

Agenda – Constitutional and Legislative Affairs Committee

Meeting Venue:

Committee Room 1 – Senedd

Meeting date: 5 March 2018

Meeting time: 14.30

For further information contact:

Gareth Williams

Committee Clerk

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1 Introduction, apologies, substitutions and declarations of interest

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

Negative Resolution Instruments

- 2.1 SL(5)192 – The Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) (Amendment) (Wales) Order 2018
(Pages 1 – 11)

CLA(5)–08–18 – Paper 1 – Order

CLA(5)–08–18 – Paper 2 – Explanatory Memorandum

CLA(5)–08–18 – Paper 3 – Report

Affirmative Resolution Instruments

- 2.2 SL(5)190 – The Welsh Revenue Authority (Powers to Investigate Criminal Offences) Regulations 2018
(Pages 12 – 30)

CLA(5)–08–18 – Paper 4 – Regulations

CLA(5)–08–18 – Paper 5 – Explanatory Memorandum

CLA(5)–08–18 – Paper 6 – Report

3 Papers to Note



3.1 Welsh Government Written Statement: report on the consultation for Welsh Revenue Authority ("WRA") to have access to criminal powers

(Pages 31 – 33)

CLA(5)–08–18 – Paper 7 – Welsh Government report on the consultation for Welsh Revenue Authority ("WRA") to have access to criminal powers

4 Motion under Standing Order 17.42 to resolve to exclude the public from the meeting for the following business:

4.1 Public Services Ombudsman (Wales) Bill: Draft Report

(Pages 34 – 72)

CLA(5)–08–18 – Paper 8 – Draft Report

4.2 Law Derived from the European Union (Wales) Bill

(Pages 73 – 83)

CLA(5)–08–18 – Paper 9 – Legal Briefing

Date of the next meeting

12 March 2018

Agenda Item 2.1

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

2018 No. 197 (W. 46)

**INVESTIGATORY POWERS,
WALES**

**The Regulation of Investigatory
Powers (Directed Surveillance and
Covert Human Intelligence
Sources) (Amendment) (Wales)
Order 2018**

EXPLANATORY NOTE

(This note is not part of the Order)

This Order is made by the Welsh Ministers and makes amendment to the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010 (“the Principal Order”).

Article 2 of this Order amends the Principal Order by inserting an entry into Part 1 of the Schedule to the Principal Order in relation to the Welsh Revenue Authority (“WRA”). This is to prescribe the rank of those within WRA who can authorise activity for the purposes of sections 28 and 29 of the Regulation of Investigatory Powers Act 2000.

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

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

2018 No. 197 (W. 46)

**INVESTIGATORY POWERS,
WALES**

**The Regulation of Investigatory
Powers (Directed Surveillance and
Covert Human Intelligence
Sources) (Amendment) (Wales)
Order 2018**

Made 20 February 2018

Laid before the National Assembly for Wales
21 February 2018

Coming into force 1 April 2018

The Welsh Ministers make the following Order in exercise of the powers conferred on them by section 30(1) and (6A) of the Regulation of Investigatory Powers Act 2000⁽¹⁾.

Title and commencement

1.—(1) The title of this Order is the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) (Amendment) (Wales) Order 2018.

(2) This Order comes into force on 1 April 2018.

Amendment of the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010

2. In Part 1 of the Schedule to the Regulation of Investigatory Powers (Directed Surveillance and

(1) 2000 c. 23. Section 30 was amended by section 187 of the Tax Collection and Management (Wales) Act 2016 (anaw 6). As a result of this amendment the power in subsection 30(1) is exercisable by the Welsh Ministers for the purposes of prescribing persons exercising Welsh Revenue Authority functions of such description or holding such offices, ranks or positions as may be prescribed.

Covert Human Intelligences Sources) Order 2010⁽¹⁾
(offices etc. and restrictions in respect of public
authorities specified in Part 1 of Schedule 1 to the
Act), after the entry for “The Welsh Assembly
Government”⁽²⁾ insert—

“The Welsh Revenue Authority	Grade 7 or equivalent	—	Paragraphs (b) and (f)”.
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Mark Drakeford
Cabinet Secretary for Finance, one of the Welsh
Ministers
20 February 2018

(1) S.I. 2010/521, to which there are amendments but none are relevant.
(2) Modified by the Wales Act 2014 (c. 29), section 4(4)(a) so that it is to be read as “The Welsh Government”.

**Explanatory Memorandum to the Regulation of Investigatory Powers
(Directed Surveillance and Covert Human Intelligence Sources)
(Amendment) (Wales) Order 2018**

This Explanatory Memorandum has been prepared by the Welsh Revenue Authority Implementation Directorate and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Cabinet Secretary/Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) (Amendment) (Wales) Order 2018.

I am satisfied that the benefits justify the likely costs.

Mark Drakeford AM
Cabinet Secretary for Finance and Local Government

21 February 2018

1. Description

- 1.1 The Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) (Amendment) (Wales) Order 2018 (“the Order”) amends the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010 (“the Principal Order”) by inserting an entry into Part 1 of the Schedule to the Principal Order in relation to the Welsh Revenue Authority (“WRA”).
- 1.2 This Order will come into force on 1 April 2018.

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

- 2.1 None.

3. Legislative background

- 3.1 The Order is made pursuant to section 30(1) and (6A) of the Regulation of Investigatory Powers Act 2000 (“RIPA”). Section 187 of the Tax Collection and Management (Wales) Act 2016 (“TCMA”) amended section 30 RIPA to enable the Welsh Ministers to make an order designating persons exercising WRA functions as persons able to grant authorisations for the use of directed surveillance and covert human intelligences sources for the purposes of sections 28 and 29 RIPA.
- 3.2 This Order is subject to the negative resolution procedure.

4. Purpose & intended effect of the legislation

- 4.1 The policy rationale in relation to these powers is that WRA should have proportionate investigation powers to tackle and deter criminality and devolved tax avoidance and evasion. HMRC are able to authorise the use of directed surveillance and covert human intelligence sources in Wales to tackle and deter avoidance and evasion. It is the policy intention that WRA should be in substantially the same position in this regard.
- 4.2 This amendment will enable an appropriately qualified person at civil service grade 7 or equivalent within WRA to grant authorisation for the use of directed surveillance and covert human intelligence sources.
- 4.3 Directed surveillance means, broadly, surveillance which is covert but not intrusive – for example, does not involve gaining access to a private dwelling or vehicle – and is undertaken for the purposes of a specific investigation or a specific operation, in such a manner as is likely to result in the obtaining of private information about a person. Surveillance is covert if, and only if, it is carried out in a manner that is calculated to

ensure that persons who are subject to the surveillance are unaware that it is or may be taking place.

