025-26**	**2026-27 – 2030-31**	**2011-12 – 2030-31**	**Over first 10 years**	**Over first 20 years**	**Over 40 years**
One off capex upgrades	751	186	20	0	**957** (As in Summary sheet)	94	48	N/A
Annual IRE* and MNI**	479	618	628	637	**2363**	110	118	121
Annual operating costs	314	254	241	241	**1,050**	57	52	50
Recurring annual cost = IRE, MNI, plus opex	793	872	869	878	**3,413**	166	171	**172** (As in Summary sheet)

*IRE = Infrastructure Replacement Expenditure (for underground assets)
**MNI = Maintenance Non-Infrastructure (for over-ground assets)
Source: Ofwat and Defra figures

70. The data provided by Ofwat covers a 30 year period from 2010/11. The table shows that the one-off capex arises largely in the first 5 years, as pumping stations and private sewers are upgraded, then decline after pumping station upgrades complete, until all sewers are upgraded after 15 years then capex on upgrades remains at zero. IRE and MNI costs rise initially as pumping stations are taken on then largely stabilise apart from minor increases due to the need to replace capex. Opex declines as problems such as sewer flooding problems and GSS payments decrease due to improved management. This results in annual costs stabilising. The analysis does not include future efficiency gains after the 10th year from Ofwat efficiency program which would likely result in longer run cost savings. After year 15 all costs are assumed to remain at the same level, except replacement capex which is repeated cyclically over a 15 year period, these assumptions have been maintained when extending the analysis beyond 30 years.

Other non-monetised costs of Transfer Option

71. Local Authorities may face costs for enforcing or solving problems up to the transfer date, once it is announced, as owners leave problems for WaSCs to fix later. This is expected to be minimal and is therefore not monetised.

72. The transfer may require Ofwat involvement in handling appeals against transfer. Ofwat estimates that this may equate to one additional, temporary Full Time Employee. This has not been monetised.

73. The insurance industry has reported that the transfer will have an insignificant impact on business, so no impact has been monetised.

74. As above, members of the drainage repair industry may face a loss of business, as the total number of call outs declines once the asset performance is improved. This may be offset in

the short term by the high demand for capex and upgrading work. The most vulnerable are micro firms, as they are least likely to win contracts from WaSCs to work on the transferred assets, though they may sub-contract to contractors. We have been unable to quantify turnover loss, but a comprehensive survey in one WaSC area suggests that up to 60% of small firms' current work arises inside the property curtilage and this market, at least, is unaffected by transfer.

75. Transfer does not impose any regulatory administrative burdens on the independent drainage sector (see the Small Firms Impact Assessment at annex 3).

76. Some land owners may have granted an easement over their land for a private sewer to be laid, and they hold the right to require the owners of the properties served by the private sewer to pay for the sewer to be moved. This right will be lost once the private sewer transfers. WaSCs have discretionary powers to charge a land owner for diverting a sewer. We have been unable to find any examples of land owners exercising their right and cannot quantify the cost.

77. It is for Defra and the Welsh Assembly Government to enforce the statutory duty for WaSCs to adopt the transferring assets. To date, no breach of a sewerage undertaker's statutory duty has needed to be enforced, and a nil annual cost is assumed in this IA.

Distribution effects

78. The transfer shifts a cost burden from those private sewer owners who do face blockages to WaSCs, and so to all sewerage bill payers. However, all those who connect to the public sewerage network currently pay sewerage bills, even those who are also liable for their own private sewer or lateral (but note that few laterals are currently the responsibility of WaSCs). Hence, under the baseline, private sewer owners are cross-subsidizing non-private sewer owners. Distributional effects include: increased annual costs for non-private sewer owners, rectifying current cross-subsidies from private sewer owners to others; increased annual costs for those private sewer owners who have not spent, and will not spend, money on fixing private sewer failures; and, potentially, decreased annual costs for private sewers owners with problematic private sewers which would require personal, remedial expenditure, in the absence of the transfer. Commercial properties and the minority of households not served by a lateral may pay the increase in their sewerage bill but not receive the benefit of having a lateral transferred.

Monetised Benefits

79. This Impact Assessment restates the evidence presented in the previous IA that accompanied the 2010 consultation.

80. It is anticipated that, after the transfer, upgrades and better quality maintenance will reduce the incidence of blockages on the transferring assets from an estimated 5.1 blockages per km per year, to perhaps 2.8 blockages per km per year (see paragraph 13). This means an improvement of over 500,000 fewer blockages per year compared with today, due to better management and more investment. Moreover, since the failure rate on private sewers would be increasing over time, without the transfer, the benefits of better management will also rise over time, post-transfer. It is assumed that the rate of blockages on private sewers would increase by 0.5% a year without a transfer. This is conservative in light of evidence that the rate of blockages on better-maintained *public* sewers has risen by 0.35% p.a on average, in the past 15 years, since a higher level of repeat blockages would be expected for private sewers.

81. An average of three alternative estimates suggests that private sewer owners and local authorities (LAs) are currently spending £149m a year on ad hoc responses to blockages. This cost will be avoided and so represents a benefit of transferring. (See annex A of the November 2008 IA for more on the underlying estimates). There is uncertainty around the figures and the average is probably a conservative estimate. Without the transfer, this annual expenditure would rise as the private assets deteriorate and block more frequently. The annual average over 40 years is £165m.

82. Time saved by private sewer owners, due to a reduction in the number of blockages post-transfer, is quantified as an hour and a half per blockage avoided, valued at the median wage, worth about £10m p.a. initially, based on a reduction of at 500k incidents per year, rising over time. The total average annual private cost avoided from maintaining private sewers is therefore £175m. This figure can be compared with the recurring annual spending by WaSCs which is estimated at around £172m.

83. Recent research further substantiates the estimate of time saved by private sewer owners. It indicates that the private drainage sector commands £454 million in managing 2.2 million sewer blockages. This averages just over £200 per call out to the homeowner. Current published rates by independent drainage contractors indicate rates of £75+VAT for 30 minutes of work – suggesting that a £200 call out would last 1 hour 10 minutes. The time saved by private sewer owners will also include time to assess the problem, research a suitable contractor, arrange the call out, and so forth. Taking these into account as well suggests that the time saved would be at least 1.5 hours, and could easily be more.

84. Currently private pumping station owners incur a cost to maintain pumping stations. Data obtained from a significant market participant estimated average annual maintenance costs of £2.2k per year, and that 25% of pumping stations will not be maintained at any one time. These are based on conservative estimates supplied in February 2010 from a pump installation and maintenance company dealing (mainly) with smaller installations with market share in the region of 13%. This analysis has assumed annual benefits from maintenance savings to the public of the number of pumping stations, estimated by Ofwat at around 22,000, multiplied by the proportion of pumping stations maintained and the cost of maintenance of approximately £37m p.a. Pumps not maintained will likely still incur costs to call out contractors and shorter life-spans, as these costs are not included this estimate is likely to be conservative.

85. As explained at paragraphs 108-110, the range of costs presented is based on a range for the costs of pumping station upgrades and the proportion of network requiring upgrade. The cost of maintenance of £37m p.a. in paragraph 84 is the central estimate; the low NPV figure is based upon a cost of £56m p.a. and a cost of £15m p.a. is used for the high NPV figure. Paragraphs 110-112 provide additional detail on the cost ranges presented.

86. The average cost of replacing pumping stations has been estimated at £8,500 per pumping station from data provided by a major industry provider of pumping stations. The average of this cost and the estimated cost of £1,500 (Ofwat estimated cost for WaScs to replace pumping stations), has been used to ensure a conservative central private cost estimate for replacing private pumping stations. The average of both estimates is £5,000. The number of pumping stations and lifespan has been assumed in line with Ofwat estimates to ensure comparability of appraisal. As explained above, lower expected rates of maintenance would lead to shorter life-spans and therefore greater numbers of annual purchases, resulting in a current conservative estimate of benefits to the public through avoided replacement pumping station expenditure. Further environmental costs and the costs of flooding neighbouring areas stemming from lack of maintenance, have not been monetised at this stage.

87. GSS Payments are payments made by water companies to customers for a level of service failure and are not compensation for damage etc. Although this is a cost to water companies

it is also a concomitant benefit to households who would not have received such a payment without this policy. The value of these payments has therefore been incorporated as a benefit to households in this analysis. They are also included in opex cost estimates for WaSCs (see paragraph 68), consequently they are treated as transfers. GSS payments reduce as efficiency gains are realised by water companies resulting in fewer and less damaging incidents, this is also reflected in declining GSS payments costs, incorporated within opex, paid by water companies over the long term.

Table 2 - Estimated undiscounted benefit of private sewer time and cost avoided, pumping station cost avoided and GSS payments received £m 2009/10 price base. (Similar discounted figures are shown in Table 3, below.)

	5 year totals				**First 20 years**	**Annual average benefit**		
	2011-12 – 2015-16	**2016-17 – 2020-21**	**2021-22 – 2025-26**	**2026-27 – 2030-31**	**2011-12 – 2030-31**	**Over first 10 years**	**Over first 20 years**	**Over 40 years**
Annual sewer repair cost avoided	755	774	793	813	**3135**	153	157	165
Annual time saving	46	47	49	51	**193**	9	10	10
Annual pump station cost avoided	89	221	221	221	**752**	31	38	42
GSS payments received	63	31	11	11	**116**	9	6	4
Annual benefit	952	1073	1075	1096	**4197**	203	210	**221** (As in Summary sheet)

88. The table shows that the benefits rise gradually over time throughout the period, because it is assumed that the private sewer network would continue to deteriorate and suffer a slightly increasing rate of blockages if it remained in private hands. Over 5 years benefits of transferring pumping stations increase until all pumping stations are transferred in line with Ofwat pumping station capex assumptions, then stabilise at the same level. The value to society of achieving permanently funded assets, through adequate annual provision for renewal and replacement, is not directly reflected in these monetary benefits.

Non-monetised benefits of transfer

89. The bulk of the benefits from the transfer may be non-monetised, and will accrue over a long period of time to the advantage of most or all in society. The interest of householders in maintaining their sewers and drains stems from the underlying need to maintain adequate sewerage arrangements for their properties. The uncertainties associated with the maintenance of assets over which they may have little ability to exercise control to prevent physical damage, and to maintain their operability in the event of any misuse or in the event of general deterioration, combined with the associated costs if problems arise, has been consistently voiced to Government. The ultimate concern of householders is that deterioration in the longer term may bring with it implications for personal and wider public health resulting from their inability to either afford or to organise proper maintenance. Although measures exist to deal with problems on private assets, through intervention by local authority Environmental Health Officers, in the longer term this is potentially at far greater cost to both individuals and society than would be the case were the assets to be the responsibility of sewerage undertakers in the first place. These considerable external social

benefits are expected to outweigh the non-monetised costs and as such the non-monetised impacts combine to support the policy having a positive net benefit.

90. As discussed in Paragraph 64, it is expected that variation in the transition costs will have an impact on the benefits (avoided repair and maintenance costs for private sewer owners). If transition costs are higher than the best estimate (under the Low scenario on the summary sheets) this implies the private sewer network is larger than was anticipated, or in a worse condition. Consequently the benefits from transfer will also be greater. This impact on benefits has not been monetised but it effectively reduces the net benefit range around the best estimate.

91. The transfer resolves today's ill-defined property rights and so saves distress and cost by removing uncertainty over the extent of sewer ownership for property owners; the necessity for developers or property owners to establish maintenance arrangements for new development; uncertainty about whether drainage arrangements are fully covered by household insurance and any need to consider taking out specialist insurance; the burden of potentially large and unexpected costs for maintenance and repair; the difficulty of recovering costs for repairs from other owners of a shared pipe and any potential of pressure to agree to works; as well as problems of access to undertake repairs. Clarity about ownership, post-transfer, benefits anyone who *may* be a private sewer owner – which is a majority of householders as well as owners of many commercial/industrial properties.

92. The upgrading and ongoing maintenance will improve the quality and ensure the longevity of the assets in question. Well-maintained sewers have positive public health and environmental externalities or benefits, and sewers may be perceived as a "merit good". The obligations placed on WaSCs, and their ability to develop and fund long term strategic plans, will provide this benefit. The rise in standards and reduction in blockages may benefit all who use public sewers (since they can be impacted by private sewer failures), as well as benefiting public health and the environment e.g. fewer pumping station failures causing raw sewage to enter water courses, and fewer health and safety risks at sub-standard pumping stations.

93. Costs to protect from sewer degradation have been incorporated within this analysis. Currently it is unlikely that individuals would be able to manage this problem in a socially optimal way, resulting in greater overall costs than those identified by WaSCs.

94. The gradual move to more planned and less reactive maintenance, and the reduction in blockages, enables less road traffic to and from blockages, and less transport disruption from ad hoc interventions on roads and pavements. This in turn should generate lower emissions than otherwise, although there may be increased emissions in the short term associated with the one off upgrading programme.

95. The transfer offers the eventual benefit of long term integrated planning and strategic management of a combined, complete network of sewage pipes and laterals.

96. A benefit arises for those homeowners and commercial properties whose private sewers run across others' land, and who may be obliged (whether or not they know it) to fund the cost of moving the sewers, should the land owners require it. They will lose this obligation.

