

Constitutional and Legislative Affairs Committee

Meeting Venue:
Committee Room 2 - Senedd

Meeting date:
14 July 2011

Meeting time:
14:15

Cynulliad
Cenedlaethol
Cymru

National
Assembly for
Wales



For further information please contact:

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Agenda

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

Negative Resolution Instruments

CLA13 - The Wildlife and Countryside (Registration, Ringing and Marking of Certain Captive Birds) (Wales) Regulations 2011

Negative Procedure. Date made 5 July 2011. Date laid 7 July 2011. Coming into force date 1 August 2011

CLA14 - The Cancellation of Student Loans for Living Costs Liability (Wales) Regulations 2011

Negative Procedure. Date made 5 July 2011. Date laid 7 July 2011. Coming into force date 1 August 2011

CLA15 - The Social Care Charges (Miscellaneous Amendments) (Wales) Regulations 2011

Negative Procedure. Date made 6 July 2011. Date laid 8 July 2011. Coming into force date 2 August 2011

CLA16 - The Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) (Amendment) Regulations 2011

Negative Procedure. Date made 6 July 2011. Date laid 7 July 2011. Coming into force date 2 August 2011

CLA17 - The National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) (Amendment) Regulations 2011

Negative Procedure. Date made 11 July 2011. Date laid 12 July 2011. Coming into force date 3 August 2011

Affirmative Resolution Instruments

None

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

Negative Resolution Instruments

None

Affirmative Resolution Instruments

None

4. Consideration of Future Committee Inquiries

Provisions about Welsh Ministers in UK Acts

The governance of the Crown Estate in Wales

A Welsh Jurisdiction?

5. Committee Correspondence

CS12 - The Welsh Language Commissioner (Appointment) Regulations 2011
(Pages 1 - 12)

6. Date of the next meeting

Papers to note

CLA(4)-03-11- Report of the meeting 7 July 2011

Transcript

View the [meeting transcript](#).

Agenda Item 5.1

Pwyllgor Offerynnau Statudol

Committee on Statutory Instruments

Leighton Andrews AM
Minister for Education and Skills
Welsh Government
5th Floor
Tŷ Hywel
Cardiff Bay
CF99 1NA



Cynulliad National
Cenedlaethol Assembly for
Cymru Wales
Bae Caerdydd / Cardiff Bay
Caerdydd / Cardiff
CF99 1NA

27 June 2011

Dear Minister

CSI2 - The Welsh Language Commissioner (Appointment) Regulations 2011

The Committee on Statutory Instruments considered the above Statutory Instrument at its meeting on 22 June 2011 and agreed that I should bring to your attention the Committee's report made under Standing Order 21.3 on the merits of the Instrument.

The Committee agreed to invite the Assembly to pay special attention to this Instrument on the grounds "that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly" (Standing Order 21.3(ii)).

The Committee's report was laid in the Table Office on 23 June 2011 and is attached for information. I would be grateful if you could consider the report and let the Committee have your response in due course.

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

Yours sincerely

David Melding AM
Chair, Committee on Statutory Instruments

Committee on Statutory Instruments 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 21.3¹ 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.

David Melding AM

Chair, 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.

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.

DRAFT WELSH STATUTORY
INSTRUMENTS

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



Ein cyf/Our ref LA/05398/11

David Melding AM
Chair of the Constitutional Affairs and
Legislative Affairs Committee
National Assembly for Wales
Tŷ Hywel
Cardiff Bay
CF99 1NA.

6 July 2011

Dear David

CSI2 - The Welsh Language Commissioner (Appointment) Regulations 2011

Thank you for your letter of 27 June drawing my attention to the report of the Committee on Statutory Instruments which considered the Welsh Language Commissioner (Appointment) Regulations 2011 ("the regulations") at its meeting on 22 June 2011. I note that you have made arrangements for the report to be drawn to the attention of the First Minister and Assembly Members and that the Committee agreed to invite the Assembly to pay special attention to this Instrument on the grounds "that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly" (Standing Order 21.3(ii)).

I responded to the points raised by your Committee in my Government response to the report as well as during the Plenary debate on the regulations on 28 June and I am grateful for the opportunity to further address these issues. The two main issues arising from the report relate to:

(i) concerns about the perceived independence of the Commissioner, particularly in light of the fact that the Commissioner is appointed by the First Minister as opposed to the National Assembly for Wales.

I am aware that during Assembly scrutiny of the Welsh Language (Wales) Measure 2011 ("the Measure"), Members raised concerns regarding the appointment of the Commissioner by the First Minister. I believe that it is appropriate for the Commissioner to be appointed by the First Minister. It should be borne in mind that the Commissioner's principal aim in exercising his or her functions will be to promote and facilitate the use of Welsh and that, in this respect, he or she will be instrumental in delivering the Government's policy aims with regard to the Welsh language. It will be important, therefore, to ensure some degree of cooperation. Appointment by the First Minister is consistent with the process for appointing the Children's Commissioner for Wales and the Commissioner for Older People in Wales.