- 4.4 A covert human intelligence source (CHIS) means a person who establishes or maintains a personal or other relationship with a person for the covert purpose of facilitating the doing the following: using the relationship to obtain information or to provide access to any information to another person; disclosing information obtained by the use of such a relationship, or as a consequence of the existence of such a relationship, to another person.
- 4.5 Authorisation may not be granted by that person unless that individual believes it is necessary for (a) the purpose of preventing or detecting crime or preventing disorder, or (b) the purpose of assessing or collecting any tax, duty, levy or other imposition, contribution or charge payable to a government department.
- 4.6 Directed surveillance and the use of covert human intelligence sources under RIPA are important not just in a criminal law context (to investigate offences), but also in a civil law context (e.g. to identify the amount of tax that a person should pay). This means that, should the power to make these authorisations be conferred, the WRA would be able to use surveillance and covert human intelligence source powers for the purpose of assessing or collecting devolved tax.
- 4.7 The fundamental purpose of the RIPA framework is to protect the rights of individuals from unlawful intrusion into their personal or business affairs by law enforcement agencies; to ensure those agencies (and individuals within them) act lawfully; and so to ensure that any evidence gathered through these activities is used fairly and appropriately as part of lawful proceedings.
- 4.8 The framework provides that CHIS can only be used when authorised by an appropriately senior officer and, in some cases, by a judge. Those officers must be professionally trained and must undergo continuous professional development in line with RIPA requirements and comply with RIPA codes of practice. Before authorising CHIS, for example, an officer would need to consider whether the information can be obtained by other means; the safety of the individuals involved; and whether the action is proportionate, necessary and reasonable.
- 4.9 Any public authority authorised under RIPA is subject to independent oversight and scrutiny by the Investigatory Powers Commissioner's Office (IPCO) (which took over the responsibility for oversight of investigatory powers from the Office of Surveillance Commissioners (OSC) in September 2017). The IPCO will scrutinise the WRA's processes and procedures in the use of investigatory powers, including directed surveillance and CHIS. IPCO considers the use of CHIS as immensely sensitive and as a result the use of these powers is very closely examined and inspected. Even where the WRA does not make

any CHIS authorisations, the WRA's records, processes and procedures will be scrutinised and reported on.

PART 2 – REGULATORY IMPACT ASSESSMENT

1. Options

Option 1: Do Nothing

1.1 Under this option, the Order would not be introduced.

Option 2: Introduce the regulations

1.2 Under this option, the Order as described in Part 1 of this Explanatory Memorandum would be introduced. This is the preferred option.

2. Costs & benefits

Option 1: Do Nothing

2.1 If the Order were not introduced, the WRA would not be required to follow the framework procedures provided by RIPA when seeking to use covert surveillance or covert human intelligence sources (CHIS) to investigate tax evasion and tax avoidance, including under the new unauthorised disposals regime introduced by Part 4 of the Landfill Disposals Tax (Wales) Act 2017 (“LDTA”). Failure to follow the procedures in RIPA does not necessarily render action unlawful. The application of the RIPA framework is designed to ensure that WRA acts in a lawful way.

2.2 Without the application of the RIPA framework and the scope to authorise surveillance and use of covert human intelligence sources, the ability of the WRA to collect and manage devolved taxes could be hampered.

2.3 This could be particularly relevant in relation to Part 4 of LDTA, taxable disposals at places other than authorised landfill sites, where WRA will need to carefully manage information that may be provided by individuals.

Option 2: Introduce the Order

2.4 The Order would allow WRA to authorise the use of surveillance and covert human intelligence sources in a lawful way, ensuring that any activities authorised by the WRA are proportionate, reasonable and a fair use of those investigatory techniques.

2.5 The use of the RIPA framework provides a structured and lawful means for evaluating the need for the use of such intrusive techniques, and is a safeguard to protect the rights of citizens and the reputation and integrity of WRA. RIPA requires a senior authorising officer to be accountable for the decision making process and before that authorisation may be given the authorising officer must be satisfied that:

- the information can not be obtained by other means;
- balance and minimise the risks to individuals involved;
- the WRA will be able to maintain the safety of all involved;
- the action is proportionate, necessary and reasonable.

- 2.6 The application of the Order would require training, accreditation and continued professional development for authorising officers in order to provide the necessary authorisation framework under RIPA.
- 2.7 It is anticipated that the initial resource requirements stemming from RIPA can be accommodated within the existing WRA budget allocation of £6m for 2018/19 and 2019/20.
- 2.8 The exercise of RIPA surveillance and CHIS in particular cases could imply further cost, for example, relating to the surveillance equipment, ensuring the safety of individuals and availability of officers to support this activity out of hours for example. The ongoing resource will depend on the extent and nature of the case-work that WRA may wish to take forward and the priority attached to it. The costs associated will be dependant upon the nature, volume and extent of criminality uncovered and the appetite to pursue unauthorised disposals once WRA becomes operational and has access to protected tax payer information.
- 2.9 Information in relation to the cost of RIPA activity is not available although, the Investigatory Powers Commissioner's Office indicates that the use of these types of covert surveillance activities across the UK and Scotland are limited and are reducing year on year. In 2016/17 1,887 instances of directed covert surveillance were authorised by public authorities in the UK and Scotland, with the Department of Work and Pensions accounting for more than 64% of those authorisations. In relation to CHIS, 2,310 authorisations were made by public authorities in 2016/17 and these were usually used for trading standards type matters. Only 6.6% of public authorities authorised to use CHIS deployed the use of CHIS in 2016/17.¹
- 2.10 The Order is not expected to impose costs on business, other than those that may become subject to an investigation from potential criminal or civil investigatory activity and the Order is not expected to have an adverse impact on competition in Wales.
- 2.11 Overall, the benefits of this option are:
- to ensure that the relevant investigatory powers are used in accordance with human rights;
 - to protect the rights of individuals from undue, unfair and unlawful intrusion into their personal life by law enforcement agencies;

¹Office of Surveillance Commissioners Annual Report, p.14 - <https://www.ipco.org.uk/docs/OSC%20Annual%20Report%202016%20-%202017%20with%20new%20page%20furniture.pdf>

- to apply independent scrutiny by the Investigatory Powers Commissioner's Office to the functions of the WRA;
- to place requirements on the WRA to train, develop and continuously review and maintain standards for all staff and senior officers;
- to provide a framework of authorisation for any use of covert surveillance or CHIS activity, including in some circumstances the authorisation of a judge; and
- consultation responses from other law enforcement agencies, including HMRC, the police and National Crime Agency were supportive of this option.

3. Consultation

- 3.1 On 10 July, the Welsh Government published a consultation on WRA access to criminal powers to tackle tax crime, which closed on 2 October. In total, the Welsh Government received 17 responses from a range of stakeholders from various sectors, all from within Wales.
- 3.2 A full Welsh Government response to the consultation can be viewed here: <https://consultations.gov.wales/consultations/welsh-revenue-authority-powers-tackle-tax-crime>
- 3.3 Following the consultation, engagement has taken place with the Home Office, HMRC, CPS, NRW, National Crime Agency and the Police as well as other WRA stakeholders. Their views have been taken into account when developing this Order.