<u>*Distribution effects*</u>

97. The transfer will end the cross subsidisation of non-private sewer owners by private sewer owners. Given the high proportion of home owners who are private sewer and lateral owners (without knowing it), there is a perception (e.g. from customer market research, see previous IAs) that clarifying and standardising liabilities through this transfer will produce a fairer outcome.

Present Values of Transfer Option

98. The transfer and WaSC expenditure is expected to start in 2011-12. New asset lives typically range from 15-30 years for pump Mechanical & Electrical replacement capex (M&E), to 80 years for small bore pipes, to 200 years for replaced or upgraded civil engineering work at pumping stations. A 40 year time horizon has been chosen for PV calculations. Ofwat-derived cost figures are inflated to today's prices with RPI. All figures are discounted over 40 years, using an initial discount rate of 3.5%, dropping to 3% after 30 years (HM Treasury's recommended discount rates).

99. The cost to WaSCs over 40 years is £7.8bn undiscounted, of which £1.0bn is the one off capex that arises mainly in the first 5 years. The discounted PV of costs totals £4.4bn in 2009/10 prices, of which £0.8bn is the PV of the capex. A long time frame is appropriate for the investments being made, it captures all the efficiencies assumed, and allows for the annual costs to influence the figures, despite the front loading of the one off investment.

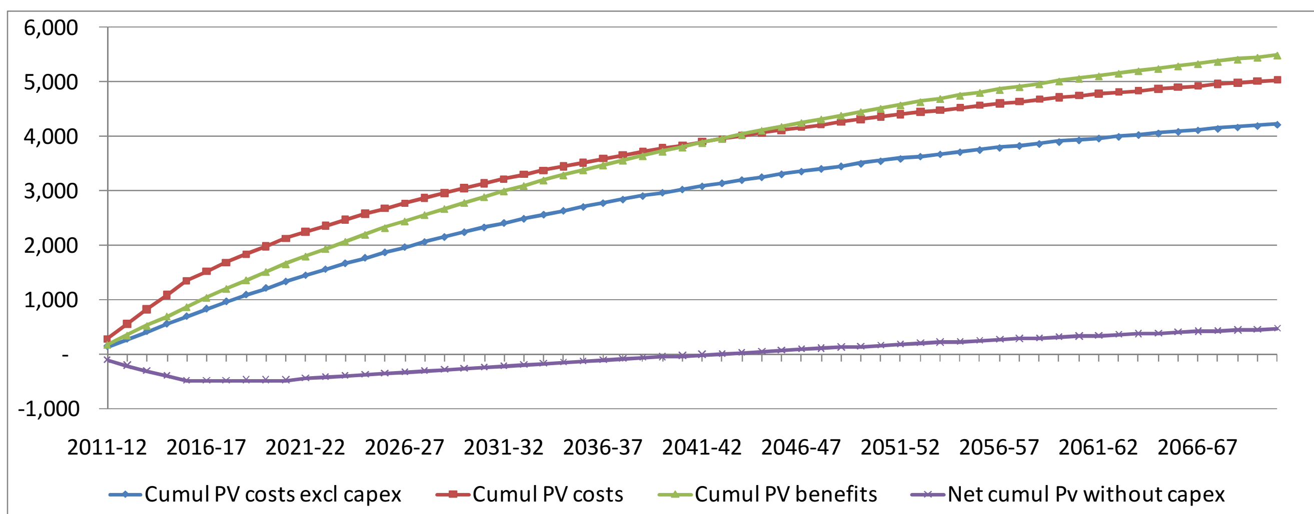
100. The benefit figures that can be monetised total £8.8bn over 40 years when not discounted. This reflects a slowly rising annual cost avoided, reflecting a rising rate of blockages on an untransferred private network. When discounted over 40 years, the PV of the avoided cost and time is £4.5bn in 2009/10 prices. This is certainly an underestimate, as it only represents the portion of the benefits which it has been possible to monetise, and not the considerable external social benefits that will arise.

101. It has not been possible to monetise all the costs and benefits, so no complete NPV figure is available. The estimate available that includes repair and time benefits only is £161m.

*Table 3 - Estimated **PV** costs and monetised benefits, £m 2009/10 price base* (based on Tables 1 and 2 above).

	5 year totals						
	2011-12 – 2015-16	**2016-17 – 2020-21**	**2021-22 – 2025-26**	**2026-27 – 2030-31**	**PV first 10 years**	**PV first 20 years**	**PV 40 years**
One off capex upgrades	656	137	12	0	793	805	805
Recurring annual cost (IRE, MNI, M&E plus opex)	690	641	538	457	1331	2326	3,548
All costs	1,346	778	550	457	1346	3131	**4,353**
All benefits	867	788	665	571	867	2891	**4,514**
NPV					-479	-240	**161** (As in Summary sheet)

Chart 1 ***Cumulative PV*** *of costs and monetised benefits over 60 years, discounted to 2009/10 price base, £m*



102. The table and chart above show that the PV of benefits slightly outweighs the PV of *annual* costs from the start, and this net advantage of transfer rises over time as benefits rise gradually. However, this annual advantage of transfer is small, and the capex arises entirely upfront, so it takes a very long time (32 years) for this annual advantage to offset the capex and produce a positive NPV.

Phased capex option 1(i) – 5 year period for all

103. This analysis assumes that capex on private sewer upgrades is undertaken over a shorter time horizon of 5 years, compared to the preferred option, resulting in larger upfront capex costs on private sewer upgrades, resulting in increased overall Present Value Costs (PVC) due to discounting effects. Quicker upgrade of private sewers reduces some opex costs such as GSS payments and sewer flooding costs due to higher quality sewers being in place sooner. Overall PVC increases to £4,234m. Pumping stations are upgraded over the first 5 years.

104. Present Value Benefits (PVB) are also reduced as GSS payments decline slightly quicker, as private sewers are built sooner, falling to £4,321m. The central estimate of Net Benefits is assumed to fall to £87m over 40 years (note that the 2010 IA used a PV base year of 2008/09).

Phased capex option 1(ii) – 10 year period for all

105. This analysis assumes that transfer of pumping stations occurs after year 10, and therefore capex on pumping station upgrades are undertaken over a longer time horizon of 10 years against the preferred option. This results in lower immediate capex costs on pumping stations, resulting in lower overall PVC due to discounting effects. Private sewers transfer are upgraded over the same period as preferred option. Overall this results in a decrease in PVC to £4,114m.

106. Benefits to the public are also reduced as the handover of maintenance and replacement expenditure is slower. PVB falls to £4,259m. The central estimate of net benefits falls to £145m over 40 years (note that the 2010 IA used a PV base year of 2008/09).

Conclusions

107. The analysis shows that the choice of option does not have a significant bearing on return of investment over a 40 year period. The final choice of preferred option is therefore motivated

by other implementation issues that although involving costs and benefits would not be picked up within the current analysis.

108. Upper and Lower Bound cost analysis was provided by Ofwat, selecting the 2 most sensitive values: cost of pumping station upgrading and the proportion of sewerage network requiring upgrading.

109. Upper Bound (low estimate): 50% increase in proportion of sewerage network requiring updating. 20% increase in costs of pumping stations (the highest cost of upgrading pumping station) assumed to be realistic by Ofwat. Results in an increase in capex from £957m to £1,267m. This leads to an increase in Present Value Costs to £4,590m over 40 years. The monetised benefits would be assumed to remain the same at £4,514m over 40 years. This results in a net benefit of -£76m over this time horizon. A more consistent way to compare this result is that this option would become cost beneficial after the 46th year. When compared to previous analysis using a 60 year time horizon this would result in a net benefit of £190m.

110. Lower Bound (high estimate): 60% decrease in proportion of sewerage network requiring updating assuming 1% of network requires replacement in line with some WaSC estimates. 52% decrease in costs of pumping stations based on lowest WaSC estimate of pumping station upgrade cost. Results in decrease in capex from £957m to £428m. This results in a decrease in Present Value Costs to £3,891m. Monetised Present Value Benefits remain the same. This results in a net benefit of £623m over 40 years. A more consistent way to compare this result is that this option would become cost beneficial after the 10th year. When compared to previous analysis using a 60 year time horizon this results in a net benefit of £863m.

Bill impacts of Transfer Option

111. Only the financial costs for WaSCs will be reflected in customer bills. Uncertainty surrounding the extent and condition of existing assets makes it impossible for Ofwat to estimate impacts on bills with certainty or known margins of error[2]. Calculations indicate an average rise of £5 per bill from 2011 rising to £8 per year on all sewerage bills as all assets are upgraded by 2019-20, or from £3 to £14 per bill p.a. across different WaSCs. As above, the bill effects are highly uncertain, as the quantities, and particularly the conditions and remedial costs for each water company area are unknown. The majority of the cost WaSCs will bear, and the majority of the bill impact, represent a transfer of cost from private sewer owners (including Local Authorities) to all WaSC customers.

112. In common with household customers, businesses are liable for repairs and maintenance of unadopted private sewers, and so in many cases will enjoy the same benefit deriving from transfer. However where there are several businesses on one site owned by a single landlord, these are likely to be considered a single site, and the sewers within the curtilage of that site will not be transferred. The impact on bills for business customers is expected to be proportionate to that of households and the figures above include business customers, although large business users of water from the public water supply will have bill increases considerably greater than the average figures quoted above (sewerage bills are proportional to water usage). It is worth noting that businesses which have need of large quantities of water for industrial purposes often do not use the public water supply or sewerage system and so in this respect will be unaffected. Both Ofwat and the companies themselves have a duty to ensure that there is no undue discrimination in the setting of charges.

Risks

[2] Bill effects have been calculated using the Aquarius 3 financial model, version 6 (WIFL), with offline calculations for the latest September 2008 information on the km transferring and expected costs. Aquarius 3 includes a cost of capex for WaSCs and for each WaSC it applies the assumptions for asset life apportionments as used in PR04 final determinations.

113. Uncertainty over the extent and condition of existing private sewers means that WaSCs cannot provide Ofwat with full and accurate data from which to calculate levels of funding in future price determinations. Recent UKWIR estimates indicate that it would cost around £1bn to map and survey private sewers. It is not proposed that this proactive, mapping and surveying is undertaken, as the cost is considered by all stakeholders to be wholly disproportionate to any conceivable benefits that might accrue. Ofwat's current estimates of transfer's financial costs to WaSCs – costs passed on to the generality of customers via increases to sewerage bills – are based on best available assumptions but remain indicative.

114. We have taken advice on the risk of legal challenge to the proposed scheme, especially on certain issues concerning the compatibility of our policy with Article 1 of Protocol 1 of the European Convention on Human Rights (the protection of property rights). The advice is that a properly made and administered adoption scheme is unlikely to contravene human rights. In particular, sufficient mechanisms exist in the Water Industry Act 1991 to accommodate a landowner's current right to have a sewer removed or moved where he has granted an easement, such that a divesting of the right would not contravene human rights. Those mechanisms include a provision for the award of compensation. In any event, any interference with property rights may be objectively justified in the circumstances.

115. If a regime for the mandatory adoption of new sewers is not in place before transfer takes place, then new private sewers may continue to be built after transfer and a new stock grow to replicate existing problems. The Government intends to have a regime in place when transfer takes place and provisions were taken in the Flood and Water Management Act 2010 to introduce one. If, for any reason, these provisions cannot be commenced prior to transfer, then it will be possible to create subsequent transfer schemes in the future, to pick up any private sewers built after the original transfer (i.e. that takes place in October 2011). The legislation required to do so is already in place (Section 105A of the Water Industry Act 1991).

Possible unintended consequences

116. Once the transfer date is announced, some property developers might be dis-incentivised from constructing new sewers and laterals to (current) adoptable standards, in the knowledge that these assets will be transferred to WaSCs in the future. However, if an agreed mandatory design and construction standard is established as soon as possible, before transfer takes place, this potential problem can be mitigated.

117. Announcing the transfer start date may cause those private sewer owners whose assets are in need of repair to delay or defer repairs. This could cause environmental and amenity problems. However, local authorities do have the power to intervene until such time as transfer takes effect.

118. Land owners, over whose land a relevant easement has been granted for the installation of private sewers, may hold the right to require the owners of the properties served by the private sewer to pay for the sewer to be moved. This right will be lost once the sewer transfers. WaSCs have discretionary powers to charge a land owner for diverting a sewer. We have been unable to find any examples of land owners exercising their right and cannot quantify the cost or "benefit" lost, but such landowners might emerge and seek compensation for their lost right when the transfer is announced. The appeal mechanism under the Water Industry Act 1991 will allow for this and it is possible that some landowners may make spurious claims for compensation which will fall to Ofwat to determine. In the absence of any useful data or assumptions we have not monetised potential costs.

Direct impact on business

119. The proposed transfer of ownership means that liabilities and associated costs are transferred from commercial property owners and householders to WaSCs. These costs, which will be accompanied by an increase in the businesses' turnover, will be passed on to householders and business customers, automatically and in full, through increases in sewerage bills which OFWAT estimates at an average £5.00 pa from 2011 rising to £8.00 pa by 2019. The OIOO methodology does not treat this pass-through as a direct impact. So whilst the net impact on business is considered neutral, there is a net cost to business when only direct impacts on business are considered: costs to business are direct but benefits are indirect.

120. To calculate the EANCB a discount rate of 3.5% has been used, with a policy appraisal period of 40 years, and 2009/10 used as the PV and price base year. All monetised costs are borne by business (the nine Water And Sewerage Companies (WaSCs)) as direct costs. The net direct cost to business is therefore £203m:

- Total cost (PV): £4,325m (lower than the £4353m on summary sheets owing to constant discount rate of 3.5% applied here rather than declining schedule after 30 years).

