

## Constitutional and Legislative Affairs Committee

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Meeting Venue:  
**Committee Room 2 - Senedd**

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Meeting date:  
**29 June 2011**

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Meeting time:  
**09:00**

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Cynulliad  
Cenedlaethol  
Cymru

National  
Assembly for  
Wales



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### Agenda

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- 1. Introduction, apologies, substitutions and declarations of interest**
- 2. Role of the Committee and Working Methods during the 4th Assembly** (Pages 1 - 10)
- 3. Instruments that raise no reporting issues under Standing Order 21.2 or 21.3**

#### Negative Resolution Instruments

##### **CLA6 - The Housing Renewal Grants (Prescribed Form and Particulars) (Revocation) (Wales) Regulations 2011**

Negative Procedure. Date made 14 June 2011. Date laid 16 June 2011. Coming into force date 7 July 2011

##### **CLA7 - The Barry College Further Education Corporation and Coleg Glan Hafren Further Education Corporation (Dissolution) Order 2011**

Negative Procedure. Date made 14 June 2011. Date laid 17 June 2011. Coming into force date 1 August 2011

#### Affirmative Resolution Instruments

**CLA5 - The Right of a Child to Make a Disability Discrimination Claim (Schools) (Wales) Order 2011**

Affirmative Procedure. Date made 2011. Date laid not stated. Coming into force date 6 July 2011

**CLA8 - The Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (Wales) Regulations 2011**

Affirmative Procedure. Date made not stated. Date laid not stated. Coming into force date 1 October 2011

**CLA9 - The Construction Contracts (Wales) Exclusion Order 2011**

Affirmative Procedure. Date made not stated. Date laid not stated. Coming into force date 1 October 2011

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

Negative Resolution Instruments

None

Affirmative Resolution Instruments

None

**5. Date of the next meeting**

**Papers to Note:**

CSI(4)-01-11- Report of the meeting 22 June 2011

# Agenda Item 2

To: Constitutional and Legislative Affairs Committee  
From: Committee Clerk

Date: 27 June 2011

Paper Reference: CLA(4)-02-11(p1)

## **Role of the Committee and Working Methods during the 4<sup>th</sup> Assembly**

### **Purpose**

1. This paper sets out the role and remit of the Constitutional Affairs Committee. It explains the:
  - functions that the Committee is required to carry out by the Assembly's Standing Orders; and
  - other, discretionary, functions that the Committee can carry out if it chooses to do so.
2. This paper also sets out proposed arrangements for scrutinising subordinate legislation and invites Members views on how the Committee can best discharge its discretionary functions.

### **Committee's Remit**

3. The Committee's remit as agreed by Plenary is:

*... to carry out the functions of the responsible committee set out in Standing Order 21 and to consider any other constitutional or governmental matter within or relating to the competence of the Assembly or Welsh Ministers.*
4. This remit contains both non-discretionary duties as well as a broad range of discretionary functions. These are discussed further below.

### Non-Discretionary Duties

5. Standing Order 21.2 lays a duty on the Committee to consider all relevant subordinate legislation laid by the Government, test it against the specific grounds listed in the Standing Order and, if the Committee has any concerns, report these to the Assembly within 20 days. The full Standing Order and the specific reporting grounds are set out in the Annexe A to this paper.
6. Generally, the grounds for reporting under Standing Order 21.2 are matters that might call into question the legality or legal correctness of the legislation concerned. For this reason, they are often referred to as technical matters, although they often relate to issues of legal principle as well as

more mundane drafting issues. This is the bread and butter work of the Committee.

### Discretionary Functions

7. In addition, the Committee has a number of discretionary functions. These are as follows:

#### *Standing Order 21.3*

8. The Committee may report on a number of other matters concerning individual Statutory Instruments. These reports have become known by the shorthand term of “**merits reports**”. Most often, reports under this standing order are because the Committee believes that a piece of subordinate legislation:

*“...is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly.”*

9. This provides the Committee with a mechanism for drawing attention to subordinate legislation that, while it may not give concern on technical grounds, raises other matters that the Committee believes should be drawn to the attention of the Assembly.