SL(5)192 – The Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence sources) (Amendment) (Wales) Order 2018

Background and Purpose

This Order amends the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010 (SI 2010/521) ('the 2010 Order') by inserting an entry into Part 1 of the Schedule to the Principal Order in relation to the Welsh Revenue Authority ('WRA'). The purpose of this amendment is to prescribe the rank of those persons within WRA (at civil services grade 7 of equivalent) who can authorise activity for the purposes of sections 28 and 29 (for the use of directed surveillance and covert human intelligences sources) of the Regulation of Investigatory Powers Act 2000.

Procedure

Negative

Technical Scrutiny

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

Merits Scrutiny

This Order makes as technical amendment to the 2010 Order that will enable an appropriately qualified person at civil services grade 7 or equivalent to grant authorisation for the use of directed surveillance and covert human intelligence sources in relation to WRA wider powers for the investigation of offences. The Explanatory Memorandum details the policy rationale which does not seem unreasonable. Nevertheless, attention is drawn to the Regulations on the basis that they are of legal or political importance or give rise to issues of public policy that are likely to be of interest to the Assembly. [Standing Order 21.3(ii)]

Implications arising from exiting the European Union

None.

Government Response

No government response is required.

Legal Advisers

Constitutional and Legislative Affairs Committee

26 February 2018



Agenda Item 2.2

Draft Regulations laid before the National Assembly for Wales under section 114ZA(4) of the Police and Criminal Evidence Act 1984 and section 67A(4) of the Criminal Justice and Police Act 2001, for approval by resolution of the National Assembly for Wales.

DRAFT WELSH STATUTORY
INSTRUMENTS

2018 No. (W.)

TAXES, WALES

**The Welsh Revenue Authority
(Powers to Investigate Criminal
Offences) Regulations 2018**

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations provide for various provisions of the Police and Criminal Evidence Act 1984 (“the 1984 Act”) and the Criminal Justice and Police Act 2001 (“the 2001 Act”) to be applied to the investigation of offences conducted by the Welsh Revenue Authority (“WRA”).

Regulation 3(1) introduces the Schedule to these Regulations which specifies the provisions of the 1984 Act which are to be applied to investigations conducted by WRA, subject to certain modifications. The applicable provisions of the 1984 Act contained in the Schedule consist of—

- (a) a power to apply for and obtain a warrant from a justice of the peace to authorise the entry and search of premises (section 8 of the 1984 Act);
- (b) a power to obtain access to “excluded material” or “special procedure material” (defined in Part 2 of the 1984 Act), subject to obtaining a warrant from a judge in accordance with the procedure in Schedule 1 to the 1984 Act (section 9 of the 1984 Act);
- (c) various safeguards in relation to an application for a warrant and the execution of searches (sections 15 and 16 of the 1984 Act);
- (d) a power to seize relevant items found during the course of a search (section 19 of the 1984 Act);

- (e) the extension of the seizure powers to require information contained in an electronic format to be produced during the course of a search (section 20 of the 1984 Act);
- (f) a power which enables WRA to copy information which has been seized during the course of a search, and accompanying rights for the owners of property seized during the course of a search (section 21 of the 1984 Act);
- (g) a power to retain anything seized during the course of a search (section 22 of the 1984 Act);
- (h) a requirement for WRA to notify in writing a person interviewed in relation to an offence when a decision is taken to conclude the investigation (section 60B of the 1984 Act); and
- (i) a requirement for WRA to have regard to the codes of practice issued under section 66 of the 1984 Act when conducting a relevant investigation.

Regulation 3(2) provides that the provisions contained in Part 2 of the 2001 Act (which, among other things, provide for additional powers of seizure) also apply when WRA conducts a relevant investigation.

Regulation 3(3) makes general provision in relation to the application of the provisions of the 1984 Act and the 2001 Act. The effect of this paragraph is to provide for the general substitution of “constable”, “police officer” and “the police” with “WRA” in applying the provisions of the 1984 Act and the 2001 Act.

Regulation 3(4) provides that the provisions of the 1984 Act which are not specified in the Schedule are to apply so far as they relate to the provisions specified in the Schedule. For example, the definition of “excluded material” in section 11 of the 1984 Act is to apply to define “excluded material” in relation to a search conducted by WRA in reliance of a warrant issued under paragraph 12 of Schedule 1 to the 1984 Act.

Regulation 4 provides that a person exercising a function conferred on WRA by these Regulations may use reasonable force, if necessary, in the exercise of that function.

Regulation 5 provides that WRA may search a person found on a premises which is the subject of a search by WRA in reliance of a warrant issued under section 8 of, or paragraph 12 of Schedule 1 to, the 1984 Act, provided that WRA has reasonable cause to believe that the person is in possession of material

which is likely to be of substantial value to the investigation.

Regulation 6 modifies section 16(3A) and (3B) of the 1984 Act to the extent that a person may not enter or search a premises not specified in an all premises warrant, or enter or search a premises on a second or subsequent occasion unless that person has been authorised in writing by a person of at least civil service Grade 7 (or equivalent).

Regulation 7 modifies section 77(3) of the 1984 Act, which makes provision in relation to the treatment of confessions made by a person with a learning disability. The modification made by regulation 7 ensures that an “independent person” cannot be a person exercising a function conferred by these Regulations on WRA.

Regulation 8 provides that the functions conferred on WRA by these Regulations may only be exercised by a person who has been authorised in writing by WRA to conduct relevant investigations.

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

Draft Regulations laid before the National Assembly for Wales under section 114ZA(4) of the Police and Criminal Evidence Act 1984 and section 67A(4) of the Criminal Justice and Police Act 2001, for approval by resolution of the National Assembly for Wales.

DRAFT WELSH STATUTORY
INSTRUMENTS

2018 No. (W.)

TAXES, WALES

**The Welsh Revenue Authority
(Powers to Investigate Criminal
Offences) Regulations 2018**

Made

Coming into force

1 April 2018

The Welsh Ministers make the following Regulations in exercise of the powers conferred on them by section 114ZA(1) and (2) of the Police and Criminal Evidence Act 1984⁽¹⁾ and section 67A(1) and (2) of the Criminal Justice and Police Act 2001⁽²⁾.

In accordance with section 114ZA(4) of the Police and Criminal Evidence Act 1984 and section 67A(4) of the Criminal Justice and Police Act 2001, a draft of these Regulations was laid before and approved by a resolution of the National Assembly for Wales.

Title and commencement

1.—(1) The title of these Regulations is the Welsh Revenue Authority (Powers to Investigate Criminal Offences) Regulations 2018.

(2) These Regulations come into force on 1 April 2018.