- Total benefit (PV): £0m

- Net cost to business (PV): £4,325m

- Equivalent annual cost: £203m

- Equivalent annual benefit: £0m

- Equivalent annual net direct cost to business: £203m

121. These figures are consistent with the 40 year period over which the policy is appraised, but not with the 30-year period over which a constant discount rate should be applied under HMT guidance. If instead the EANCB is calculated over a policy appraisal period of 30 years (with a discount rate of 3.5%), the total PV cost is £3,932m (2009/10 remains the PV and price base year). The annual net direct cost to business in this case is £214m. .

Implementation, Monitoring and Enforcement

122. Water is a devolved responsibility and though this IA contains data covering England and Wales. Separate decisions on implementation may be taken by the Welsh Assembly Government. The Water Act 2003 contains provisions to make transfer a statutory duty for WaSCs by way of an Affirmative Resolution Statutory Instrument (SI). The Government intends that the regulations will come into force in July 2011, with transfer taking place on 1 October 2011.

123. These regulations will require WaSCs to publish a notification of their intention to adopt (all relevant sewers and laterals in their area) under section 102 of the Water Industry Act 1991. Under the legislation, owners or affected third parties who want to appeal against adoption must do so within two months and Ofwat will determine the appeals.

124. WaSCs will be obliged to make a declaration of adoption in their area under s102 of the Act by October 2011. The proposed light-touch approach in the regulations is that WaSCs should be able to make a blanket declaration for their area.

125. The regulations will impose no administrative burdens on independent drainage contractors in the terms of this IA. None are anticipated for WaSCs either but we will continue to keep

this under review with Ofwat, who after transfer may require WaSCs to provide additional information as part of the WaSCs usual annual reporting cycle to Ofwat (known as June returns, see paragraph122). All indications to date from Ofwat have been that any admin burdens, if any, will be minimal.

126. Given the time needed for the Affirmative Resolution process to be completed and the desire to give small businesses in particular, sufficient lead in time, we propose that the implementation date is 1 October 2011 for sewers and laterals and 1 October 2016 for pumping stations. A communication strategy is being completed, involving key stakeholders such as BIS, Water UK and CCWater (the statutory representative body for WaSC customers).

Monitoring

127. WaSCs operate under appointments, granted by the Secretary of State for Environment, Food and Rural Affairs and by the Welsh Ministers, to provide water and sewerage services in England and Wales.

128. Ofwat is the independent, statutory economic regulator of water and sewerage services (i.e. WaSCs) in England and Wales. Monitoring will be part of Ofwat's independent regulatory duties.

129. The costs associated with the transfer and subsequent management of private sewers and laterals by WaSCs will be recovered via their customers' bills, appearing as increases to the annual sewerage bill and will be subject to scrutiny by Ofwat. Ofwat has sole responsibility for setting price limits (which determine bill levels) as a condition of WaSCs' appointments and Ofwat designs and leads a periodic review of price limits (currently every five years).

130. Ofwat also has a primary duty to further the consumer objective by having regard for and protecting the interests of customers. The periodic review process and the information it provides enable Ofwat to establish with sufficient certainty what the functions of companies will be in the five years under review, what the costs of efficiently carrying out those functions will be, and what will be in the interests of customers.

131. Ofwat also monitors the activities of companies on an ongoing basis. Every year it asks the companies to provide information about the previous year (ending 31 March) in the June Return. These reports provide details on a wide variety of activities including levels of customer service, new additions to the network, and leakage information, and allow the regulator to compare performance levels between companies.

132. Ofwat requires each WaSC (and water only company) in England and Wales to appoint an independent professional, known as the Reporter, to examine, test, and give his opinion on this information. Reporters work closely with their companies during the development of their regulatory information submissions.

133. Any additional assets transferred to WaSCs will be monitored in the same way as the rest of the public network, but data may be collated and reported to Ofwat separately to reconcile funding with output measures and levels of service delivered.

134. Ofwat checks that companies are meeting the outputs assumed in the price limits that have been set. Ongoing monitoring allows it to take early action if needed.

Enforcement

135. The enforcement authorities for legislation governing the water industry are the Secretary of State for Environment, Food and Rural Affairs, the Welsh Ministers and Ofwat. Different parts of legislation are enforced by different authorities, but most enforcement is delegated to

Ofwat. The Secretary of State for Environment, Food and Rural Affairs or the Welsh Ministers are empowered to make regulations providing for them to make schemes for the adoption of private sewers.3 Those regulations may require WaSCs to submit draft schemes to the Secretary of State or the Welsh Ministers for their approval. The details of how WaSCs are required to adopt existing and new private sewers will be included in the regulations, which will be enforceable by the Secretary of State or the Welsh Ministers under section 18 of the Water Industry Act (1991).

136. If the Secretary of State or the Welsh Ministers are satisfied that a company has contravened, or is likely to contravene, any of its duties under section 105A of the Water Industry Act 1991, they have a duty to make an enforcement order under section 18 of that Act requiring the company to put matters right.

137. Compliance and further enforcement duties will fall within Ofwat's existing role. As the independent economic regulator of the water industry, Ofwat's responsibilities include the enforcement of conditions imposed on the companies by their licence agreements, issuing Enforcement Orders on companies in breach of those terms, and monitoring their activities and performance on an ongoing basis. Ofwat enforce WaSC duties under s94 of the Water Industry Act 1991 to provide and maintain sewerage systems. Post-transfer these regulatory duties will apply to a larger sewerage network, estimated to increase by 70% and Ofwat may choose to monitor transferred assets separately from those already owned by WaSCs at the time of transfer.

138. Compliance with the transfer regulations is expected to be 100%.

Sanctions

139. Transfer will mean that WaSCs' performance in relation to all newly acquired assets will be subject to the regime of sanctions currently at the disposal of the enforcement authorities (the Secretary of State for Environment, Food and Rural Affairs, the Welsh Ministers and Ofwat). Since April 2005 each enforcement authority has been able to impose financial penalties of up to 10 per cent of turnover where a company contravenes its licence or appointment conditions, or fails to meet required standards in performing its duties.

Compensatory Simplification

140. Implementation will simplify a confused regime of responsibility, providing much greater clarity for homeowners, WaSCs and the independent drainage sector. It has not been possible to monetise this benefit.

Sunset Clause

The regulations that implement the transfer of private sewers will affect the transfer by requiring water and sewerage companies to use their existing powers under the Water Industry Act 1991 to declare sewerage assets to be vested in them as "public" sewerage assets. They will be required to make declarations in respect of private sewers, laterals and associated pumping stations which are connected to the public sewerage system on a date specified in the regulations. This exercise is a single operation such that, once over the transitional period specified in the regulations they will have no ongoing effect. No sunset clause is therefore proposed for these regulations.

[3] The Water Act 2003 amended the Water Industry Act 1991 to include this enabling power under section 105A(1).

Annexes

Annex 1 should be used to set out the Post Implementation Review Plan as detailed below. Further annexes may be added where the Specific Impact Tests yield information relevant to an overall understanding of policy options.

Annex 1: Post Implementation Review (PIR) Plan

A PIR should be undertaken, usually three to five years after implementation of the policy, but exceptionally a longer period may be more appropriate. If the policy is subject to a sunset clause, the review should be carried out sufficiently early that any renewal or amendment to legislation can be enacted before the expiry date. A PIR should examine the extent to which the implemented regulations have achieved their objectives, assess their costs and benefits and identify whether they are having any unintended consequences. Please set out the PIR Plan as detailed below. If there is no plan to do a PIR please provide reasons below.

Basis of the review: [The basis of the review could be statutory (forming part of the legislation), i.e. a sunset clause or a duty to review , or there could be a political commitment to review (PIR)]; Political Commitment to Review
Review objective: [Is it intended as a proportionate check that regulation is operating as expected to tackle the problem of concern?; or as a wider exploration of the policy approach taken?; or as a link from policy objective to outcome?] Proportionate check, using established performance standards for the operability of the public sewerage system, to determine whether the assets transferred are being maintained to the level of operation that satisfies the statutory duty on WaSCs to provide and maintain an effectual sewerage system, together with improved customer experience of resolving drainage problems.
Review approach and rationale: [e.g. describe here the review approach (in-depth evaluation, scope review of monitoring data, scan of stakeholder views, etc.) and the rationale that made choosing such an approach] Costs will be reviewed by Ofwat at each 5 year price review. Customer experience will be reviewed by Defra and the Welsh Assembly Government after three years and thereafter, alongside Ofwat price reviews, through customer research and steering group participation to evaluate expected removal of householder burdens.
Baseline: [The current (baseline) position against which the change introduced by the legislation can be measured] Customer experience, established through surveys and stakeholder steering group participation, together with analysis of Ofwat performance reporting standards currently applying to the public sewerage system.
Success criteria: [Criteria showing achievement of the policy objectives as set out in the final impact assessment; criteria for modifying or replacing the policy if it does not achieve its objectives] WaSCs operating transferred assets to Ofwat performance standards in respect of the condition and operation of the public sewerage system at a cost within the estimated ranges.
Monitoring information arrangements: [Provide further details of the planned/existing arrangements in place that will allow a systematic collection systematic collection of monitoring information for future policy review] Ofwat already monitors the performance of WaSCs against a range of indicators in respect of the maintenance of the public sewerage system. On-going collection of performance data will allow the success of the policy to be measured and steps to be introduced, if necessary, to improve its operation.
Reasons for not planning a review: [If there is no plan to do a PIR please provide reasons here] n/a

Annex 2 – Competition Assessment

1. A Competition Assessment was published with the November 2008 IA (see summary page for web-link). Following the August 2010 consultation our conclusion remains essentially the same:

Conclusion

2. A transfer of private sewer ownership is likely to change the current market structure in the drain repair industry insofar as the customers for drain repair services will cease to be private sewer owners and will become WaSCs. Possible impacts on competition in the drain repair industry include:

- Whilst approximately 50 per cent of the sewerage and drainage network currently in private ownership and which connects to the public system will be transferred to WaSCs under an automatic overnight transfer, drains within the curtilage of premises, totalling some 179,500km, together with pipe work excluded from transfer (including surface water sewers draining direct to watercourses) and those subject to successful appeal will remain in private ownership. In addition, transfer does not apply to entirely self-contained foul drainage systems not connected to the public sewer of which there are some 15,700km;

- The amount of work available to drain repair companies directly from the householder is likely to decrease but be counterbalanced by an increase, directly or indirectly, in contracts from WaSCs;

- WaSCs have already invited drain repair contractors to tender for contracts for the extra work to maintain assets that will be transferred to them;

- Competition for contract work from WaSCs could increase, which could improve standards of training and workmanship and proposals for accreditation and for training courses are under development – procurement policy offering householders more certainty of the standard of work undertaken than the lottery of the Yellow Pages;

- Some smaller businesses may be less able to meet the required standards for tender and therefore unable to compete and could cease trading or merge with other businesses;

- No reduction in the level of employment within the market is anticipated in the short to medium term, though, over time, in total, we estimate that there will be upwards of 500,000 fewer blockages and call outs as the network quality improves.

- The need for WaSCs to tackle a backlog of maintenance/repair will potentially increase business opportunity for drain repair companies in the short term.

3. In April 2009, Professor Martin Cave completed a review of competition and innovation in water markets [The Cave Review, web site: http://www.defra.gov.uk/environment/quality/water/industry/cavereview/index.htm]. The Government accepted Cave's recommendations for England and then undertook a three-month, public consultation process that closed in December 2009. The Cave Review did not focus specifically on the transfer of private sewers. Nevertheless, the Cave Review did recommend, among other things, extending a reformed framework for competition to include sewerage services that are provided to non-household customers. The Water White Paper to be published in June next year will consider the Cave Review's recommendations and put forward proposals on the best way to increase choice and deliver benefits for customers.

Annex 3 - Small Firms Impact Test

1. A detailed Small Firms Impact Test (SFIT) was published as an annex to the November 2008 IA (see summary page for web-link) and was completed with the assistance of the Enterprise Directorate (now at the Department for Business, Innovation and Skills) who confirmed that they were satisfied the concerns of the small business sector had been taken into account.

2. Our conclusions remain the same: it is expected that the amount of work in maintaining and repairing currently private drainage will remain roughly constant. It will decline in the longer term, and there may inevitably be a change in the market focus in the short term for some private drainage contractors operating in this sector, including the need for WaSCs to address the backlog of repairs and who may wish to enter into arrangements with WaSCs or their sub-contractors. As we previously reported, the small firms most likely to be affected by a transfer of private sewers and laterals are those in the drain repair and maintenance sector. These small businesses tend to be 'small bore specialists' operating cleaning, surveying and repair services primarily within and around the curtilage of a property. The drains within the curtilage will remain the responsibility of the householder when ownership of private sewers and lateral drains is transferred to WaSCs, leaving this section of the market unaffected, albeit we understand the concerns expressed by small firms about this (see paragraphs 5-10 of annex G of the Nov 08 IA).

3. In our detailed November 2008 SFIT we noted that in 2007 the insurance industry Drainage Forum estimated the value of the drainage repair industry to be at least £272 million per annum, with the market being shared between an estimated 1,600-2,000 firms operating throughout England and Wales. We have recently been made aware of research carried out by a commercial organisation which indicated that there be as many as 8,500 small drainage contracting businesses, 7,500 having less than 5 employees.