10. There are no hard and fast rules about what these issues might be. It can be simply to point out that a matter is politically contentious or significant. Alternatively, it might be because it raises issues concerning the rights of individuals or that, however laudable its policy intentions might be, the subordinate legislation does not implement these intentions in the way claimed. It has also been used to draw the Assembly’s attention to the first use of a particular enabling power.

#### *Standing Order 21.7*

11. Standing Order 21.7 allows the Committee to consider and report on a range of matters including proposed subordinate legislation powers in Assembly Bills and UK Acts of Parliament and draft legislation on which the Government is consulting. It also allows the Committee to consider and report on “*any legislative matter of a general nature within or relating to the competence of the Assembly or Welsh Ministers*”. This particular power gives the Committee wide latitude to consider Constitutional and Legislative matters and to hold inquiries if it wishes into these matters.

#### *Standing Order 21.8 - 21.11*

12. This is a new function in the Standing Orders. It allows the Committee to consider:

*“...draft European Union legislation relating to matters within the legislative competence of the Assembly or to the functions of the Welsh Ministers and of the Counsel General in order to consider whether it complies with the principle of subsidiarity.”*

13. If the Committee has concerns about whether the principle of subsidiarity is being complied with, it can make written representations to the Parliamentary Committees dealing with the matter with a view to that committee incorporating those concerns into a reasoned opinion for the relevant European Union authorities.

14. Standing Order 21.11 allows the Committee to delegate its functions under this Standing Order to the Committee Chair to act on its behalf when the Assembly is in recess. This is particularly important during the summer recess because of the time limits referred to below. The Committee Chair would then be required to report to the Committee as soon as possible thereafter.

15. The Committee will wish to consider whether to exercise the discretion to delegate its functions to the Committee Chair during no-sitting weeks.

#### *Other Functions*

16. In addition, to the functions in Standing Order 21, the Committee also has a broader remit to consider any “constitutional or governmental matter within or relating to the competence of the Assembly or Welsh Ministers.” This could include specific Ministerial functions such as the First Minister’s responsibilities for relationships with the rest of the UK and Europe but allows the Committee wide latitude to consider cross-cutting issues that have constitutional implications.

17. The Committee may also, from time to time, be required to consider Legislative Consent Memoranda that may be referred to it by the Business Committee under Standing Order 29.4

#### **Committee’s Working Arrangements for Considering Statutory Instruments**

18. The Committee’s consideration of statutory instruments under Standing Order 21.3 is demand led. However, the large number of statutory instruments that the Committee has to consider (almost 600 in the 3<sup>rd</sup> Assembly) together with the limited time available for doing so (within 20 days of being laid) means that the Committee generally has to meet every week when the Assembly is sitting.

19. Each Statutory Instrument is looked at by the Committee’s Legal Advisers who consider whether it raises any issues of concern under Standing Order 21.2. If any issues arise, legal advisers prepare a draft report for the Committee and at the same time invite comments from the Welsh

government. The draft report and government response are put on the agenda for the next available meeting for the Committee to consider. The draft report, the Statutory Instrument itself and the accompanying Explanatory Memorandum are all provided to Committee Members as papers for the meeting.

20. Consideration of “merits” issues under Standing Order 21.3 follows a similar but parallel process. Instruments are considered by the Committee Clerk, legal advisers or research staff. If any issues arise, a draft report will be provided to the next meeting of the Committee to consider. However, it is not generally the practice to invite comments from the government on merits reports. That may be done, for example, if the ‘merits’ report raises a technical issue such as inappropriate implementation of EU law (SO21.3(iv)).

21. Any instruments that do not raise reporting issues are listed on the Committee’s agenda, and a link to the instrument provided for Members. However, the instruments themselves are not provided routinely as meeting papers.

22. The agenda for this part of each meeting will generally be divided into two parts

- Subordinate Legislation that raises no reporting issues under Standing Order 21.2 or 21.3
- Subordinate Legislation to be reported to the Assembly under Standing Order 21.2 or 21.3

Each of these is sub divided into:

- Negative resolution subordinate legislation; and
- Affirmative resolution subordinate legislation.