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- (1) 1984 c. 60. Section 114ZA was inserted by section 185(1) of the Tax Collection and Management (Wales) Act 2016 (anaw 6).
- (2) 2001 c. 16. Section 67A was inserted by section 185(2) of the Tax Collection and Management (Wales) Act 2016.

Interpretation

2. In these Regulations—

“the 1984 Act” (“*Deddf 1984*”) means the Police and Criminal Evidence Act 1984;

“the 2001 Act” (“*Deddf 2001*”) means the Criminal Justice and Police Act 2001;

“relevant investigation” (“*ymchwiliad perthnasol*”) means a criminal investigation which relates to a matter in relation to which WRA has functions;

“WRA” (“*ACC*”) means the Welsh Revenue Authority.

Application of the 1984 Act and the 2001 Act

3.—(1) Subject to paragraph (3) and regulations 4 to 8, the provisions of the 1984 Act contained in the Schedule to these Regulations (“the applicable PACE functions”) apply to relevant investigations conducted by WRA.

(2) Subject to paragraph (3) and regulations 4 to 8, where WRA exercises any of the applicable PACE functions, the provisions contained in Part 2 of the 2001 Act apply to relevant investigations conducted by WRA.

(3) Subject to regulation 6, the provisions of the 1984 Act and the 2001 Act applied by these Regulations have effect as if references to “constable”, “police officer” and “the police” (however expressed) are substituted with references to “WRA”, and those provisions are to be construed accordingly.

(4) The other provisions of the 1984 Act, in so far as they relate to the applicable PACE functions, apply to relevant investigations conducted by WRA.

Use of reasonable force

4. A person exercising a function conferred on WRA by these Regulations may use reasonable force, if necessary, in the exercise of that function.

Search of persons

5. WRA may search a person where—

- (a) the person is found on premises which are being searched by WRA in reliance on a warrant issued under section 8 of, or paragraph 12 of Schedule 1 to, the 1984 Act; and
- (b) WRA has reasonable cause to believe that person to be in possession of material which is likely to be of substantial value (whether by

itself or together with other material) to a relevant investigation.

Modification of section 16 of the 1984 Act (execution of warrants)

6. Section 16 of the 1984 Act⁽¹⁾ (execution of warrants) is modified as follows—

(a) for subsection (3A) substitute—

“(3A) If the warrant is an all premises warrant, no premises which are not specified in it may be entered or searched by a person exercising WRA functions unless that person has been authorised in writing by another person exercising WRA functions of at least Grade 7 (or equivalent).”;

(b) for subsection (3B) substitute—

“(3B) No premises may be entered or searched by a person exercising WRA functions for the second or any subsequent time under a warrant which authorises multiple entries unless that person has been authorised in writing by another person exercising WRA functions of at least Grade 7 (or equivalent).”

Modification of section 77(3) of the 1984 Act (definition of “independent person”)

7. Section 77(3) of the 1984 Act⁽²⁾ (definition of “independent person”) is modified to the extent that the definition of “independent person” includes a person exercising a function conferred on WRA by these Regulations.

Authorisation

8. The functions conferred on WRA by these Regulations are only exercisable by persons with written authorisation from WRA to conduct relevant investigations.

Cabinet Secretary for Finance, one of the Welsh Ministers

Date

(1) Section 16(3A) and (3B) were inserted by sections 113(9)(a) and 114(8)(b) of the Serious Organised Crime and Police Act 2005 (c. 15).

(2) Section 77 was amended by paragraph 48 of Part 4 of Schedule 36 to the Criminal Justice Act 2003 (c. 44). There is another amendment to this section but it is not relevant to these Regulations.

Applicable provisions of the 1984 Act

- (a) section 8 (power of justice of the peace to authorise entry and search of premises)(1);
- (b) section 9 (special provisions as to access)(2) and Schedule 1 (special procedure)(3);
- (c) section 15 (search warrants – safeguards)(4);
- (d) section 16 (execution of warrants) subject to the modifications in regulation 6;
- (e) section 19 (general power of seizure etc.)(5);
- (f) section 20 (extension of powers of seizure to computerised information)(6);
- (g) section 21 (access and copying)(7);
- (h) section 22(1) to (4) and (7) (retention)(8);
- (i) section 60B (notification of decision not to prosecute person interviewed)(9);
- (j) section 66 (codes of practice)(10);
- (k) section 67 (codes of practice – supplementary)(11);
- (l) section 77 (treatment of confessions by persons with a learning disability) subject to the modification in regulation 7.

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- (1) Section 8 was amended by sections 113(3), (4) and 114(2) of, and paragraph 43(3) of Part 3 of Schedule 7 to, the Serious Organised Crime and Police Act 2005 and section 86 of the Finance Act 2007 (c. 11). There are other amendments but none is relevant to these Regulations.
 - (2) Section 9 was amended by the Courts Act 2003 (c. 39). There is another amendment to this section but it is not relevant to these Regulations.
 - (3) Schedule 1 was amended by paragraph 14 of Part 2 of Schedule 2 to, the 2001 Act; paragraph 6 of Schedule 4 to the Courts Act 2003; section 113(10) to (14) of, and paragraph 43(13) of Part 3 of Schedule 7 to, the Serious Organised Crime and Police Act 2005; and section 82(3) of the Deregulation Act 2015 (c. 20). There is another amendment to this section but it is not relevant to these Regulations.
 - (4) Section 15 was amended by section 113(6) to (8) and 114(4) to (7) of, and paragraph 1 of Part 2 of Schedule 17 to, the Serious Organised Crime and Police Act 2005 and article 7 of the Serious Organised Crime and Police Act 2005 (Amendment) Order 2005 (S.I. 2005/3496).
 - (5) Section 19 was amended by paragraph 13(1) and (2)(a) of Part 2 of Schedule 2 to the 2001 Act.
 - (6) Section 20 was amended by paragraph 13(1) and (2)(a) of Part 2 of Schedule 2 to the 2001 Act.
 - (7) Section 21 was amended by paragraphs 1 and 3 of Schedule 1 to the Criminal Justice Act 2003.
 - (8) Section 22(7) was inserted by paragraphs 1 and 4 of Schedule 1 to the Criminal Justice Act 2003.
 - (9) Section 60B was inserted by section 77 of the Policing and Crime Act 2017 (c. 3).
 - (10) Section 66 was amended by section 57(4) of the Criminal Justice and Court Services Act 2000 (c. 43). There are other amendments but none is relevant to these Regulations.
 - (11) Section 67 was amended by Part 1 of Schedule 37 to the Criminal Justice Act 2003. There are other amendments but none is relevant to these Regulations.