4. We still consider that the sector is fragmented, with inconsistent working practices and, historically, with no single effective representative trade body and that many small firms see transfer as more of a threat than opportunity and that micro businesses in particular may not have the opportunity or ability to develop and expand or diversify their operation.

5. Since our November 2008 SFIT we have listened to the concerns of a new group of drainage contractors, the National Association of Drainage Contractors which, we believe, was formed around July 2009 and voiced concerns of some independent contractors. We consider that they corroborate our view that some small businesses are concerned about transfer.

6. They have suggested that Government and Water companies have ignored the sector. Since the first consultation in 2003 and the Government's 2004 response paper, considerable effort has been put into seeking and taking into account the views of drainage contractors. As far back as January 2005 Defra led a seminar 'Review of Existing Private Sewers: What Next?' which included an 'Impact on Small Business' workshop, introduced by the Small Business Service. This workshop sought views from delegates from the drain repair industry about how they anticipated a transfer of ownership might affect small businesses, and whether any impacts could be mitigated. The outcome was that the majority of delegates thought that transfer would be perceived by small businesses as more of a threat than an opportunity, which we noted. A telephone survey was subsequently undertaken with guidance from the Small Business Service to seek the views of small drainage contractors. 145 calls were made to 'drain and sewer repair' and 'pipework' contractors across England and Wales. Only 23 of those contacted agreed to answer questions and share further comments. Establishing robust lines of communication with the small drainage contractor industry has been difficult throughout the review because of the sector's fragmented nature and the fact that no national body existed that specifically represented the interests of smaller drainage companies. The recently established National Association of Drainage Contractors has however designed a protocol for an operating relationship for the allocation of business between WaSCs and independent drainage contractors which is under discussion, which we welcome.

7. We are also aware that several water companies have run seminars in their areas. Water UK has a section on its website too. http://www.water.org.uk/home/policy/positions/private-sewers

8. We noted in our previous SFIT that some responses highlighted job losses as a consequence whereas others believed that the same amount of work will need to be carried out post-transfer and that the remaining domestic drainage work may be sufficient to support small contractors, i.e. it represents a shift in the way the work is done but the overall quantity will remain very similar and may, indeed, increase in the short to medium term. While this may be true for CCTV work for instance, we must acknowledge that over time, in total, we estimate that there will

be upwards of 500,000 fewer blockages and call outs as the network quality improves.

9. However it is interesting to note the situation in Scotland, which we did not report in the November 2008 SFIT. When the Sewerage (Scotland) Act 1968 was introduced, it vested all sewers in the sewerage authority - now Scottish Water.

10. The definition of a drain in Scotland is limited to within the curtilage and the definition of sewer contains "does not include a drain…but includes all sewers, pipes or drains used for the drainage of buildings and yards appurtenant to buildings", this suggests that once a drain leaves the curtilage of a property, it becomes a sewer and is therefore vested in the sewerage authority unless an agreement not to has been authorised.

11. In effect this means that the current situation in Scotland replicates what will happen in England and Wales after transfer. A sample of cities suggests that the market in Scotland is comparable to the current pre-transfer market in England:

DRAINAGE INDUSTRY IN SCOTLAND – COMPARATIVE SEARCH MADE ON YELL.COM (JANUARY 2010)

	Population (2001)	**No. of contractors**
Edinburgh	452,000	21
Glasgow	577,000	43
Aberdeen	197,000	12
Liverpool	469,000	24
Bristol (urban area)	551,000	40
Norwich	195,000	30

Note: Population figures taken from ONS census.

Steps to help small businesses

1. An issue of concern to small businesses operating in this sector should they choose to offer themselves as contractors or sub-contractors is whether they will need training or accreditation in order to meet the requirements of WaSCs in order to operate in partnership with them or their sub-contractors. We understand that in considering pre-qualification for tenders, WaSCs are likely to expect companies to be able to show that their staff have been adequately trained but will not necessarily expect them to have attained specific qualifications.

2. Energy and Utility Skills – under licence to the Dept. for Education and Skills – has worked with the sewerage industry to identify National Occupational Standards in a Sewerage Maintenance Standards project, and currently offers National Vocational Qualifications covering sewer maintenance. WaSCs support the project and small businesses who obtain the qualification are likely to make themselves more attractive as sub-contractors.

3. A drainage operatives registration scheme is under development by Energy and Utility Skills and this provides a means to demonstrate competency through training and experience. This will provide a framework and registration scheme which will give confidence to asset owners and domestic customers alike, that the work will be carried out safely and competently.

4. Transfer will also create new opportunities and open new markets for other small businesses involved in training, health and safety audit, scheduling and account management.

5. Transfer will be brought into force with sufficient lead-in time and implementation will be to a common commencement date.

6. No licences or other stringent new measures or processes for small businesses are being introduced with transfer. There will be no added administrative regulatory burden that small businesses will need to comply with.

7. Transfer will bring clarity on what is and is not a householder's responsibility for drainage. The market will be clearly defined.

Annex 4 - note on Specific Impact Tests

1. The recommendations have no implications for Race, Gender or Disability Equality that we have been able to find.
2. A competition assessment is included at annex 2.
3. A small firms impact test is included at annex 3.
4. We do not anticipate any changes in the overall level of greenhouse gas emissions. Though it is possible they may slightly increase in the short period of capital programme expenditure they are expected to decrease over time as fewer blockages are attended to.
5. We do not anticipate any wider environmental impacts.
6. The recommendations do not have direct health impacts but will contribute to better management of the wider sewerage system in the longer term which is expected to reduce potential instances of pollution.
7. Human Rights are unlikely to be affected.
8. There are no legal aid implications that we are aware of.

9. The recommendations apply wherever there is a connection to the public sewer. Those not connected to the public system do not pay an annual sewerage bill to a WaSC. Therefore the recommendations will not have a different impact in rural areas.
10. The recommendations comply with Sustainable Development Principles.

Draft Regulations laid before Parliament and the National Assembly for Wales under section 105A of the Water Industry Act 1991, for approval by resolution of each House of Parliament and by the National Assembly for Wales.

D R A F T   S T A T U T O R Y   I N S T R U M E N T S

2011 No. 0000

WATER INDUSTRY, ENGLAND AND WALES

The Water Industry (Schemes for Adoption of Private Sewers) Regulations 2011

Made - - - -	***
Coming into force - -	*1st July 2011*

These Regulations are made in exercise of the powers conferred by sections 102(4) (as modified by section 105A(6)(a) of the Water Industry Act 1991), 105A and 213(2)(f) of the Water Industry Act 1991(**a**).

The Secretary of State and the Welsh Ministers(**b**) have consulted in accordance with the requirements set out in section 105C(2)(**c**) of that Act.

A draft of these Regulations has been approved by a resolution of each House of Parliament and by the National Assembly for Wales(**d**) in accordance with section 105A(8) of that Act.

Accordingly, the Secretary of State, in relation to any sewerage undertaker whose area is wholly or mainly in England, and the Welsh Ministers, in relation to any sewerage undertaker whose area is wholly or mainly in Wales, make the following Regulations.

(**a**) 1991 c. 56. Section 102(4) was amended by the Water Act 2003 (c. 37), section 96(1)(c), and modified by section 105A(6)(a) of the Water Industry Act 1991; see section 219(1) of that Act for the definition of "prescribed". Section 105A was inserted by the Water Act 2003, section 98. The functions of the Secretary of State under section 105A of the Water Industry Act 1991 were transferred to the National Assembly for Wales by article 2 of, and Schedule 1 to, the National Assembly for Wales (Transfer of Functions) Order 1999, S.I. 1999/672 ("the Order") (as amended by section 100(2)(b)(vii) of the Water Act 2003), in relation to any water or sewerage undertaker whose area is wholly or mainly in Wales. The functions of the Secretary of State under section 213(2)(f) of the Water Industry Act 1991 were made exercisable by the National Assembly for Wales to the same extent as the powers, duties and other provisions to which that section applies were exercisable by that Assembly by virtue of article 2 of, and Schedule 1 to, the Order. The functions conferred on the National Assembly for Wales were subsequently transferred to the Welsh Ministers by section 162 of, and paragraph 30 of Schedule 11 to, the Government of Wales Act 2006 (c. 32).

(**b**) Functions of the Secretary of State under section 105C of the Water Industry Act 1991 were transferred to the National Assembly for Wales by article 2 of, and Schedule 1 to, the Order (as amended by section 100(2)(b)(vii) of the Water Act 2003). The functions conferred on the National Assembly for Wales were subsequently transferred to the Welsh Ministers by section 162 of, and paragraph 30 of Schedule 11 to, the Government of Wales Act 2006. Consultation undertaken by the National Assembly for Wales has effect as if carried out by the Welsh Ministers, by virtue of section 162 of, and paragraph 39(3) of Schedule 11 to, the Government of Wales Act 2006.

(**c**) Section 105C was inserted by the Water Act 2003, section 98.

(**d**) The reference in section 105A(8) to each House of Parliament has effect in relation to the exercise of functions by the Welsh Ministers as if it included a reference to the National Assembly for Wales, by virtue of section 162 of, and paragraph 33 of Schedule 11 to, the Government of Wales Act 2006.

Citation, commencement and expiry

1.—(1) These Regulations may be cited as the Water Industry (Schemes for Adoption of Private Sewers) Regulations 2011 and come into force on 1st July 2011.

(2) They cease to have effect at the end of 30th June 2018.

Interpretation

2. In these Regulations—

"the Act" means the Water Industry Act 1991;

"adoptable", in relation to a private sewer or private lateral drain, means a sewer or lateral drain in relation to which a sewerage undertaker must perform the relevant duty;

"declaration" means a declaration of vesting under subsection (1) of section 102(**a**) of the Act (adoption of sewers and disposal works);

"exempt", in relation to a private sewer or private lateral drain, means a sewer or lateral drain which is exempt under regulation 5;

"main scheme" means a scheme under regulation 3;

"private lateral drain" means the whole or part of a lateral drain(**b**) which is not vested in a sewerage undertaker in its capacity as such;

"private sewer" means the whole or part of a foul, combined or surface water private sewer(**c**), but does not include a highway drain or sewer;

"pumping station" means that part of a sewer or lateral drain which is a pumping station used or intended to be used in connection with that sewer or lateral drain, and includes the rising main (the pressurised pipe that connects the pumping station with the rest of the sewer or lateral drain);

"the relevant date" means the date of commencement (in full) of section 42(1) of the Flood and Water Management Act 2010(**d**);

"the relevant duty" means the duty under section 105A(4) of the Act (duty on sewerage undertakers to exercise their powers under section 102 of the Act with a view to making a declaration pursuant to a scheme);

"scheme" means a scheme described in section 105A of the Act (schemes for the adoption of sewers, lateral drains and sewage disposal works);

"the supplementary adoption date" means the date which is the day after the end of the period of 6 months beginning with the relevant date; and

"supplementary scheme" means a scheme under regulation 4.

Main schemes

3.—(1) The Secretary of State must make a scheme (a "main scheme") for the adoption of private sewers and private lateral drains by every sewerage undertaker whose area is wholly or mainly in England.

(2) The Welsh Ministers must make a scheme (a "main scheme") for the adoption of private sewers and private lateral drains by every sewerage undertaker whose area is wholly or mainly in Wales.

(3) The making of a main scheme is the circumstance giving rise to the relevant duty pursuant to that scheme.

(**a**) Section 102 was amended by the Water Act 2003, section 96(1) and Part 3 of Schedule 9.

(**b**) See section 219(1) of the Water Industry Act 1991 for the definition of "lateral drain", and see also section 219(2)(a) of that Act.

(**c**) See, in section 219(1) of the Water Industry Act 1991, the definitions of "public sewer" and "sewer", and see also section 219(2)(a) of that Act.

(**d**) 2010 c. 29. Section 42(1) inserts section 106B into the Water Industry Act 1991.

(4) Paragraphs (5) to (7) specify criteria relevant to the performance of that duty.

(5) Each sewerage undertaker must perform the relevant duty pursuant to a main scheme in relation to any private sewer—

(a) which is situated within the area of that undertaker; and

(b) which, immediately before 1st July 2011, communicates with a public sewer(**a**).

(6) Each sewerage undertaker must perform the relevant duty pursuant to a main scheme in relation to any private lateral drain which, immediately before 1st July 2011, communicates with a public sewer which is vested in that undertaker.

(7) The relevant duty pursuant to a main scheme is not owed in relation to any private sewer or private lateral drain—

(a) which is exempt; or

(b) which is, immediately before 1st July 2011, the subject of a declaration.

(8) Each main scheme must provide that any declaration which is made pursuant to that scheme in relation to a private sewer or private lateral drain—

(a) must specify 1st October 2011 as the date of vesting of that sewer or lateral drain (except any part of that sewer or lateral drain which is a pumping station), and

(b) must specify a date no later than 1st October 2016 as the date of vesting of any pumping station which forms part of that sewer or lateral drain,

except where it is not possible, in respect of a particular sewer or lateral drain, to make a declaration specifying such a date because a proposal to make a declaration in respect of that sewer or lateral drain is subject to an outstanding appeal under section 105B(**b**) of the Act (adoption schemes: appeals).

(9) Any number of declarations may be made pursuant to a main scheme.