23. Once the Committee has agreed a report on Statutory Instruments, it is formally laid before the Assembly as part of the meeting report. In the case of merits reports (which are fewer in number), the Clerk of the Committee will also send copies direct to all Assembly Members for information. In addition, the Committee Chair may also write to the Minister responsible asking for their views on any further matters identified by the Committee during their consideration of an Instrument.

*What happens once the Committee has considered a Statutory Instrument?*

24. Once the Committee has reported, its role under standing orders in the consideration of Statutory Instruments is ended. However, where an instrument is debated in Plenary (because a Member has tabled a motion to annul it or because it needs to be made by an affirmative resolution of the Assembly), it is usual for the Committee Chair to speak in the debate to draw the Assembly’s attention to the Committee’s report.

## **Working Arrangements in relation to the Committee's Powers under Standing Order 21.7**

25. The Committee's work under Standing Order 21.7 is discretionary and partly demand led. As well as further powers in relation to the scrutiny of certain specific types of subordinate legislation, the most noteworthy powers it gives the Committee are those that allow it:

- to scrutinise proposed subordinate legislation provisions in Assembly and Parliamentary Bills – SO21.7(ii); and
- to look at “any legislative matter of a general nature within or relating to the competence of the Assembly or Welsh Ministers) - SO21.7(v).

### Subordinate Legislation within Assembly and Parliamentary Bills (SO21.7ii)

26. The third Assembly Constitutional Affairs Committee scrutinised and reported on the subordinate legislation provisions in all Assembly Measures. In doing so, it usually took both oral and written evidence from the Minister in charge of the Measure but did not generally take evidence from others, which was seen as the prerogative of the legislation committee responsible for scrutinising the Measure. Given that the Assembly's legislative competence in the 4<sup>th</sup> Assembly is considerably greater than in the 3<sup>rd</sup>, it seems likely that this area of the Committee's work will increase.

27. The Committee also occasionally considered UK Parliament Bills that affected the powers of the Assembly, Welsh Ministers or had particular implications for Wales. There were, however, practical difficulties in trying to consider these Bills (usually within a very tight Parliamentary timetable) and report to the Welsh and UK Governments in time to have a reasonable chance of influencing the Bill's content. The Assembly's new powers in the 4<sup>th</sup> Assembly suggest that there is likely to be less for the Committee to consider in this area than in the 3<sup>rd</sup> Assembly.

28. The Committee will wish to consider its general approach to the scrutiny of proposed subordinate legislation powers in Assembly and UK Bills.

### Power to Consider Legislative Matters of a General Nature - SO21.7(v)

29. This power needs to be considered along with the Committee's remit to consider constitutional and governmental matters. Together they give the Committee wide latitude to consider constitutional and legislative matters and to hold inquiries into these matters if it wishes. The previous Committee held a number of such inquiries and we anticipate that the new Committee will also wish to do so in due course.

30. The Committee will wish to consider its approach to future Committee inquiries. There are a number of sources of ideas for potential scrutiny work including:

- Members' suggestions based on their political and personal experiences and interests,
- Suggestions based on analysis of emerging issues of concern (including relevant legislation and manifesto commitments), normally identified by the Research Service;
- Suggestions based on issues raised in the course of committee and Assembly proceedings (including through the public petitions process, or as a result of a resolution in Plenary);
- Seeking ideas from stakeholders or groups with an interest in the Committee's work.

31. The Research Service has drawn up a provisional list of possible subjects for inquiry for initial consideration by the Committee. This has been circulated to Committee Members separately. The Committee may also wish to consider commissioning further work from the Assembly's Research Service on possible areas for inquiry.

### **Working Arrangements in relation to the Committee's Powers under Standing Order 21.8**

32. The consideration of subsidiarity issues is a role that the Committee has taken over from the European and External Affairs Committee of the 3<sup>rd</sup> Assembly. It arises from a protocol to the Lisbon Treaty, which makes specific reference to the role of 'regional' legislatures. Article 6 of the 2<sup>nd</sup> Protocol to the Lisbon Treaty states that: "... It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers."

