Constitutional and Legislative Affairs Committee

Meeting Venue:
Committee Room 2 - Senedd

Meeting date:
21 May 2012

Meeting time:
14:30

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

None

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

CLA144 - The Nitrate Pollution Prevention (Wales) (Amendment) Regulations 2012 (Pages 1 - 16)
Negative Procedure. Date made 5 May 2012. Date laid 9 May 2012. Coming into force date 1 June 2012

Affirmative Resolution Instruments

CLA142 – The Mental Health (Secondary Mental Health Services) (Wales) Order 2012 (Pages 17 – 34)
Affirmative Procedure. Date made 2012. Date laid not stated. Coming into force date 6 June 2012.

CLA143 – The Mink Keeping (Prohibition) (Wales) Order 2012 (Pages 35 – 42)
Affirmative Procedure. Date made 8 May 2012. Date laid 8 May 2012. Coming into force date 1 June 2012

4. Committee Inquiries: Inquiry into the establishment of a separate Welsh jurisdiction

Evidence from Emyr Lewis and Professor Dan Wincott (Pages 43 – 50)
Papers:
CLA(4)-11-12(p1) – WJ 28 – Response from Mr Emyr Lewis and Professor Dan Wincott (Cardiff University)

Present:
- Emyr Lewis, Senior Fellow in Welsh Law, Cardiff Law School
- Professor Dan Wincott, Blackwell Professor of Law and Society; Cardiff University

5. Committee Correspondence

CLA124 – The Controlled Waste (England and Wales) Regulations 2012 (Pages 51 – 54)
Papers:
CLA(4)-11-12(p2) –Letter to the Chair from the Minister for Environment and Sustainable Development dated 26 April 2012
CLA(4)-11-12(p3) – The Minister's response dated 4 May 2012

6. Paper to Note (Pages 55 – 56)
CLA(4)-10-12 – Report of the Meeting 14 May 2012

Date of next meeting
28 May 2012

7. Motion under Standing Order 17.42 to resolve to exclude the public from the meeting for the following business:
A Committee may resolve to exclude the public from a meeting or any part of a meeting where:
(vi) the Committee is deliberating on the conclusions or recommendations of a report it proposes to publish; or

(ix) any matter relating to the internal business of the Committee, or of the Assembly, is to be discussed

8. Consideration of the evidence submitted to Inquiry to date

9. Welsh Government Response to the Constitutional and Legislative Affairs Committee's Inquiry into Powers granted to Welsh Ministers in UK Laws (Pages 57 – 64)

Papers:
CLA(4)-11-12(p4) – the First Minister's response dated 14 May 2012
CLA(4)-11-12(p4) – Annex

Transcript
View the meeting transcript.

Constitutional and Legislative Affairs Committee Report

CLA144

Title: The Nitrate Pollution Prevention (Wales) (Amendment) Regulations 2012

These Regulations revoke and replace certain provisions in the Nitrate Pollution Prevention (Wales) Regulations 2008 ("the principal Regulations"), which relate to the designation of nitrate vulnerable zones. The principal Regulations implement, in Wales, Council Directive 91/676/EEC concerning the protection of waters against pollution by nitrates from agricultural sources. The provision made by these Regulations relates to the review by the Welsh Ministers of the designation of nitrate vulnerable zones in 2009 by the principal Regulations. Provision is made by these Regulations for the Environment Agency to make recommendations to the Welsh Ministers to publish and notify their decisions following those recommendations, and for appeals to be made to the Welsh Ministers and determined by a person appointed by them.

Procedure: **Negative**

Technical Scrutiny

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

Merits Scrutiny

The following point is identified for reporting under Standing Order 21.3 in respect of this instrument at this stage:-

These Regulations (at regulation 9(4) illustrate a significant change in the drafting style of Statutory Instruments made by Welsh Ministers. When the National Assembly was established in 1999, sub-paragraphs were initially lettered (a), (b), (c), (d), (e), etc. in both language texts of Statutory Instruments. By 2000, they were lettered (a), (b), (c), (ch), (d), etc. in the Welsh text as it was considered that using the Welsh alphabet more faithfully reflected the equal status of the two languages. That practice has continued until now. It means, for example, that sub-paragraph (ch) in Welsh corresponds to sub-paragraph (d) in the English text, whilst paragraph (d) in the Welsh text corresponds to (e) in English.

When the Assembly acquired the competence to make primary legislation by way of measures under the Government of Wales Act 2006, it was decided to revert to the initial practice of using the English alphabet for the lettering of sub-paragraphs in both language

texts. The principal explanation was that as Members would routinely be proposing and debating amendments to draft Measures, it would be less confusing to refer to paragraphs (the third level of sub-division in primary legislation) labelled in the same way in both language texts.

That approach has been continued in relation to Bills introduced during the current Assembly.

The Welsh Government has now decided to extend that approach to statutory instruments, even though they are not capable of being amended in the same way as Bills. Although this ensures a consistent approach in all legislation currently before the Assembly, it is inconsistent with the practice in relation to statutory instruments for the last twelve years or so.

This matter is drawn to the attention of the Assembly under Standing Order 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.

David Melding AM
Chair, Constitutional and Legislative Affairs Committee

21 May 2012

The Government has responded as follows:

The Nitrate Pollution Prevention (Wales) (Amendment) Regulations 2012

As reported by the Constitutional and Legislative Affairs Committee, the Welsh Government confirms that the lettering of sub-paragraphs in the Welsh text of statutory instruments will in future use the English alphabet. The reason for using the English alphabet in the Welsh text of bilingual legislation is that we think it removes the potential for confusion to arise in legal proceedings and Assembly debate, particularly where both texts are being referred by means of simultaneous translation. The intention behind the change is to promote the use of Welsh legislative text by removing a barrier to its effective use.