Supplementary schemes

4.—(1) On or as soon as reasonably practicable after the relevant date, the Secretary of State must make a scheme (a "supplementary scheme") for the adoption of private sewers and private lateral drains by every sewerage undertaker whose area is wholly or mainly in England.

(2) On or as soon as reasonably practicable after the relevant date, the Welsh Ministers must make a scheme (a "supplementary scheme") for the adoption of private sewers and private lateral drains by every sewerage undertaker whose area is wholly or mainly in Wales.

(3) The making of a supplementary scheme is the circumstance giving rise to the relevant duty pursuant to that scheme.

(4) Paragraphs (5) to (7) specify criteria relevant to the performance of that duty.

(5) Each sewerage undertaker must perform the relevant duty pursuant to a supplementary scheme in relation to any private sewer—

(a) which is situated within the area of that undertaker;

(b) which, immediately before the relevant date, communicates with a public sewer; and

(c) in relation to which the relevant duty is not owed pursuant to a main scheme.

(6) Each sewerage undertaker must perform the relevant duty pursuant to a supplementary scheme in relation to any private lateral drain—

(a) which, immediately before the relevant date, communicates with a public sewer which is vested in that undertaker; and

(b) in relation to which the relevant duty is not owed pursuant to a main scheme.

(**a**) See section 219(1) of the Water Industry Act 1991 for the definition of "public sewer".
(**b**) Section 105B was inserted by the Water Act 2003, section 98.

(7) The relevant duty pursuant to a supplementary scheme is not owed in relation to any private sewer or private lateral drain—

(a) which is exempt; or

(b) which is, immediately before the relevant date, the subject of a declaration**.**

(8) Each supplementary scheme must provide that any declaration which is made pursuant to that scheme in relation to a private sewer or private lateral drain—

(a) must specify the supplementary adoption date as the date of vesting of that sewer or lateral drain (except any part of that sewer or lateral drain which is a pumping station), and

(b) must specify a date no later than 1st October 2016 as the date of vesting of any pumping station which forms part of that sewer or lateral drain,

except where it is not possible, in respect of a particular sewer or lateral drain, to make a declaration specifying such a date because a proposal to make a declaration in respect of that sewer or lateral drain is subject to an outstanding appeal under section 105B of the Act.

(9) Any number of declarations may be made pursuant to a supplementary scheme.

Exempt private sewers and exempt private lateral drains

5.—(1) A private sewer or private lateral drain is exempt for the purposes of a main scheme or a supplementary scheme if that sewer or lateral drain is owned by a railway undertaker(**a**).

(2) A private sewer or private lateral drain is exempt for the purposes of a main scheme if—

(a) that sewer or lateral drain is situated on or under Crown land; and

(b) the sewerage undertaker within whose area that sewer or lateral drain is situated has received notice in writing before 1st July 2011 from the appropriate authority in relation to that land that that sewer or lateral drain should be exempt.

(3) A private sewer or private lateral drain is exempt for the purposes of a supplementary scheme if—

(a) that sewer or lateral drain is situated on or under Crown land; and

(b) the sewerage undertaker within whose area that sewer or lateral drain is situated has received notice in writing before the relevant date from the appropriate authority in relation to that land that that sewer or lateral drain should be exempt.

(4) In this regulation "Crown land" means land an interest in which—

(a) belongs to Her Majesty in right of the Crown; or

(b) belongs to a government department or is held in trust for Her Majesty for the purposes of a government department.

(5) In this regulation "the appropriate authority" means—

(a) in the case of land which belongs to Her Majesty in right of the Crown, the Crown Estate Commissioners or other government department having management of the land in question;

(b) in the case of land which belongs to a government department or is held in trust for Her Majesty for the purposes of a government department, that department.

Publication of proposal to make a declaration

6. In exercising its powers under subsection (4) of section 102 of the Act (as modified by section 105A(6)(a) of the Act) pursuant to the relevant duty, a sewerage undertaker must publish notice of its proposal to make a declaration—

(a) in the London Gazette; and

(**a**) See section 219(1) of the Water Industry Act 1991 for the definition of "railway undertakers".

(b) in as many local or regional newspapers circulating in that undertaker's area as may be required to cover the whole of that area.

Existing proposals to make declarations, and existing declarations

7.—(1) Paragraph (2) applies where—

(a) a private sewer or private lateral drain which would be adoptable pursuant to a main scheme is, immediately before 1st July 2011, the subject of a proposal (under section 102(4) of the Act) to make a declaration; or

(b) a private sewer or private lateral drain which would be adoptable pursuant to a supplementary scheme is, immediately before the relevant date, the subject of such a proposal.

(2) Where this paragraph applies—

(a) that proposal, in so far as it relates to that sewer or lateral drain, is treated as having been withdrawn; and

(b) any appeal under subsection (1)(a) of section 105(**a**) of the Act (appeals with respect to adoption) in relation to that sewer or lateral drain which is outstanding immediately before—

(i) 1st July 2011, in relation to a sewer or lateral drain to which this paragraph applies by virtue of paragraph (1)(a), or

(ii) the relevant date, in relation to a sewer or lateral drain to which this paragraph applies by virtue of paragraph (1)(b),

is to be discontinued.

(3) Where—

(a) (if it were not for regulation 3(7)(b)) a private sewer or private lateral drain would be adoptable pursuant to a main scheme, and

(b) that sewer or lateral drain is, immediately before 1st July 2011, the subject of a declaration which specifies 2nd October 2011 or a later date as the date of vesting of that sewer or lateral drain,

the date of vesting of that sewer or lateral drain pursuant to that declaration is treated as being 1st October 2011.

(4) Where—

(a) (if it were not for regulation 4(7)(b)) a private sewer or private lateral drain would be adoptable pursuant to a supplementary scheme, and

(b) that sewer or lateral drain is, immediately before the relevant date, the subject of a declaration which specifies a date later than the supplementary adoption date as the date of vesting of that sewer or lateral drain,

the date of vesting of that sewer or lateral drain pursuant to that declaration is treated as being the supplementary adoption date.

Outstanding appeals under section 105(1)(b) of the Act

8. Where an appeal under section 105(1)(b) of the Act—

(a) is outstanding, immediately before 1st July 2011, in relation to a private sewer or private lateral drain which would be adoptable pursuant to a main scheme, or

(b) is outstanding, immediately before the relevant date, in relation to a private sewer or private lateral drain which would be adoptable pursuant to a supplementary scheme,

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(**a**) Section 105 was amended by the Water Act 2003, sections 36(2) and 96(5), and is prospectively amended by the Flood and Water Management Act 2010 (c. 29), section 42(2).

that appeal is to be discontinued.

Existing applications for agreements, and existing agreements, under section 104 of the Act

9.—(1) Paragraph (2) applies where—

(a) a private sewer or private lateral drain which would be adoptable pursuant to a main scheme is, immediately before 1st July 2011, the subject of an application, under subsection (2) of section 104(**a**) of the Act (agreements to adopt sewer, drain or sewage disposal works at future date), for an agreement; or

(b) a private sewer or private lateral drain which would be adoptable pursuant to a supplementary scheme is, immediately before the relevant date, the subject of such an application.

(2) Where this paragraph applies—

(a) that application, in so far as it relates to that sewer or lateral drain, is treated as having been withdrawn; and

(b) any appeal under section 105(2)(**b**) of the Act in relation to that sewer or lateral drain which is outstanding immediately before—

(i) 1st July 2011, in relation to a sewer or lateral drain to which this paragraph applies by virtue of paragraph (1)(a), or

(ii) the relevant date, in relation to a sewer or lateral drain to which this paragraph applies by virtue of paragraph (1)(b),

is to be discontinued.

(3) Paragraph (4) applies where—

(a) a private sewer or private lateral drain which would be adoptable pursuant to a main scheme is, immediately before 1st July 2011, the subject of an agreement; or

(b) a private sewer or private lateral drain which would be adoptable pursuant to a supplementary scheme is, immediately before the relevant date, the subject of an agreement.

(4) Where this paragraph applies—

(a) that sewer or lateral drain vests in the relevant sewerage undertaker on the earlier of—

(i) the date specified as the date of vesting of that sewer or lateral drain in a declaration made pursuant to a main scheme or a supplementary scheme (as the case may be), or

(ii) the date of vesting under the agreement in question;

(b) that agreement, in so far as it relates to that sewer or lateral drain, is treated as terminating on the vesting date; and

(c) the relevant sewerage undertaker may continue to benefit from any term of that agreement relating to the provision by any other party to the agreement of security for the discharge of obligations in connection with that sewer or lateral drain, in recompense for expenditure incurred prior to the vesting date by that undertaker in relation to—

(i) any works carried out on that sewer or lateral drain by that undertaker prior to the vesting date, or

(ii) any contract entered into by that undertaker with another party for the carrying out of such works.

(5) In this regulation—

(a) "agreement" means an agreement under section 104 of the Act;

(**a**) Section 104 was amended by the Water Act 2003, section 96(4) and Part 3 of Schedule 9, and is prospectively amended by the Flood and Water Management Act 2010, section 42(3).

(**b**) Section 105(2) is prospectively substituted by the Flood and Water Management Act 2010, section 42(2).

(b) "the relevant sewerage undertaker" means the sewerage undertaker which is a party to the agreement in question; and

(c) "the vesting date", in relation to a sewer or lateral drain, means the date on which that sewer or lateral drain vests in the relevant sewerage undertaker, as determined by paragraph (4)(a).

Name
Minister of State
Date Department for Environment, Food and Rural Affairs

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

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations provide for the Secretary of State and the Welsh Ministers to make schemes for the adoption by sewerage undertakers in England and Wales of private sewers and private lateral drains under section 102 of the Water Industry Act 1991 ("the Act").

Regulation 3 makes provision in relation to main schemes (which relate to the adoption of private sewers and lateral drains which communicate with a public sewer immediately before 1st July 2011). Regulation 4 makes provision in relation to supplementary schemes (which relate to the adoption of private sewers and lateral drains which communicate with a public sewer immediately before the date of commencement of section 42(1) of the Flood and Water Management Act 2010). Regulation 5 describes sewers and lateral drains which are exempt from adoption under a scheme.

A declaration under section 102 of the Act must specify that adoptable private sewers and lateral drains will vest in an undertaker on 1st October 2011 (pursuant to a main scheme) or 6 months after the date of commencement of section 42(1) of the Flood and Water Management Act 2010 (pursuant to a supplementary scheme), or, in the case of a pumping station which forms part of a private sewer or lateral drain, no later than 1st October 2016 (regulations 3 and 4).

Regulations 7, 8 and 9 make provision in relation to private sewers and lateral drains which are the subject of existing adoption declarations or agreements under section 102 or 104 of the Act (or proposals for such declarations or agreements).

These Regulations cease to have effect on 30th June 2018.

A full impact assessment of the effect that this instrument will have on the costs of business, the voluntary sector and the public sector has been produced and placed in the library of each House of Parliament. It is available from the Private Sewers Transfer Team, Area 2C, Ergon House, Horseferry Road, London SW1P 2AL or on the Defra website at www.defra.gov.uk. It is also published with the Explanatory Memorandum alongside the instrument on www.legislation.gov.uk.

Committee on Statutory Instruments Draft Report

CSI2

Title: The Welsh Language Commissioner (Appointment) Regulations 2011

Procedure: **Affirmative**

The Welsh Language (Wales) Measure 2011 ("the Measure") creates the office of Welsh Language Commissioner ("the Commissioner"). Section 2 of the Measure provides that the Commissioner is appointed by the First Minister. In appointing the Commissioner, the First Minister is under a duty to comply with regulations that make provision about the appointment (referred to in the Measure as "appointment regulations"). The Welsh Ministers make these regulations to comply with their duty to make appointment regulations. These regulations make provision about convening a selection panel and its membership. These regulations also make provision about the principles to be followed by the First Minister in appointing the Commissioner and the Welsh language knowledge and proficiency that a person appointed as Commissioner must have.

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

Merits Scrutiny
Under Standing Orders 21.3[1] the Assembly is invited to pay special attention to the following points in relation to the instrument:-

i) These regulations are the first to be made under the Measure. The appointment arrangements for the Commissioner were considered in the third Assembly by both the Constitutional Affairs Committee and Legislation Committee 2 as part of their stage 1 scrutiny of the Measure. Both Committees drew attention to the proposed appointment arrangements and raised concerns over the perceived independence of the Commissioner. In particular, Legislation Committee No.2 in their scrutiny of the Measure raised concerns over the appointment of the Commissioner by the First Minister and recommended that the National Assembly for Wales have responsibility for the Commissioner's appointment.

ii) The Constitutional Affairs Committee's report said:

"58. We do not believe it is part of our remit to comment on whether the appointment arrangements in this case strike the

[1] SO 21.3(ii) "that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly."

right balance between political direction and independence. However, we believe that the issue will be a key factor in establishing the credibility of the Commissioner in due course. We believe it is an area where Members of the National Assembly should have the opportunity to consider and decide whether the arrangements that are finally proposed get this balance right. For this reason we believe that the relevant appointment regulations should be made by the affirmative resolution procedure."

iii) Whilst Legislation Committee No.2's recommendation was not accepted by the Welsh Government, it subsequently brought forward amendments to the proposed Measure so that the regulations governing the Commissioner's appointment are now to be made by affirmative resolution of the Assembly. Regulation 2(d) also makes provision for an Assembly Member to be nominated by a relevant committee of the National Assembly to sit on the selection panel, although it is not clear how this will work in practice.

iv) The Regulations define a "relevant committee" as "a committee of the National Assembly for Wales invited by the Welsh Ministers to make a nomination." The Regulations do not provide any guidance as to which committee Ministers may invite to nominate a member of the panel and practical difficulties could arise if the invitation is made at a time when no committee is in a position to make a nomination (e.g. because of a recess. Members may therefore wish to seek an explanation from Ministers as to how they intend to apply this provision in practice.

v) The Committee may wish to note that Schedule 1, paragraph 3(1) (b) of the Measure states that the First Minister must take into account the recommendations of the selection panel.