Explanatory Memorandum to:

- 1. The Welsh Revenue Authority (Powers to Investigate Criminal Offences) Regulations 2018**
- 2. The Proceeds of Crime Act 2002 (References to Welsh Revenue Authority Financial Investigators) Order 2018**

This Explanatory Memorandum has been prepared by the Welsh Revenue Authority Implementation Directorate and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Cabinet Secretary's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of:

1. The Welsh Revenue Authority (Powers to Investigate Criminal Offences) Regulations 2018; and
2. The Proceeds of Crime Act 2002 (References to Welsh Revenue Authority Financial Investigators) Order 2018

I am satisfied that the benefits justify the likely costs.

Mark Drakeford AM
Cabinet Secretary for Finance

21 February 2018

1. Description

- 1.1 Part 9 of the Tax Collection and Management (Wales) Act 2016 (“TCMA”) amended the Police and Criminal Evidence Act 1984 (“the 1984 Act”), the Criminal Justice and Police Act 2001 (“the 2001 Act”) and the Proceeds of Crime Act 2002 (“the 2002 Act”) to allow the Welsh Ministers, by regulation and order, to confer powers on the Welsh Revenue Authority (“WRA”) to investigate devolved tax crime.

The Welsh Revenue Authority (Powers to Investigate Criminal Offences) Regulations 2018.

- 1.2 These Regulations provide that the following provisions contained in the 1984 Act apply to WRA when it investigates devolved tax crime:
- a power to apply for and obtain a warrant from a justice of the peace to authorise entry and search of premises (section 8 of the 1984 Act);
 - a power to obtain access to “excluded material” or “special procedure material” (defined Part 2 of the 1984 Act), subject to obtaining a warrant from a judge in accordance with the procedure in Schedule 1 to the 1984 Act (section 9 of the 1984 Act);
 - a power to seize relevant items found during the course of a search (section 19);
 - the extension of seizure powers to require information contained in an electronic format to be produced during the course of a search (section 20);
 - a power which enables WRA to copy information which has been seized during the course of a search (section 21);
 - a power to retain anything seized during the course of a search (section 22).
- 1.3 In addition to these powers, the Regulations apply appropriate safeguards and governance on their potential use. These include safeguards in relation to execution of searches and the seizure of items found during the course of a search (sections 15 and 16), and accompanying rights for the owners of property seized during the course of a search (section 21). WRA will also be under a duty to notify in writing a person interviewed in relation to an offence when a decision is taken not to proceed (section 60B). More generally, WRA must comply with the statutory codes of practice issued under sections 66 and 67 of the 1984 Act when investigating criminal offences.
- 1.4 These Regulations will also apply provisions in Part 2 of the 2001 Act to investigations conducted by WRA, which, among other things, provide for additional powers of seizure during the course of a search. As with the 1984 Act, various safeguards are also applied to the use of those powers. For example, section 52 of the 2001 Act imposes a requirement on WRA when relying on the powers of seizure provided by sections 50 or 51 to provide the owner of the property with a written notice setting down various details, including what has been seized, the grounds of seizure and the scope to apply to a judge for the return of the seized

items. Section 59 of the 2001 Act gives any person with an interest in property seized using these powers the right to apply to the court for it to be returned, subject to certain conditions being met.

- 1.5 Regulation 3 provides that further to the provisions listed in the Schedule to the Regulations, any applicable safeguards, and procedural elements in the 1984 Act will also apply. Consequently, any terms defined by other provisions in the 1984 Act will also apply to WRA when the provisions listed in the Schedule are applied to WRA investigations.
- 1.6 Regulation 3(3) substitutes references to police officers, constables and the police with references to WRA.
- 1.7 Regulation 4 allows a person exercising a function conferred on WRA by the Regulations to use reasonable force if that person considers it necessary in the exercise of that function. This could range from guiding a person to stand aside by placing a hand on their arm through to stopping a person by restraining them to prevent violence or injury against another person or officer, for example.
- 1.8 Regulation 5 makes provision for WRA to search any person found on the premises which is the subject of a search in reliance of a warrant issued under the 1984 Act. However, WRA may only search a person where there is reasonable cause to believe the person is in possession of something which is likely to be of “substantial value” to the investigation. This may be concealing/hiding something which may be relevant to the investigation, whether by itself, such as a relevant document in a briefcase, or something which when considered alongside other material could be of value, such as a mobile phone with passwords for electronic files or a key in a persons pocket which would open a filing cabinet on the premises.
- 1.9 Regulation 6 modifies section 16 of the 1984 Act, which makes provision in relation to the authorisation required before multiple premises warrants can be executed on a second or subsequent occasion, and where an all premises warrant can be executed in respect of property not specified in the warrant. The modification made by regulation 6 has the effect of substituting the requirement of obtaining a police inspector’s approval with a requirement that approval may only be provided by a person exercising WRA functions of at least civil service Grade 7 (or equivalent).
- 1.10 Regulation 7 modifies section 77 of the 1984 Act, which makes provision in relation to the treatment of confessions made by a person with a learning disability. Where such a confession is received as evidence in criminal proceedings, section 77 of the 1984 Act requires the court to exercise caution before relying on that evidence where (among other things) it has not been made in the presence of an “independent person”. The modification made by regulation 7 ensures that a person

exercising a function conferred on WRA by these Regulations is not regarded as an “independent person”.

1.11 Regulation 8 specifies that the functions conferred by these Regulations may only be exercised by a person with written authorisation from WRA to conduct relevant investigations.

1.12 These Regulations will come into force on 1 April 2018.

The Proceeds of Crime Act 2002 (References to Welsh Revenue Authority Financial Investigators) Order 2018

1.13 The Proceeds of Crime Act 2002 (References to Welsh Revenue Authority Financial Investigators) Order 2018 (“the Order”) enables accredited financial investigators who are members of staff of the WRA to exercise the following powers under the 2002 Act:

- apply for a restraint order under Part 2;
- seize property to which a restraint order applies;
- search for, seize, detain and apply for the forfeiture of cash under Chapter 3, Part 5 (recovery of cash in summary proceedings); and
- apply for orders and warrants in relation to confiscation, money laundering and detained cash investigations under Part 8, including an application to the courts for an order requiring a financial institution to provide customer information in relation to a specified person.

1.14 The types of investigations referred to in relation to Part 8 can be described as follows:

- **Confiscation** – A confiscation investigation is an investigation into whether a person has benefited from his criminal conduct or to the extent or whereabouts of his benefit from his criminal conduct, following criminal prosecution.
- **Detained Cash** – A detained cash investigation is an investigation for the purposes of Chapter 3 of Part 5 of the 2002 Act into the derivation of cash detained under that chapter or a part of such cash, or whether cash detained under that chapter is intended by any person to be used in unlawful conduct.
- **Money laundering** – A Money laundering investigation is an investigation into whether a person has committed a money laundering offence. This could occur where for example, there is a reasonable suspicion that a person has converted criminal property.

1.15 In addition, the Order applies appropriate safeguards and governance on the potential use of these powers, including the requirement that certain powers can only be exercised after obtaining senior officer approval.