33. Copies of Explanatory Memoranda in relation to draft European legislation are forwarded to Assembly staff by counterparts at Westminster who advise the European committees of both Houses and by the Welsh Government. These are reviewed by Assembly legal and research staff who will draw the Committee's attention to any issues that it might wish to consider.

34. The process is characterised by very tight timescales. Member State legislatures are given eight weeks to respond to notification of legislative proposals. As any concerns that are to be raised by way of Reasoned Opinion have to be agreed by the relevant House after committee consideration, which itself will be informed by representations from devolved legislatures, the period available for Assembly consideration is much shorter than eight weeks.

35. Fortunately, matters of concern under this limited issue of subsidiarity arises relatively infrequently, but the Committee has to be able to respond



swiftly to proposals as they arise. A more detailed paper will be prepared for the Committee on consideration of subsidiarity.

### **Recommendation**

36. Members are invited to note the contents of this paper and:

- indicate whether they are content, at this stage, with the working arrangements for subordinate legislation outlined in paragraphs 10-16;
- consider whether it wishes to delegate its functions under Standing Order 21.8 to the Committee Chair for weeks when the Assembly is not sitting;
- consider its general approach to the scrutiny of proposed subordinate legislation powers in Assembly and UK Bills; and
- consider its approach to considering matters of a general legislative nature including possible matters for inquiry.

**Steve George**  
**Committee Clerk**

### **STANDING ORDER 21 – Constitutional and Legislative Affairs Committee or Committees**

21.1 In proposing the remits of committees under Standing Order 16.2 or 16.3, the Business Committee must ensure that responsibility for the functions in Standing Order 21 is assigned to a committee or committees (referred to within Standing Order 21 as “a responsible committee”).

#### **Functions**

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).

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.

21.4 A responsible committee must make any report under Standing Order 21.2 or 21.3 in respect of any statutory instrument or draft statutory instrument no later than 20 days after the instrument or draft has been laid.

21.5 In calculating for the purposes of Standing Order 21.4 any period of days, no account is to be taken of any time during which the Assembly is dissolved or is in recess for more than 4 days.

21.6 Standing Orders 21.2 and 21.3 do not apply to proposed or draft Legislative Competence Orders under Standing Order 25 or subordinate legislation subject to Special Assembly Procedure under Standing Order 28.

21.7 A responsible committee may consider and report on:

- (i) any other subordinate legislation laid before the Assembly other than that subject to Special Assembly Procedure under Standing Order 28;
- (ii) the appropriateness of provisions in proposed Assembly Measures and in Bills for Acts of the United Kingdom Parliament that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister or the Counsel General;
- (iii) consequences for legislation subject to the consideration of the Assembly of draft orders under Part 1 of the Legislative and Regulatory Reform Act 2006;
- (iv) the exercise of commencement powers by the Welsh Ministers;
- (v) any legislative matter of a general nature within or relating to the competence of the Assembly or Welsh Ministers; or
- (vi) draft legislation which is the subject of consultation.

21.8 A responsible committee may consider draft European Union legislation relating to matters within the legislative competence of the Assembly or to the functions of the Welsh Ministers and of the Counsel General in order to consider whether it complies with the principle of subsidiarity.

21.9 If a responsible committee considers that draft European Union legislation does not comply with the principle of subsidiarity it may make written representations, on behalf of the Assembly, to the relevant committee of the House of Commons or the House of Lords with a view to having those representations incorporated into a reasoned opinion to be submitted by that committee to the relevant European Union authorities.

21.10 If a responsible committee makes written representations in accordance with Standing Order 21.9, it must lay a copy of those written representations before the Assembly.

21.11 A responsible committee may, to enable its functions under Standing Order 21.9 to be exercised during any non-sitting week, delegate those functions to the chair of the responsible committee who must, if they are exercised, report that fact to the responsible committee as soon as possible.

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## **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 Medicott, 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 Medicott's concerns, which the Committee shared, and to Mr Medicott 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**

**CS13 - 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

**CS14 - 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**

**CS11 - 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.

**CS12 - 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 it is 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 Order 21.2 (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 Order 21.2 (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 Order 21.2 (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<sup>1</sup> 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

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<sup>1</sup> 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.