Legal Advisers
Committee on Statutory Instruments

June 2011

The Government has responded as follows:

Merits Response – The Welsh Language Commissioner (Appointment) Regulations 2011

The Welsh Government have listened to the concerns raised by Assembly Members regarding the appointment of the Welsh Language Commissioner and the legislative procedure that the regulations should follow. These Regulations will proceed via the Affirmative Resolution Procedure and

provide an opportunity for the National Assembly to play a role in the process that leads to the appointment of the Commissioner by the First Minister.

This Government's intention would be to invite the Assembly Committee with responsibility for scrutiny of issues relating to the Welsh language to nominate an Assembly Member to sit on the selection panel. However, in anticipation of a situation where no such Committee is in existence regulation 2(d) is drafted to provide a degree of flexibility for Welsh Ministers to invite another Committee to nominate an Assembly Member.

In most cases, the need to appoint a Commissioner and the consequent need to convene a selection panel will be known in advance. As such, this Government will take steps to correspond with the Committee during the Assembly term. However, in some circumstances it may be necessary to write to the Committee during a recess period.

Explanatory Memorandum to the Welsh Language Commissioner (Appointment) Regulations 2011

This Explanatory Memorandum has been prepared by the Department for Education and Skills and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Welsh Language Commissioner (Appointment) Regulations 2011. I am satisfied that the benefits outweigh any costs.

Leighton Andrews AM

Minister for Education and Skills

1st June 2011

Description

1. The draft regulations make provision about the appointment of the Welsh Language Commissioner ("the Commissioner") whose office is established under section 2 of the Welsh Language (Wales) Measure 2011 ("the Measure"). The draft regulations make provision about the establishment of a selection panel whose members will interview candidates for appointment as Commissioner and make recommendations to the First Minister in relation to that appointment. The regulations also make provision about the principles to be followed in appointing the Commissioner and about the knowledge and proficiency in Welsh that is required of the Commissioner.

Matters of special interest to the Constitutional Affairs Committee

2. None.

Legislative background

3. Section 2 of the Measure provides that there is to be a Welsh Language Commissioner and that the First Minister must appoint the Commissioner. Paragraph 3(1)(a) of Schedule 1 to the Measure provides that, in appointing the Commissioner, the First Minister must comply with appointment regulations made by the Welsh Ministers under paragraph 7 of that Schedule.

4. Paragraph 7 of Schedule 1 to the Measure imposes a duty upon the Welsh Ministers to make provision, by regulations, regarding the appointment of the Commissioner (referred to in the Measure as "appointment regulations"). Paragraph 7(2) of Schedule 1 to the Measure provides that appointment regulations must make provision for the establishment of a panel of persons (a "selection panel") who are to interview candidates for appointment as Commissioner and make recommendations to the First Minister in relation to the appointment. In appointing the Commissioner, the First Minister must, in line with paragraph 3(1)(b) of Schedule 1, take into account the selection panel's recommendations. In accordance with paragraphs 7(3) – (6) of Schedule 1 to the Measure, appointment regulations may also make provision about other matters relating to the appointment including provision about principles to be followed in appointing the Commissioner and provision about the knowledge of, and proficiency in, the Welsh language which the Commissioner must have. Paragraph 7(7) of Schedule 1 to the Measure provides that appointment regulations may confer functions on any person, including functions involving the exercise of a discretion.

5. As specified in section 150(2)(l) of the Measure, these regulations are subject to the approval of the National Assembly through the Affirmative Resolution procedure.

Purpose and intended effect of the legislation

<u>Policy Objectives</u>

6. These regulations are required for Welsh Ministers to comply with the obligation placed on them by the Measure to make provision about the appointment of the Commissioner, and will in turn enable the First Minister to make an appointment. Without these regulations, the Commissioner cannot be appointed and the policy objectives set out in the Measure cannot be realised.

<u>Effect</u>

7. These regulations place a duty on the Welsh Ministers, once requested to do so by the First Minister, to convene a selection panel. The regulations state broadly who the categories of members will be: namely a person accredited by the Office of the Commissioner for Public Appointments who will act as an independent appointments assessor; a person with experience of the promotion of the use of Welsh and/or another language; a member of staff of the Welsh Government and a member nominated by a committee of the National Assembly for Wales. These categories of members were chosen and set out in legislation to ensure that the appointment process is fair and transparent and that the selection panel's composition is appropriate to providing a balanced view and making recommendations. The selection panel's membership will ensure it has a mixture of experience and expertise relevant to the appointment process and the field in which the Commissioner will work. Its recommendations will be provided to the First Minister who must take them into account in appointing the Commissioner. Additionally, in making the appointment, these regulations ensure that the First Minister must follow the principles of ministerial responsibility, merit, independent scrutiny, equal opportunities, probity, openness and transparency, and proportionality which are core considerations in the public appointments process and take into account the description of those principles in the Commissioner for Public Appointments' Code of Practice for Ministerial Appointments to Public Bodies of August 2009. Provision is also made in the regulations to ensure that the appointment process can continue in the event that an Assembly committee declines or fails to make a nomination.

8. Provision is made to disqualify persons who hold or who have held the post of Commissioner or Deputy Commissioner from sitting on the selection panel for the appointment of a Commissioner. This reinforces the independence and objectivity of the panel.

Consultation

9. Information under this heading is included in the Regulatory Impact Assessment at Part 2.

PART 2- REGULATORY IMPACT ASSESSMENT

Options

Option 1: Do Nothing

10. Paragraph 3(1)(a) of Schedule 1 to the Measure sets out that in appointing the Commissioner the First Minister must comply with appointment regulations. Paragraph 7(1) of Schedule 1 to the Measure imposes a duty upon the Welsh Ministers, by regulations, to make provision about the appointment of the Commissioner.

11. The Welsh Ministers, in order to comply with their duty, must make appointment regulations and the Commissioner cannot be appointed unless appointment regulations have been made. Therefore, the 'do nothing' option is not feasible.

Option 2: Make the Legislation

12. Making these regulations enables Welsh Ministers to discharge the duty placed upon them to make appointment regulations. These regulations in turn will allow the First Minister to satisfy the legal duty placed upon him to comply with the regulations in appointing a person to the post. These regulations will lead to the appointment of the Commissioner, which is an integral part in fulfilling the policy objectives of the Measure.

Costs and benefits

Option 1: Do Nothing

13. There would be no costs or benefits as a result of not making the legislation as it would not be possible for the First Minister to appoint a Commissioner.

14. Should the Commissioner not be appointed, it would not be possible to implement the Measure. This would be contrary to the expectation of the National Assembly for Wales and the general public.

Option 2: Make the Legislation

Costs

15. There are no cost implications arising from these regulations for business, the voluntary sector, local government and others.

16. Costs stemming from these regulations are those associated with the appointment process for the Commissioner. It is estimated that the cost of advertising the post and of using an executive search company to help identify suitable candidates will amount to around £30k. This cost will be met from the Department for Education and Skills' budget for 2011-12.

17. Under the current arrangements, salary costs incurred by the Welsh Language Board are met from Budget Expenditure Line (BEL) 6020 Welsh Language Board which has a revenue budget of £13.858m for 2011-12.

This BEL is due to transfer from Heritage Main Expenditure Group (MEG) to the Education and Skills MEG in the first Supplementary Budget for 2011-12. Costs associated with the remuneration of the Commissioner, once appointed, will be met from this same budget.

18. As previously estimated in the Regulatory Impact Assessment to the Measure, the staff costs associated with implementing the Measure is circa £200k in year 1 (2011-12) which is being met from the Welsh Government's existing budgets. A small proportion of this total staff cost will be incurred in delivering the work associated with these regulations, namely planning and managing the appointment process for the Commissioner.

Benefits

19. Making the legislation will ensure that the appointment of the Commissioner can occur and discharges the duty on the Welsh Ministers to make appointment regulations.

Consultation

20. No public consultation has been undertaken on the policy principles or on the draft regulations as they will not have a direct impact on the public, private or voluntary sectors.

Competition Assessment

21. The competition assessment is not applicable in this case as these regulations will not affect business, charities or the voluntary sector.

Post implementation review

22. The regulations will be reviewed following the appointment of each Commissioner with a view to making any amendments required prior to the next appointment.

Draft Order laid before the National Assembly for Wales under section 150(2) of the Welsh Language (Wales) Measure 2011, for approval by resolution of the National Assembly for Wales.

DRAFT WELSH STATUTORY INSTRUMENTS

2011 No. (W.)

WELSH LANGUAGE, WALES

The Welsh Language Commissioner (Appointment) Regulations 2011

EXPLANATORY NOTE

(This note is not part of the Regulations)

The Welsh Language (Wales) Measure 2011 ("the Measure") creates the office of Welsh Language Commissioner ("the Commissioner"). Section 2 of the Measure provides that the Commissioner is appointed by the First Minister.

In appointing the Commissioner, the First Minister is under a duty to comply with regulations that make provision about the appointment (referred to in the Measure as "appointment regulations").

Paragraph 7(1) of Schedule 1 to the Measure imposes a duty upon the Welsh Ministers to make appointment regulations.

Paragraph 7(2) of Schedule 1 to the Measure provides that appointment regulations must make provision about the establishment of a panel of persons who are to interview candidates for appointment as Commissioner and make recommendations to the First Minister in relation to that appointment (referred to in the Measure as a "selection panel").

Paragraphs 7(3) to (6) of Schedule 1 to the Measure provide that appointment regulations may make provision about the principles to be followed in appointing the Commissioner and the knowledge of, and proficiency in, the Welsh language of the Commissioner, amongst other matters.

The Welsh Ministers make these regulations to comply with their duty to make appointment regulations. These regulations make provision about

convening a selection panel and its membership. These regulations also make provision about the principles to be followed by the First Minister in appointing the Commissioner and the Welsh language knowledge and proficiency that a person appointed as Commissioner must have.

Regulation 2 imposes a duty upon the Welsh Ministers to convene a selection panel when requested by the First Minister to do so. A selection panel established for appointing the Commissioner will include a member of staff of the Welsh Assembly Government (known as "the Welsh Government"); an independent assessor; a person with experience of the promotion of the use of Welsh and/or another language; and an Assembly Member nominated by a committee of the National Assembly for Wales. In the event that a committee declines or fails to make a nomination, regulation 2 permits the Welsh Ministers to convene a section panel which does not include an Assembly Member.

Regulation 3 prevents a person who holds or has held the post of Commissioner or Deputy Welsh Language Commissioner from sitting on a selection panel.

Regulation 4 imposes a duty upon the First Minister, in appointing the Commissioner, to follow the principles of ministerial responsibility; merit; independent scrutiny; equal opportunities; probity; openness and transparency; and proportionality taking into account the description of those principles set out in the Commissioner for Public Appointments' Code of Practice for Ministerial Appointments to Public Bodies of August 2009. A copy of the Code of Practice of August 2009 can be found on the Commissioner for Public Appointments' website: www.publicappointmentscommissioner.org/

Regulation 5 makes provision in relation to the knowledge of, and proficiency in, the Welsh language that a person appointed as Commissioner must have.

A Regulatory Impact Assessment for these regulations has been prepared and a copy can be obtained from the Welsh Language Unit, Department for Education and Skills, Welsh Government, Cathays Park, Cardiff, CF10 3NQ.

Draft Order laid before the National Assembly for Wales under section 150(2) of the Welsh Language (Wales) Measure 2011, for approval by resolution of the National Assembly for Wales.

D R A F T W E L S H S T A T U T O R Y I N S T R U M E N T S

2011 No. (W.)

WELSH LANGUAGE, WALES

The Welsh Language Commissioner (Appointment) Regulations 2011

Made	*****
Coming into force	*29 June 2011*

The Welsh Ministers, in exercise of the powers conferred by section 2(3) of, and paragraph 7 of Schedule 1 to, the Welsh Language (Wales) Measure 2011(**1**), make the following Regulations:

Title, commencement and application

1.—(1) The title of these Regulations is the Welsh Language Commissioner (Appointment) Regulations 2011.

(2) These Regulations come into force on the 29 June 2011 and apply in relation to Wales.

Establishment of a selection panel

2.—(1) Upon being requested to do so by the First Minister the Welsh Ministers must convene a selection panel for the purposes of paragraph 7(2) of Schedule 1 to the Welsh Language (Wales) Measure 2011.

(2) Subject to paragraph (3), a selection panel must comprise of—

(a) a member of staff of the Welsh Assembly Government;

(b) a person accredited by the Office of the Commissioner for Public Appointments to act as an independent appointments assessor;

(**1**) 2011 nawm 1

(c) a person who appears to the Welsh Ministers to possess relevant experience; and

(d) a member of the National Assembly for Wales nominated by a relevant committee.