1.16 Article 3 of the Order provides that a reference to an accredited financial investigator in a provision of the 2002 Act specified in Part 1 of the Schedule to the Order, is a reference to an accredited financial investigator who is a member of staff of WRA.

1.17 Article 4 of the Order provides that a reference to an accredited financial investigator in a provision of the 2002 Act specified in Part 2 of the Schedule, is a reference to an accredited financial investigator who is a member of staff of WRA and is at or above grade 7 or equivalent.

1.18 This Order comes into force on 1 April 2018.

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

2.1 This Explanatory Memorandum covers two Statutory Instruments; The Welsh Revenue Authority (Powers to Investigate Criminal Offences) Regulations 2018, which is subject to the affirmative procedure and the Proceeds of Crime Act 2002 (References to Welsh Revenue Authority Financial Investigators) Order 2018, which is subject to the negative procedure.

2.2 These Statutory Instruments are interlinked and it is beneficial to interpret the impacts of each Statutory Instrument jointly to explain the wider legislative context. Thus, an Explanatory Memorandum incorporating a Regulatory Impact Assessment has been prepared to describe both Statutory Instruments.

3. Legislative background

3.1 The Welsh Revenue Authority (Powers to Investigate Criminal Offences) Regulations 2018 are made under section 114ZA of the Police and Criminal Evidence Act 1984 and section 67A into the Criminal Justice and Police Act 2001.

3.2 Section 114ZA of the Police and Criminal Evidence Act 1984 was inserted by section 185(1) TCMA and section 67A of the Criminal Justice and Police Act 2001 was inserted by section 185(2) TCMA.

3.3 In accordance with section 114ZA(4) of the 1984 Act and section 67A(4) of the 2001 Act, the regulations must be laid before and approved by the National Assembly for Wales (the affirmative procedure).

3.4 The Proceeds of Crime Act 2002 (References to Welsh Revenue Authority Financial investigators) Order 2018 is made pursuant to section 453(1A) and (2) of the Proceeds of Crime Act 2002. This Order is subject to the negative resolution procedure.

3.5 Section 453(1A) of the Proceeds of Crime Act 2002 was inserted by section 186 TCMA.

4. Purpose & intended effect of the legislation

- 4.1 The Tax Collection and Management (Wales) Act 2016 creates three criminal offences: wrongful disclosure of protected taxpayer information under section 20; concealing or destroying documents following an information notice under section 114 and concealing or destroying documents following notification under section 115. In addition to these offences there are a number of other criminal offences relevant to devolved taxes, including fraud (under the Fraud Act 2006); the common law offence of cheating the public revenue; and facilitating tax evasion (under the Criminal Finances Act 2017).
- 4.2 WRA's functions include promoting compliance with the law relating to devolved taxes (section 12 TCMA). This means that WRA has a role to play in tackling criminal behaviour that impacts on the devolved taxes. The purpose of the Regulations and the Order are to confer relevant investigatory powers on WRA so that it can lawfully and effectively tackle criminal behaviour, exercising powers as a law enforcement agency, by acquiring evidence to enable the prosecution of criminal offences.
- 4.3 Criminal behaviour in this context can be wide ranging, covering both devolved taxes, and could include deliberately providing false information to WRA (e.g. lying in a tax return); deliberately failing to comply with the requirements of the law (e.g. not weighing waste before it is sent to landfill or misstating the value of a land transaction); or deliberately destroying documents or other information that may be needed to establish a person's true tax position. The criminal intent in each of these circumstances is to make a financial gain or to seek to reduce the amount of money that should be paid to the public revenue.
- 4.4 These criminal investigation powers are additional to the civil investigatory powers conferred on WRA under the devolved tax legislation (Tax Collection and Management (Wales) Act 2016, Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017 and Land Disposals Tax (Wales) Act 2017), which are primarily intended to allow WRA to identify and collect the correct amount of tax due (by obtaining information and inspecting premises, and where appropriate, imposing financial penalties). In some cases, it may be appropriate for individuals to face criminal sanctions for their behaviour, including fines and custodial sentences and these powers facilitate that.
- 4.5 It may also be considered appropriate to recover the money and assets a person acquires as a result of that criminal behaviour. The 2002 Act enables an accredited financial investigator to look into the financial position of individuals under investigation to identify, trace and freeze the proceeds of crime with a view to asking the courts to make a confiscation order following prosecution.

- 4.6 The Regulations and Order seek to put WRA in a similar position to HMRC in terms of criminal investigation powers, although the powers conferred on WRA by these statutory instruments are narrower than those conferred on HMRC. This reflects the narrower scope of the functions which WRA is able to exercise, for example WRA has no customs functions. WRA will not, for example, have the power to arrest or detain a person, or the powers to stop and search a person or vehicles without a warrant from a justice of the peace.
- 4.7 There is a real possibility of criminal offences in relation to Welsh devolved taxes in the future. The OECD report on Fighting Tax Crime recognises that “criminal law plays an important role... it enhances the general preventive effect that criminal law enforcement can have and reduces non compliance.”¹ Enabling the WRA to investigate devolved tax offences, as HMRC does for LfT and SDLT, with a consistent set of criminal investigation powers will help to ensure Wales is not seen as a soft target for those who may be seeking to evade taxes. Public knowledge that there are the appropriate criminal powers in place will allow WRA to prioritise criminal enforcement in appropriate cases and, therefore, act as a deterrent for those contemplating breaking the law. However, as previously noted, the civil powers conferred on WRA will be used in the majority of compliance cases.
- 4.8 The Regulations and Order are intended to provide WRA with proportionate criminal investigation powers to tackle and deter devolved tax crime. In exercising the powers conferred by these statutory instruments, WRA will be subject to the supervision of the courts and will be required to comply with all relevant safeguards in the same way as the exercise of these powers by other law enforcement agencies such as the police and HMRC. In particular, a person will only be authorised by WRA to exercise these powers where that person has the requisite experience, training and understanding of the relevant legal framework and it is anticipated that these staff will carry specific identification similar to a warrant card. In addition, use of the powers will need to comply with PACE codes of practice and, where specified, be approved at an appropriate level within WRA by a senior, authorised officer with the requisite experience, training, accreditation and understanding of the relevant legal framework.
- 4.9 In relation to the POCA order, accredited financial investigators must be trained, accredited and monitored by the National Crime Agency and the use of these investigatory powers must be by order or warrant from the court. Evidence and information obtained through the use of these powers must be retained and stored in a safe and secure way and used only for the purpose for which it was obtained, as is the case for all protected taxpayer information.

¹ Fighting Tax Crime: The Ten Global Principles OECD 2017, p.14 - <http://www.oecd.org/tax/crime/fighting-tax-crime-the-ten-global-principles.pdf>

PART 2 – REGULATORY IMPACT ASSESSMENT

1. Options

Option 1: Do Nothing

1.1 Under this option, the Regulations and Order would not be introduced.

Option 2: Introduce the regulations

1.2 Under this option, the Regulations and Order as described in Part 1 of this Explanatory Memorandum would be introduced. This is the preferred option.