At the same time, the Measure includes a number of safeguards which secure the Commissioner's independence, for example the duty on the Welsh Ministers, when exercising functions in relation to the Commissioner, to have regard to the fact that it is desirable to ensure that the Commissioner is under as few constraints as reasonably possible in determining his or her activities, timetable and priorities.

The Measure, as approved by Members, does place a duty on the First Minister to appoint the Commissioner. However, I believe that the Welsh Government has responded to the wish expressed by Members to be involved in the appointment process. The regulations approved by the Assembly on 28 June include a provision which ensures an Assembly Member nominated by a committee of the Assembly will sit on the selection panel to interview candidates and make recommendations to the First Minister regarding the appointment. I am confident that these important provisions strike an appropriate balance between cooperation and independence for the Commissioner.

The Measure was amended, in line with the recommendation of the then Constitutional Affairs Committee, to ensure that the regulations are subject to the affirmative resolution procedure, therefore providing an opportunity for the National Assembly to debate the balance between cooperation and independence of the Commissioner. I am pleased that Members approved these regulations.

(ii) concerns about how the provision to invite a committee of the Assembly to nominate a member of the selection panel will work in practice.

As stated in my Government response, regulation 2(2)(d) is drafted to provide a degree of flexibility for Welsh Ministers in terms of how they seek a nomination for an Assembly Member. Normally, and I believe that this will usually be the case, the Government will invite a committee of the Assembly with responsibility for scrutiny of the Government's Welsh language policy to nominate an Assembly Member to sit on the panel. In future, the need to appoint a new Commissioner, and the consequent need to convene a selection panel, should be known sufficiently well in advance. This will enable the Government to make every effort to seek this nomination from the Assembly during term time.. However, in some exceptional circumstances it may be necessary to write to the Committee during a recess period.

In appointing the first Commissioner, however, I am keen to see the appointment being made as soon as possible in order to ensure that the successful candidate is able to make a valuable contribution to the important work that lies ahead in terms of establishing his or her office and in facilitating the transition from the current arrangements to the new system of language standards. Since a scrutiny committee had not been established, on 20 June I invited the Business Committee to provide this nomination. Of course, since that date, the Communities, Equality and Local Government Committee has been established and, as such, I have written to the Chair of the Communities, Equality and Local Government Committee inviting that Committee to make a nomination. This accords with the Business Committee's assessment, in their meeting on 28 June, that the Communities, Equality and Local Government Committee should make the nomination.,.

The Committee's report also makes reference to the provision contained in paragraph 3(1)(b) of Schedule 1 to the Measure which places a duty on the First Minister, in appointing the Commissioner, to take account of the recommendations made by the selection panel. In my view, this provision is entirely appropriate. As I stated during the plenary debate, the composition of the selection panel is consistent with well-established processes for public appointments but also includes a person with experience relevant to the field in which the Commissioner will work.

I am confident that the selection panel is appropriate and will provide a balanced view in its recommendations to the First Minister. However, the First Minister could legitimately take into account the panel's recommendations and appoint a different candidate. In such a situation, the First Minister would need to have legitimate grounds for doing so and be able to evidence that the panel's recommendations had been taken into account.

I hope the Committee finds this information helpful.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Leighton Andrews', written in a cursive style.

Leighton Andrews AC / AM
Y Gweinidog Addysg a Sgiliau
Minister for Education and Skills

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Wales



Constitutional and Legislative Affairs Committee

Report: CLA(4)-03-11 : 7 July 2011

The Committee reports to the Assembly as follows:

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

Negative Resolution Instruments

CLA11 - The Disabled Persons (Badges for Motor Vehicles) (Wales) (Amendment) Regulations 2011

Procedure: Negative.

Date made: 22 June 2011.

Date laid: 29 June 2011.

Coming into force date: 1 August 2011

CLA12 - The Plastic Kitchenware (Conditions on Imports from China) (Wales) Regulations 2011

Procedure: Negative.

Date made: 28 June 2011.

Date laid: 30 June 2011.

Coming into force date: 1 July 2011

Instruments that raise reporting issues under Standing Order 21.2 or 21.3

Affirmative Resolution Instruments

CLA10 - The Environmental Permitting (England and Wales) (Amendment) Regulations 2011

Procedure: Affirmative.

Date made: Not stated.

Date laid: Not stated.

Coming into force date: In accordance with regulation 1(b).