(3) Where a relevant committee either:

(a) declines to make a nomination; or

(b) fails to make a nomination within a reasonable time,

paragraph (2)(d) of this regulation does not apply.

(4) In this regulation—

"relevant committee" ("*pwyllgor perthnasol*") means a committee of the National Assembly for Wales invited by the Welsh Ministers to make a nomination;

"relevant experience" ("*profiad perthnasol*") means experience of the promotion of the use of Welsh and/or another language.

Disqualified persons

3. A person who holds or has held the post of the Commissioner or the Deputy Commissioner is disqualified from sitting on a selection panel.

Principles to be followed

4. In appointing the Commissioner the First Minister must follow the principles of ministerial responsibility, merit, independent scrutiny, equal opportunities, probity, openness and transparency and proportionality taking into account the description of those principles in the Commissioner for Public Appointments' Code of Practice for Ministerial Appointments to Public Bodies of August 2009.

Welsh language knowledge and proficiency

5.—(1) In interviewing candidates for appointment as Commissioner, a selection panel must assess each candidate's knowledge of, and proficiency in, the Welsh language.

(2) A selection panel's recommendations to the First Minister in relation to the appointment must include the panel's assessment of the knowledge of, and proficiency in, the Welsh language of each candidate.

(3) Before appointing a person as Commissioner the First Minister must be satisfied that the person has sufficient knowledge of, and proficiency in, the Welsh language to exercise the functions of the Commissioner.

Name

Minister for Education and Skills, one of the Welsh Ministers

Date

Agenda Annex

Cynulliad Cenedlaethol Cymru

National Assembly for Wales

Committee on Statutory Instruments

Report: CSI(4)-01-11 : 22 June 2011

The Committee reports to the Assembly as follows:

Statutory Instruments laid before or during the dissolution of the Third Assembly

The Committee considered the Statutory Instruments which had been laid before the Third Assembly at a point that did not allow them to be properly considered by the then Constitutional Affairs Committee.

The Instruments concerned were all now in force and the time within which Assembly Members could seek their annulment had passed. Despite this, the Committee agreed that, where relevant, this legislation should be reported to the National Assembly under Standing Order 21.3

The Committee also considered correspondence from Mr Ian Medlicott, Policy Officer of the Association of Council Secretaries and Solicitors, Wales Branch, expressing concern about introducing statutory instruments at a time when they could not be scrutinised effectively.

The Committee agreed to write to the responsible Welsh Minister about Mr Medlicott's concerns, which the Committee shared, and to Mr Medlicott thanking him for his interest.

Third Assembly Instruments do not raise issues to be reported under Standing Order 21.2 or 21.3

CA587 - The Child Measurement Programme (Wales) Regulations 2011
Procedure: Negative.
Date made: 28 March 2011.
Date laid: 30 March 2011.
Coming into force date: 1 August 2011

CA588 - The Public Health Wales National Health Service Trust (Membership and Procedure) (Amendment) Regulations 2011
Procedure: Negative.

Date made: 29 March 2011.
Date laid: 30 March 2011.
Coming into force date: 23 June 2011

CA589 - The Tax Credits (Approval of Child Care Providers) (Wales) (Amendment) Scheme 2011
Procedure: Negative.
Date made: 28 March 2011.
Date laid: 30 March 2011.
Coming into force date: 1 April 2011

CA590 - The Beef and Veal Labelling (Wales) Regulations 2011
Procedure: Negative.
Date made: 29 March 2011.
Date laid: 30 March 2011.
Coming into force date: 21 April 2011

CA591 - The Vegetable Seed (Wales) (Amendment) Regulations 2011
Procedure: Negative.
Date made: 29 March 2011.
Date laid: 30 March 2011.
Coming into force date: 22 April 2011

CA592 - The Non-Domestic Rating (Small Business Relief) (Wales) (Amendment) Order 2011
Procedure: Negative.
Date made: 29 March 2011.
Date laid: 30 March 2011.
Coming into force date: 22 April 2011

Third Assembly Instruments that raise issues to be reported under Standing Order 21.2 or 21.3

CA581 - The Waste (Miscellaneous Provisions) (Wales) Regulations 2011
Procedure: Negative.
Date made: 28 March 2011.
Date laid: 28 March 2011.
Coming into force date: 29 March 2011

In addition to the report proposed under Standing Order 21.3, the Committee agreed to write to the relevant Minister emphasising that the criteria for the choice of procedure in this case were helpful and could be used to inform future similar decisions.

CA582 - The Social Care Charges (Means Assessment and Determination of Charges) (Wales) Regulations 2011
Procedure: Negative.

Date made: 24 March 2011.
Date laid: 29 March 2011.
Coming into force date: 11 April 2011

CA583 - The Social Care Charges (Direct Payments) (Means Assessment and Determination of Reimbursement or Contribution) (Wales) Regulations 2011
Procedure: Negative.
Date made: 24 March 2011.
Date laid: 29 March 2011.
Coming into force date: 11 April 2011

CA593 – The Reporting of Prices of Milk Products (Wales) Regulations 2011
Procedure: Negative.
Date made: 29 March 2011.
Date laid: 31 March 2011.
Coming into force date: 21 April 2011

CA594 – The Care Homes (Wales) (Miscellaneous Amendments) Regulations 2011
Procedure: Negative.
Date made: 29 March 2011.
Date laid: 31 March 2011.
Coming into force date: 1 June 2011

The Committee agreed the Reports under S.O.21.2 and S.O.21.3 on these statutory instruments, which are attached as Annexes 1-5.

Subordinate Legislation laid during the Fourth Assembly

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

CSI3 - The Assured Tenancies (Amendment of Rental Threshold) (Wales) Order 2011
Procedure: Negative.
Date made: 2 June 2011.
Date laid: 6 June 2011.
Coming into force date: 1 December 2011

CSI4 - The Food Additives (Wales) (Amendment) (No. 2) Regulations 2011
Procedure: Negative.
Date made: 8 June 2011.
Date laid: 9 June 2011.
Coming into force date: In accordance with regulation 3.

Instruments that raise reporting issues under Standing Order 21.2 or 21.3

CSI1 - The Water Industry (Schemes for Adoption of Private Sewers) Regulations 2011
Procedure: Affirmative.
Date made: Not stated.
Date laid: Not stated.
Coming into force date: 1 July 2011.

CSI2 - The Welsh Language Commissioner (Appointment) Regulations 2011
Procedure: Affirmative.
Date made: Not stated.
Date laid: Not stated.
Coming into force date: 29 June 2011

The Committee agreed the Reports under S.O.21.2 and S.O.21.3 on these statutory instruments, which are attached as Annexes 6-7.

David Melding AM
Chair, Committee on Statutory Instruments
22 June 2011

Annex 1

Committee on Statutory Instruments

(CSI(4)-01-11)

CA581

Committee on Statutory Instruments Report

Title: The Waste (Miscellaneous Provisions) (Wales) Regulations 2011

Procedure: **Negative**

These Regulations are supplementary to the Waste (England and Wales) Regulations 2011 ("the England and Wales Regulations"). They make amendments to several Welsh statutory instruments for the purposes of transposing, in relation to Wales, Directive 2008/98/EC of the European Parliament and of the Council on waste (OJ No. L 312, 22.11.2008, p3). They also revoke, for the same purpose, one Welsh statutory instrument.

Technical Scrutiny

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

Merits Scrutiny

Under Standing Orders 21.3 the Assembly is invited to pay special attention to the following instrument:-

1. These Regulations have failed to be implemented in Wales within the time frame set by the revised Waste Framework Directive ("the RWFD"). The UK (including the devolved administrations) was required to transpose the RWFD by 12th December 2010. The UK Government has not met that deadline. The Minister for Business and Budget has written to the Presiding Officer notifying him of the reasons pertinent to the breach. The primary reason was that it was necessary to wait for the England and Wales Regulations to be made in the first instance because it was those Regulations that principally transposed the RWFD. The Waste (Miscellaneous Provisions) (Wales) Regulations 2011("the Welsh Regulations") make a number of consequential amendments to Welsh Statutory Instruments which had been made by the Welsh Ministers previously. The need for separate legislation was because the Welsh instrument must be made bilingually, and the UK Government, for administrative reasons in the context of the

transposition timetable, were unwilling to include such amendments in the England and Wales Regulations.

(Standing Order 21.3 (iv) – that it inappropriately implements European Union legislation.)

2. Regulations made under section 2(2) of the European Communities Act 1972 can be made using either the negative or affirmative procedure. The choice of procedure is at the discretion of the maker of the regulations (in this case the Welsh Ministers) and no criteria are laid down in law for doing so.

These particular regulations were made in breach of the 21-day rule. The reasons for the breach were set out in the then Minister for Business and Budget's letter of 28 March 2011 to the Presiding Officer. Her letter also offered the following explanation for the use of the negative procedure in this case:

"...the choice of procedure has depended on the nature of the provision being made rather than procedural considerations. The Wales Regulations do not substantially affect the provisions of an Act of Parliament or Assembly Measure, they do not amend any provision of an Act or Measure, and provide only for consequential updatings of subordinate legislation to reflect changes in Directive terminology and objectives. It was concluded, therefore, that it would not be appropriate to make the Wales Regulations under the affirmative procedure."

The Committee is wholly content with this explanation. Moreover, the Committee believes that it also provides important and useful criteria for judging whether any future legislation made under these powers (or legislation where Ministers have similar discretion over the procedure to be used) should be made by the affirmative or negative procedure.

The Committee believes that it would be helpful if explanatory memorandums relating to any future use of such powers could set out briefly, as a matter of special interest to the Committee, how the criteria set out in the Minister's letter have been used to judge whether to use the negative or affirmative procedures.

(Standing Order 21.3 (ii) – that it is of political or legal importance.)

Committee on Statutory Instruments
22 June 2011

The Government has responded as follows:

The Waste (Miscellaneous Provisions) (Wales) Regulations 2011

The Government has explained, through the Minister for Business and Budget’s letter to the Presiding Officer, why it was necessary for the Welsh Regulations to contain provisions which refer to and depend on provisions in the England and Wales Regulations. It followed from this that the Welsh Regulations could not be made earlier than the England and Wales Regulations. As to those Regulations, the Government would point out that the revised Waste Framework Directive introduces several new provisions, in addition to consolidating earlier Waste Directives, and places emphasis on engagement with stakeholders. The Government therefore considered it necessary to engage effectively with stakeholders through extensive public consultation before introducing the necessary legislation. However, the issues arising from the consultations had an impact on the timetable for the transposition of the Directive. The Government regrets this, but considers that its consultation and consideration of the issues arising has helped to ensure a more effective implementation of the Directive in Wales.

Annex 2

Committee on Statutory Instruments

(CSI(4)-01-11)

CA582

Committee on Statutory Instruments Report

Title: The Social Charges (Means Assessment and Determination of Charges) (Wales) Regulations 2011

Procedure: Negative

Section 1 of the Social Care Charges (Wales) Measure 2010 gives local authorities in Wales a discretionary power to impose a reasonable charge upon adult recipients of non-residential social care services (a "service user"). These Regulations do not require a local authority to impose a charge when it provides or makes arrangements for the provision of a chargeable service; however, in cases where a local authority does determine to impose a charge upon the service user, the charging policy of that local authority must comply with the relevant provisions of these Regulations (and with any regulations made by the Welsh Ministers under section 16 of the Community Care (Delayed Discharges etc.) Act 2003).

Technical Scrutiny

Under Standing Orders 21.2 the Assembly is invited to pay special attention to the following instrument:-

There is a discrepancy between regulation 7 (1) (b) (iv) of the English and Welsh versions of the text. In regulation 7 (1) (b) (iv) the English version makes reference to the words "for services" in respect of the "details of the maximum reasonable charge," in accordance with regulation 5, whereas the Welsh version at regulation 7 (1) (b) (iv) omits to include the words "for services," and so it is not clear in respect of what the maximum reasonable charge should be imposed in accordance with regulation 5 of the Welsh version.

(Standing Order 21.2 (vi) that its drafting appears to be defective or it fails to fulfil statutory requirements; and Standing Order 21.2 (vii) that there appear to be inconsistencies between the meaning of its English and Welsh texts).

Merits Scrutiny

For points identified for reporting under Standing Order 21.3 in respect of this instrument see CLA(4)-01-11(p1).

Committee on Statutory Instruments
22 June 2011

The Government has responded as follows:

The Social Care Charges (Means Assessment and Determination of Charges) (Wales) Regulations 2011

The reporting point is accepted. The Government intends to bring forward amending legislation at the earliest opportunity and in any event within 3 months from the coming into force of the Regulations.

Annex 3

Committee on Statutory Instruments

(CSI(4)-01-11)

CA583

Committee on Statutory Instruments Report

Title: The Social Care Charges (Direct Payments) (Means Assessment and Determination of Reimbursement or Contribution) (Wales) Regulations 2011

Procedure: Negative

Section 1 of the Social Care Charges (Wales) Measure 2010 gives local authorities in Wales a discretionary power to impose a reasonable charge upon adult recipients of non-residential social care services. The Regulations set out a number of provisions with which local authorities are required to comply when exercising this power.