2. Costs & benefits

Option 1: Do Nothing

2.1 If these Regulations and Order were not introduced, the WRA would be unable to use the investigative powers in the 1984 Act, the 2001 Act and the 2002 Act to investigate criminality and reclaim the proceeds of that crime for the public purse in relation to the devolved Welsh taxes. In this option, powers to investigate criminality in the devolved Welsh taxes would fall to the police forces in Wales.

2.2 It would be possible for the police in Wales to lead on all elements of investigation of devolved tax offences. However, this would be an additional responsibility for police in Wales and any police action would be dependent on their consideration of a range of other priorities. The Home Office are responsible for policing across England and Wales, (though the Welsh Government partially funds the police and, along with Welsh local authorities, have a strong and close relationship with the Welsh police).

Option 2: Introduce the Regulations and Order

2.3 The Welsh Government's preferred option is that the WRA investigate tax crime themselves. Financial profit is the driver for almost all serious and organised crime, and other lower-level acquisitive crime. It is difficult to estimate the cost of tax crime in relation to the two devolved taxes, however, HMRC estimate that there is a 10% tax gap for landfill tax and a 1% tax gap for stamp duty land tax². This suggests that the potential lost revenue to the WRA for LDT could be in the region of £2.6 million and for LTT in the region of £2.5 million – although only part of this

² Measuring the Tax Gap 2017, HMRC The tax gap is the difference between the amount of tax that should, in theory, be collected by HMRC, and what is actually collected.

would be due to tax crime.³As tax rules diverge across the UK following the devolution of tax powers to Wales and Scotland, it is imperative that tax crime is tackled consistently and in the best interests of compliant taxpayers and businesses, so no part of the UK is a safe haven for those who evade tax. It will be important that any organisation responsible for investigating devolved tax offences works closely with HMRC and Revenue Scotland to share information and ensure effective enforcement.

- 2.4 It is clear that the application of the 1984 Act, the 2001 Act and the 2002 Act will have resource implications for WRA and the Welsh Government and there is a shared commitment to ensuring that appropriate resources are made available.
- 2.5 Much of the governance and compliance work required to enable the lawful exercise of these powers will be case-specific – the powers under consideration are permissive: WRA would not be required to use them, but would have the option to do so in appropriate circumstances.
- 2.6 This means that the immediate impact of the Regulations and the Order could be relatively limited, for example, to allow staff to receive appropriate training and accreditation. It is anticipated that the initial resource requirements stemming from WRA access to criminal powers can be accommodated within the existing WRA budget allocation of £6m for 2018/19 and 2019/20.
- 2.7 The exercise of the powers in particular cases could imply further cost, for example, relating to the storage of evidence and the appropriate equipment for staff. The ongoing resource will depend on the extent and nature of the case-work that WRA may wish to take forward and the priority attached to it. The costs associated will be dependant upon the nature, volume and extent of criminality uncovered once WRA becomes operational and has access to protected taxpayer information.
- 2.8 However, it may be anticipated that some of those costs may overlap with WRA's civil enforcement powers under TCMA, to inspect premises and to take samples and remove documents during an inspection.
- 2.9 The Office of Budget Responsibility considers the cost and benefits associated with compliance work subject to “high levels of uncertainty since they target specific subsets of taxpayers who are already actively changing their behaviour to lower their tax liabilities. As a result, there is usually relatively high behavioural uncertainty. Similarly, since the measures are directed at uncollected tax, there is usually less reliable data available to inform the costing.”⁴

³ Based on information from HMRC Measuring the Tax Gap 2017 and Welsh Government tax forecasts

⁴ Office of Budget Responsibility – “Working Paper No.11: Evaluation of HMRC anti-avoidance and operational measures, September 2017” http://budgetresponsibility.org.uk/docs/dlm_uploads/WP-No.11-Evaluation-of-HMRC-anti-avoidance-and-operational-measures.pdf

- 2.10 However, the benefit of investment in tackling tax crime are seen as not only recovering lost tax, but also in encouraging wider compliance as the risk of being caught outweighs the potential benefit. In addition, OECD states that “the investment is worthwhile, with some jurisdictions being able to calculate the return on investment from the criminal tax investigation teams and reporting recovery of funds well in excess of the expenditure, ranging from 150% to 1500% return on investment.”⁵
- 2.11 The Regulations and Order are not expected to impose costs on business, other than those that may become subject to an investigation from potential criminal activity.
- 2.12 The Regulations and Order are considered as a way of levelling the playing field for legitimate businesses in Wales. The Regulations and Order are designed to tackle tax crime and we anticipate this to be most prevalent in landfill disposals tax, which will have the potential to impact on wider waste crime which can have serious environmental impacts. However, the motive for tax crime is economic and is aimed at the acquisition of financial benefit. As with any crime, waste crime has a cost to the wider economy, taking business away from legitimate, permitted waste operators, who therefore lose income and the ability to invest in their businesses and the wider local economy. However, the profits come largely at the expense of the taxpayer. The Environmental Services Association estimates “each pound spent on enforcement is likely to yield a return of as much as £5.60. Of this £3.20 would be received directly by government in taxes, with the rest benefitting legitimate waste sector businesses and wider society.”⁶
- 2.13 Overall, the benefits of this option are:
- By creating an effective deterrent to criminal behaviour, it has the potential to reduce tax lost as a result of criminal activity;
 - There is the potential to reclaim revenue lost to the public purses as a result of criminal behaviour;
 - It has the potential to create a fairer environment for waste businesses and other tax payers in Wales; and
 - Consultation responses from other law enforcement agencies, including the police, National Crime Agency and NRW were supportive of the proposals.

3. Consultation

- 3.1 On 10 July, the Welsh Government published a consultation on WRA access to criminal powers to tackle tax crime, which closed on 2 October. In total, the Welsh Government received 17 responses from a

⁵ Fighting Tax Crime – The Ten Global Principles: OECD 2017-
<http://www.oecd.org/tax/crime/fighting-tax-crime-the-ten-global-principles.pdf>

⁶ Environmental Services Association Education Trust- Waste Crime: Tackling Britain’s Dirty Secret:
http://www.esauk.org/esa_reports/ESAET_Waste_Crime_Tackling_Britains_Dirty_Secret_LIVE.pdf

range of stakeholders from various sectors, all from within Wales.

3.2 A full Welsh Government response to the consultation can be viewed here: <https://consultations.gov.wales/consultations/welsh-revenue-authority-powers-tackle-tax-crime>

3.3 Following the consultation, engagement has taken place with the Home Office, HMRC, CPS, NRW, National Crime Agency and the Police as well as other WRA stakeholders. Their views have been taken into account when developing these Regulations and Order.