The Committee agreed the Report under S.O.21.2 and S.O.21.3 on this statutory instrument, which is attached as Annex 1. The Committee expressed concern that the Instrument had been made in English only. The Committee agreed that there needed to be a clearer rationale to explain why joint Statutory Instruments should not be made in both

Welsh and English. It was particularly important for instruments made by affirmative resolution, or which were significant in other ways, to be made in both English and Welsh. The Committee agreed to ask the Chair to write to Ministers to convey the Committee's views and to seek further clarification.

Other Business

Supplementary Legislative Consent Motion: Localism Bill

The Committee considered the third Legislative Consent Memorandum (LCM) in relation to the Localism Bill, which had been referred to it by the Business Committee under Standing Order 29.4. The Memorandum related to further government amendments to the Bill in connection with tenants' deposits and the licensing of houses in multiple occupation (HMOs).

The Legislative Consent Motion in relation to this memorandum was due to be considered by the Assembly in plenary on Tuesday 12th July, but the LCM had not been laid until the day before the Committee's meeting. The Committee nevertheless received oral advice from its legal advisers.

The proposed amendments in relation to tenants' deposits would give landlords 30 days rather than 14 days to comply with existing requirements, would remove the loophole that emerged from recent litigation that permitted them in practice to comply at any time before a court hearing on the subject. It also clarifies what a tenant can do when the tenancy has already ended, but the deposit was not protected

The amendment in relation to HMOs would exclude tenants' co-operatives from the licensing requirements for HMOs under the Housing Act 2004.

The amendments make small, but significant, amendments to Wales and England legislation, rather than to legislation that relates only to Wales. They do not confer any powers on ministers, but change the wording of legislation. The Committee therefore saw no reason to raise concerns regarding the LCM.

David Melding AM

Chair, Constitutional and Legislative Affairs Committee

7 July 2011

Annex 1

Constitutional and Legislative Affairs Committee

(CLA(4)-03-11)

CLA10

Constitutional and Legislative Affairs Committee Report

Title: The Environmental Permitting (England and Wales) (Amendment) Regulations 2011

Procedure: Affirmative

These draft Regulations will apply to both England and Wales.

The Regulations amend some of the provisions relating to the regulation of radioactive substances in the Environmental Permitting (England and Wales) Regulations 2010 S.I.2010/675 in order to provide a more modern, transparent and user-friendly system for the regulation of radioactive substances which present a very low risk to people and the environment, while at the same time maintaining the necessary level of protection.

These draft Regulations also transpose provisions of the IPPC Directive (Directive 2008/1/EC) and the Water Framework Directive (Directive 2000/60/EC) that have been inserted by the Carbon Capture and Storage Directive (Directive 2009/31/EC) (“CSS Directive”).

Technical Scrutiny

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

1. 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 Order 21.3 the Assembly is invited to pay special attention to the following instrument:-

1. Parts of these Regulations transpose provisions of the CSS Directive. The transposition deadline of the CSS Directive was 25th June 2011. These Regulations have failed to be implemented in England and Wales within the time frame set by the CSS Directive.

2. The explanatory memorandum prepared by the Department of Energy and Climate states that the provisions implementing Article 32 and 37 of the CSS Directive will come into force on the day after the day on which the regulations are made. It states that the short time period is justifiable in this case, in order that the draft Regulations can be brought into force as soon after the transposition deadline for the Directive as possible and in light of the high level of awareness of the proposed change among those affected.

David Melding AM

Chair, Constitutional and Legislative Affairs Committee

7 July 2011

The Government has responded as follows:

The Environmental Permitting (England and Wales) (Amendment) Regulations 2011

These composite Regulations amend some of the provisions relating to the regulation of radioactive substances in the Environmental Permitting (England and Wales) Regulations 2010 S.I. 2010.675 and transpose certain Articles of the Carbon Capture and Storage Directive (Directive 2009/31/EC) ("CCS Directive").

The Environmental Permitting regime streamlines the procedural parts of a raft of highly technical and complex legislation. It has enabled the simplification of the operation of the permitting system that industry and regulators work with without in any way compromising environmental or human health standards. This has brought much needed simplification to the complexity that industry and regulators in England and Wales previously faced. Due to the scale of the legislation, amendments are occasionally required. Securing these changes via composite instruments made with the Secretary of State is consistent with that aim of simplification. The composite instrument also minimises the inconvenience and potential confusion for those affected by the Regulations, especially as the Environment Agency (a regulator) is a cross border body. These composite Regulations apply to England and Wales and are subject to approval by the National Assembly for Wales and by Parliament. Accordingly, it is not considered reasonably practicable for this Instrument to be laid in draft, or made, bilingually.

The Government regrets that these amendments were not made in time to meet the transposition deadline for the CCS Directive. Issues arising from the internal pre-legislative clearance process impacted on the timetable for these Regulations to come into force.