Technical Scrutiny

Under Standing Orders 21.2 the Assembly is invited to pay special attention to the following instrument:-

1. Regulation 2 (1) (Page 5) – “basic entitlement” – as a result of paragraphs (a) and (b) severe disability premium may be disallowed where it is paid, the text incorrectly refers in both paragraphs to “where is it paid” which creates ambiguity. (Standing Order 21.2 (vi) –that its drafting appears to be defective or it fails to fulfil statutory requirements)

2. Regulation 2 (1) (Page 7) – “home visiting facility” means a visit or visits which are undertaken by an appropriate officer of a local authority to D’s current **place of residence**. The Welsh text translates to …..**home or place of residence**. (Standing Order 21.2 (vii) – that there appear to be inconsistencies between the meaning of its English and Welsh texts)

3. Regulation 2 (1) (page 7) – “in writing”. The English text refers to ‘words or figures’ however the welsh text refers to ‘words and figures’.

4. Regulation 2 (1) (page 8) – “service user” means an adult who has been offered, or who is receiving, a service provided **or secured** by a local authority. The Welsh text omits the words **or secured.** (Standing Order21.2 (vii) – that there appear to be

inconsistencies between the meaning of its English and Welsh texts)

5. Regulation 7 (4) (b) (page 11) – The English text provides that when issuing an invitation to request a means assessment, the invitation must contain full details of its charging policy which **must** include the information in sub-paragraph (1) – (v). The Welsh translation does not **require** such information to be included. (Standing Order21.2 (vii) – that there appear to be inconsistencies between the meaning of its English and Welsh texts)

6. Regulation 7 (4)(e) (page 12) – the English text refers to sub-paragraph (d), but the welsh text refers to (dd) instead of (ch). (Standing Order21.2 (vii) – that there appear to be inconsistencies between the meaning of its English and Welsh texts)

7. Regulation 7 (4) (i) – the English text refers to individuals in the plural. The Welsh text initially refers to individuals, but goes on to refer to single individual "gysylltu ag ef". (Standing Order 21.2 (vii) – that there appear to be inconsistencies between the meaning of its English and Welsh texts)

Merits Scrutiny

For points identified for reporting under Standing Order 21.3 in respect of this instrument see CLA(4)-01-11(p1).

Committee on Statutory Instruments
22 June 2011

The Government has responded as follows:

The Social Care Charges (Direct Payments) (Means Assessment and Determination of Reimbursement or Contribution) (Wales) Regulations 2011

The reporting points are accepted. The Government intends to bring forward amending legislation at the earliest opportunity and in any event within 3 months from the coming into force of the Regulations.

[The Committee received oral confirmation that the correction on publication had taken place since the draft report and government response were prepared]

Annex 4

Committee on Statutory Instruments

(CSI(4)-01-11)

CA593

Committee on Statutory Instruments Report

Title: The Reporting of Prices of Milk Products (Wales) Regulations 2011

Procedure: **Negative**

These Regulations revoke and replace the Reporting of Prices of Milk Products (Wales) Regulations 2005. They require a sample of milk processors to provide information on the prices at which they sell milk products after processing, to the Welsh Assembly Government, for onward transmission by the Department for Environment, Food and Rural Affairs to the European Commission.

Technical Scrutiny

Under Standing Orders 21.2 the Assembly is invited to pay special attention to the following instrument:-

Regulation 4 (1) provides that any person who fails to comply with a notice served by Welsh Ministers under regulation 2 (1) is guilty of an offence. Regulation 3 (1) rather than regulation 2 (1) provides for the Welsh Ministers to serve such a notice. Regulation 2 (1) does not exist.

(Standing Order 21.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirements)

Merits Scrutiny

For points identified for reporting under Standing Order 21.3 in respect of this instrument see CLA(4)-01-11(p1).

Committee on Statutory Instruments
22 June 2011

The Government has responded as follows:

The Reporting of Prices of Milk Products (Wales) Regulations 2011

The Government considers the technical scrutiny point of the CAC to be a typographical error and one appropriate for amendment on

publication which will take place by the end of May 2011. Support for the Government's response is as follows:

1. The explanatory note to the Regulations makes it clear that failure to comply with the notice requirements contained in the Regulations is an offence and that such notices must be served under regulation 3. Whenever there is ambiguity in the body of the Regulations, the explanatory notes though not legally binding would be used to assist the reader in reaching an interpretation.

2. There is no regulation 2(1) in the Regulations. Taken in the context that notices are served under regulation 3 and that it is an offence under regulation 4 to fail to comply with such a notice, it is unlikely that the incorrect citation of regulation 2(1) can mean anything other than that it is a typographical error which should have cited regulation 3(1).

3. Bennion's publication is the recognised legal authority on statutory interpretation. An example given in Bennion's of when it is accepted practice for the courts to apply a construction to statutory instruments in order to rectify any error and to give practical effect to the legislator's intention is when there is a typographical error.

Summary of Government's response

The insertion of regulation 2(1) in place of what should have read regulation 3(1) is a clear typographical error which can be appropriately amended on publication. This is supported by the reasons stated in 1 – 3 above.

[The Committee received oral confirmation that the correction on publication had taken place since the draft report and government response were prepared]

Annex 5

Committee on Statutory Instruments

(CSI(4)-01-11)

CA594

Committee on Statutory Instruments Report

Title: The Care Homes (Wales) (Miscellaneous Amendments) Regulations 2011

Procedure: **Negative**

These Regulations amend the Care Homes (Wales) Regulations 2002 to make it a requirement that the person who manages a care home possesses a minimum level of qualification to undertake that role and that such a person is registered with the Care Council for Wales. They also make consequential amendments to the Registration of Social Care and Independent Health Care (Wales) Regulations 2002.

Technical Scrutiny

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

Merits Scrutiny

The Assembly is invited to pay special attention to these regulations under Standing Order 21.3(ii) as giving rise to an issue of public policy likely to be of interest to the Assembly:
In the light of recent public concerns about the management and operation of care homes providing services for adults, Assembly Members may wish to note that these Regulations introduce new arrangements to make it a legal requirement that all managers of care homes for adults register with the Care Council for Wales in order to undertake that role.
This instrument was laid during the third Assembly and it has not been possible to report on it within the usual 20-day timescale. Further information about this is set out in the report (laid document reference CR-LD8540) by the former Constitutional Affairs Committee laid on 31 March 2011.

Committee on Statutory Instruments
22 June 2011

Annex 6

Committee on Statutory Instruments

(CSI(4)-01-11)

CSI1

Committee on Statutory Instruments Report

Title: The Water Industry (Schemes for Adoption of Private Sewers) Regulations 2011

Procedure: **Affirmative**

These Regulations provide for the Secretary of State and the Welsh Ministers to make schemes for the adoption by sewerage undertakers in England and Wales of private sewers and private lateral drains under section 102 of the Water Industry Act 1991 (“the Act”).

Technical Scrutiny

Under Standing Order 21.2 the Assembly is invited to pay special attention to the following instrument:-

These Regulations have not been made bilingually.

[21.2(ix) - that it is not made or to be made in both English and Welsh].

Merits Scrutiny

Under Standing Orders 21.3 the Assembly is invited to pay special attention to the following instrument:-

These Regulations will directly affect a large proportion of people living in Wales. The Water Industry Act 1991 places statutory sewerage undertakers under a duty to provide, maintain and extend a system of public sewers as to ensure that the area is and continues to be effectively drained. Whilst the 1991 Act provides for the voluntary adoption as part of the public sewerage system of sewers and lateral drains that connect to it, it is not a requirement and as a result an extensive system of private sewers has developed since 1937. It has been estimated that 50% of properties in England and Wales are connected to a private sewer in one form or another and as a result responsibility for those sewers are shared by the owners of the properties that those sewers serve. These Regulations will transfer responsibility for the maintenance of all sewers and lateral drains that drain to the public sewerage system to the Water and Sewerage

Companies. This will include sewers and lateral drains draining both residential and commercial premises.

These Regulations contain a sunset clause. A sunset clause provides that the law shall cease to have effect after a specific date. Regulation 1(2) states that these Regulations will "cease to have effect at the end of 30th June 2018." The explanatory memorandum explains why a sunset clause is necessary in this instance. It states that "the regulations that implement the transfer of private sewers will affect the transfer by requiring water and sewerage companies to use their existing powers under the Water Industry Act 1991 to declare sewerage assets to be vested in them as "public" sewerage assets. They will be required to make declarations in respect of private sewers, laterals and associated pumping stations which are connected to the public sewerage system on a date specified in the regulations. This exercise is a single operation such that, once over the transitional period specified in the regulations they will have no on-going effect." The explanatory memorandum then confusingly says that "no sunset clause is therefore proposed for these regulations." This is incorrect and this error has been brought to the attention of the Government lawyers.

[21.3(ii) that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly].

Committee on Statutory Instruments
22 June 2011

The Government has responded as follows:

Technical points:

The Water Industry (Schemes for Adoption of Private Sewers) Regulations 2011

These composite regulations apply to England and Wales and are subject to approval by the National Assembly for Wales and by Parliament in accordance with statutory requirements. It is therefore not considered reasonably practicable for these regulations to be laid in draft, or made, bilingually.

Merits points:

The Water Industry (Schemes for Adoption of Private Sewers) Regulations 2011

I am grateful for the Committee's draft report. As the draft report indicates, the RIA mistakenly states that the Regulations contain no sunset clause. However, the Explanatory Memorandum correctly

states that the Regulations do contain a sunset clause. While this error is regrettable, I do not believe any corrective action would be appropriate in relation to these Regulations.

Annex 7

Committee on Statutory Instruments

(CSI (4)-01-11)

CSI2

Committee on Statutory Instruments Report

Title: The Welsh Language Commissioner (Appointment) Regulations 2011

Procedure: **Affirmative**

The Welsh Language (Wales) Measure 2011 ("the Measure") creates the office of Welsh Language Commissioner ("the Commissioner"). Section 2 of the Measure provides that the Commissioner is appointed by the First Minister.
In appointing the Commissioner, the First Minister is under a duty to comply with regulations that make provision about the appointment (referred to in the Measure as "appointment regulations"). The Welsh Ministers make these regulations to comply with their duty to make appointment regulations. These regulations make provision about convening a selection panel and its membership. These regulations also make provision about the principles to be followed by the First Minister in appointing the Commissioner and the Welsh language knowledge and proficiency that a person appointed as Commissioner must have.

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

Merits Scrutiny
Under Standing Orders 21.3[1] the Assembly is invited to pay special attention to the following points in relation to the instrument:-

i) These regulations are the first to be made under the Measure. The appointment arrangements for the Commissioner were considered in the third Assembly by both the Constitutional Affairs Committee and Legislation Committee 2 as part of their stage 1 scrutiny of the Measure. Both Committees drew attention to the proposed appointment arrangements and raised concerns over the perceived independence of the Commissioner. In

[1] SO 21.3(ii) "that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly."

particular, Legislation Committee No.2 in their scrutiny of the Measure raised concerns over the appointment of the Commissioner by the First Minister and recommended that the National Assembly for Wales have responsibility for the Commissioner's appointment.

ii) The Constitutional Affairs Committee's report said:

"58. We do not believe it is part of our remit to comment on whether the appointment arrangements in this case strike the right balance between political direction and independence. However, we believe that the issue will be a key factor in establishing the credibility of the Commissioner in due course. We believe it is an area where Members of the National Assembly should have the opportunity to consider and decide whether the arrangements that are finally proposed get this balance right. For this reason we believe that the relevant appointment regulations should be made by the affirmative resolution procedure."

iii) Whilst Legislation Committee No.2's recommendation was not accepted by the Welsh Government, it subsequently brought forward amendments to the proposed Measure so that the regulations governing the Commissioner's appointment are now to be made by affirmative resolution of the Assembly. Regulation 2(d) also makes provision for an Assembly Member to be nominated by a relevant committee of the National Assembly to sit on the selection panel, although it is not clear how this will work in practice.

iv) The Regulations define a "relevant committee" as "a committee of the National Assembly for Wales invited by the Welsh Ministers to make a nomination." The Regulations do not provide any guidance as to which committee Ministers may invite to nominate a member of the panel and practical difficulties could arise if the invitation is made at a time when no committee is in a position to make a nomination (e.g. because of a recess. Members may therefore wish to seek an explanation from Ministers as to how they intend to apply this provision in practice.

v) The Committee may wish to note that Schedule 1, paragraph 3(1) (b) of the Measure states that the First Minister must take into account the recommendations of the selection panel.

Committee on Statutory Instruments
22 June 2011

The Government has responded as follows:

Merits Response – The Welsh Language Commissioner (Appointment) Regulations 2011

The Welsh Government have listened to the concerns raised by Assembly Members regarding the appointment of the Welsh Language Commissioner and the legislative procedure that the regulations should follow. These Regulations will proceed via the Affirmative Resolution Procedure and provide an opportunity for the National Assembly to play a role in the process that leads to the appointment of the Commissioner by the First Minister.

This Government's intention would be to invite the Assembly Committee with responsibility for scrutiny of issues relating to the Welsh language to nominate an Assembly Member to sit on the selection panel. However, in anticipation of a situation where no such Committee is in existence regulation 2(d) is drafted to provide a degree of flexibility for Welsh Ministers to invite another Committee to nominate an Assembly Member.

In most cases, the need to appoint a Commissioner and the consequent need to convene a selection panel will be known in advance. As such, this Government will take steps to correspond with the Committee during the Assembly term. However, in some circumstances it may be necessary to write to the Committee during a recess period.