4. Post implementation review

4.1 The Finance Committee in its Stage 1 Report on the TCMA stated: “the Minister should consider reviewing these powers once the taxes have been established and in operation for a number of years.”⁷

4.2 It is anticipated that TCMA will be reviewed within three to five years. The Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017 will be reviewed by May 2023 and the Landfill Disposals Tax (Wales) Act 2017 will follow the same timeline. The impact of the powers conferred by the Regulations and Order will be considered as part of the wider review programme.

⁷National Assembly for Wales, Finance Committee, Tax Collection and Management (Wales) Bill Stage 1 Committee Report, November 2015. Paragraph 241.
<http://www.assembly.wales/laid%20documents/cr-ld10451/cr-ld10451-e.pdf>

SL(5)190 – The Welsh Revenue Authority (Powers to Investigate Criminal Offences) Regulations 2018

Background and Purpose

These Regulations provide for various provisions of the Police and Criminal Evidence Act 1984 and the Criminal Justice and Police Act 2001 to be applied to the investigation of offences conducted by the Welsh Revenue Authority (“WRA”). They include obtaining entry to premises under specified circumstances and seizing relevant items.

Explanations of the individual powers are given in the Explanatory Note and Explanatory Memorandum. The Cabinet Secretary made a written statement on 21 February 2018 that referred to the consultation on the powers and the decisions that were taken.

Procedure

Affirmative

Technical Scrutiny

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

Merits Scrutiny

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

These Regulations give substantial powers to the WRA. An explanation has been given that does not appear unreasonable. Nevertheless, attention is drawn to the Regulations on the basis that they are of legal or political importance or give rise to issues of public policy that are likely to be of interest to the Assembly. [Standing Order 21.3(ii)]

Implications arising from exiting the European Union

No points are identified for reporting under Standing Order 21.3 in respect of this instrument in that respect.

Government Response

No Government response is required.

Legal Advisers

Constitutional and Legislative Affairs Committee

February 2018



**WRITTEN STATEMENT
BY
THE WELSH GOVERNMENT**

TITLE Welsh Government report on the consultation for Welsh Revenue Authority (“WRA”) to have access to criminal powers

DATE 21 February 2018

BY Mark Drakeford, Cabinet Secretary for Finance

On 10 July a consultation was launched seeking views on the Welsh Government's proposals for WRA to access criminal powers. The consultation, which closed on October 2, outlined my proposal for the WRA to have powers in place to deter and investigate devolved tax crime. Seventeen responses were received, including contributions from key partners like the National Crime Agency and Natural Resources Wales. Overall, there was support for the Welsh Government's position on the main issues identified in the consultation.

No government should legislate to provide a public authority with criminal powers unless it is necessary. The consultation proposed that WRA should have access to some of the powers currently exercised by HMRC when investigating tax crime in Wales. These established powers are accompanied by a clearly defined set of safeguards to ensure that these powers are used proportionately and appropriately. Having considered the responses received, I have concluded WRA should have access to some of the powers currently available to HMRC under the Police and Criminal Evidence Act 1984 and the Criminal Justice and Police Act 2001. In particular, WRA should be able to apply to a justice of the peace for a warrant to enter, search and seize items from premises or search a person found on those premises when investigating devolved tax crime.

Respondents were split over our proposal not to provide WRA with powers to arrest and detention as part of a criminal investigation, and expressed concern that the absence of these powers might prevent WRA from interviewing suspects. Given these views, and the small number of devolved tax offences expected to be investigated each year, I do not believe it is currently proportionate for WRA to have access to those powers. However, it is important to note that the absence of these powers will not prevent WRA from interviewing suspects, and WRA will need to comply with the relevant Code of Practice and wider legal obligations when conducting such an interview.

Based on these responses, a draft of the Welsh Revenue Authority (Powers to Investigate Criminal Offences) Regulations 2018 has been laid before the Assembly for approval during plenary on the 20 March 2018.

Our consultation also sought views on WRA being able to exercise powers under the Proceeds of Crime Act 2002 (“POCA”). Respondents were also supportive of our suggested approach to enable WRA to appoint an accredited financial investigator to exercise POCA powers to:

- i. apply for a restraint order and exercise related search and seizure powers;
- ii. recover cash through summary civil proceedings and exercise related search and seizure powers; and
- iii. make various applications (for example, making an application for an account monitoring order) under Part 8 POCA during a confiscation, money laundering or detained cash investigation.

Although not initially proposed in the consultation, a number of respondents to the consultation, in particular the National Crime Agency, (NCA) has recommended that WRA should have recourse to use certain powers to investigate money laundering. These powers will allow an accredited financial investigator to trace criminal assets where WRA has reasonable suspicion to believe devolved tax and money laundering offences have occurred.

Shaped by these responses, today the Proceeds of Crime Act 2002 (References to Welsh Revenue Authority Financial Investigators) Order 2018 have been laid, which will give WRA access - through an accredited financial investigator - to a number of powers in the Proceeds of Crime Act 2002.

Finally, respondents to the consultation also supported the proposal that the WRA should be able to authorise directed surveillance in accordance with the Regulation of Investigatory Powers Act 2000 (“RIPA”). The consultation also sought views on whether WRA should be able to authorise the use of covert human intelligence sources (“CHIS”) under RIPA. The responses received were supportive of this and subsequent discussions with key stakeholders have all stressed the importance of being able to authorise CHIS under RIPA.

The purpose of the RIPA framework is to protect the rights of individuals from unlawful intrusion into their personal or business affairs by law enforcement agencies and I believe it is important WRA are part of that framework. This means CHIS can only be used when authorised by an appropriately senior officer, suitably trained. Furthermore, any public authority authorised under RIPA is subject to independent oversight and scrutiny by the Investigatory Powers Commissioner’s Office, (IPOC).

In terms of the use of CHIS by WRA, it is conceivable that a CHIS type relationship could arise, not because WRA has proactively sought that or induced an individual to be a CHIS, but rather because WRA reacts to unrequested communication from individuals in certain circumstances. Without the ability to authorise a CHIS under RIPA, WRA’s enforcement capability would be hampered, because WRA staff could not lawfully ask for further information in such a situation.

WRA have confirmed that they would intend to authorise the use of CHIS in this reactive way, as a means of responding to unsolicited communication from individuals, rather

than in a proactive or intrusive way. WRA propose to prepare an operational policy on how it would operate shortly, drawing on the advice of the IPOC and other law enforcement agencies.

The Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) (Amendment) (Wales) Order 2018, laid before the Assembly today, therefore maintains consistency with HMRC and provides that WRA will be able to authorise both directed surveillance and CHIS under RIPA.

This statement is being issued during recess in order to keep members informed. Should members wish me to make a further statement or to answer questions on this when the Assembly returns I would be happy to do so.

Agenda Item 4.1

By virtue of paragraph(s) vi of Standing Order 17.42

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