As recognised in the Committee's report, the change ensures a consistent approach to the lettering of paragraphs and sub-paragraphs in all bilingual legislation before the Assembly, since the practice in respect of draft Measures and now carried on in respect of Bills, was determined by the Presiding Officer under the Third Assembly. The intention behind the change is to promote the use of Welsh legislative text by removing a barrier to its effective use, albeit a relatively minor one.

WELSH STATUTORY INSTRUMENTS

2012 No. 1238 (W. 151)

AGRICULTURE, WALES

WATER, WALES

The Nitrate Pollution Prevention (Wales) (Amendment) Regulations 2012

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations revoke and replace certain provisions in the Nitrate Pollution Prevention (Wales) Regulations 2008 (S.I. 2008/3143 (W.278)) ("the principal Regulations") which relate to the designation of nitrate vulnerable zones.

The principal Regulations implement, in Wales, Council Directive 91/676/EEC concerning the protection of waters against pollution by nitrates from agricultural sources (OJ No L375, 31.12.1991, p.1).

The provision made by these Regulations relates to the review by the Welsh Ministers of the designation of nitrate vulnerable zones in 2009 by the principal Regulations. The review is required by regulation 11 of the principal Regulations.

Provision is made by these Regulations for the Environment Agency to make recommendations to the Welsh Ministers, for the Welsh Ministers to publish and notify the decisions they are minded to make following those recommendations, and for appeals to be made to the Welsh Ministers and determined by a person appointed by them.

Regulation 2 revokes and replaces regulation 2 of the principal Regulations. Regulation 2, as substituted, determines the application of the various parts of the principal Regulations following the substitution (by regulation 3 of these Regulations) of provisions within Part 2 of the principal Regulations.

Regulation 3 revokes and replaces regulations 7, 8, 9 and 10 of the principal Regulations.

Regulation 7 of the principal Regulations, as substituted, continues the designation of nitrate vulnerable zones made by the principal Regulations. It also provides for the Environment Agency to assist the Welsh Ministers in their review of the zones by making recommendations to them about the designation of areas as nitrate vulnerable zones, and for the Welsh Ministers to publish those recommendations they are minded to accept (with or without amendment) and to serve notice on owners and occupiers of affected land.

Regulation 8 of the principal Regulations, as substituted, replaces the appeal arrangements in Part 2 of the principal Regulations (which applied in relation to the designation of nitrate vulnerable zones in 2009). Provision is made for appeals to be made, on specified grounds and within a specified time limit, by persons who have been sent a notice under regulation 7. Requirements as to the form of appeals are imposed. Provision is made for appeals to be made to the Welsh Ministers, but for any submitted appeal to be remitted to a person appointed by the Welsh Ministers for consideration and determination.

Regulation 9 of the principal Regulations, as substituted, makes provision about the consideration and determination of appeals by the appointed person. This includes provision as to the procedure for the making of representations, the holding of an oral hearing in exceptional circumstances, the withdrawal of appeals, and costs.

Regulation 10 of the principal Regulations, as substituted, provides that the Welsh Ministers are bound by the determinations of the appointed person, and are to publish those determinations.

The Welsh Ministers' Code of Practice on the carrying out of Regulatory Impact Assessments was considered in relation to these Regulations. As a result it was not considered necessary to carry out a regulatory impact assessment as to the likely costs and benefits of complying with these Regulations

WELSH STATUTORY INSTRUMENTS

2012 No. 1238 (W. 151)

AGRICULTURE, WALES

WATER, WALES

The Nitrate Pollution Prevention (Wales) (Amendment) Regulations 2012

Made	*5 May 2012*
Laid before the National Assembly for Wales	*9 May 2012*
Coming into force	*1 June 2012*

The Welsh Ministers are designated(**1**) for the purposes of section 2(2) of the European Communities Act 1972(**2**) in relation to matters relating to the protection of waters against pollution caused by nitrates from agricultural sources. In exercise of the powers conferred upon them by that section, the Welsh Ministers make the following Regulations:

Title, commencement, application and interpretation

1.—(1) The title of these Regulations is the Nitrate Pollution Prevention (Wales) (Amendment) Regulations 2012 and they come into force on 1 June 2012.

(2) These Regulations apply in relation to Wales.

(**1**) *See* S.I. 2001/2555 for the designation conferred upon the National Assembly for Wales. By virtue of section 59 of, and paragraph 28(1) of Schedule 11 to, the Government of Wales Act 2006, that designation is now vested in the Welsh Ministers.

(**2**) 1972 c. 68. Section 2(2) was amended by section 3(3) of, and Part 1 of the Schedule to, the European Union (Amendment) Act 2008 (c.7) and by section 27(1)(a) of the Legislative and Regulatory Reform Act 2006 (c.51).

(3) In these Regulations, "the principal Regulations" means the Nitrate Pollution Prevention (Wales) Regulations 2008(**1**).

Substitution for regulation 2

2. For regulation 2 (application) of the principal Regulations, substitute—

"Application

2.—(1) These Regulations apply in relation to Wales.

(2) Parts 3 to 8 only apply to a holding in a nitrate vulnerable zone designated as such by these Regulations.

(3) In the case of a holding which is partly in a nitrate vulnerable zone designated as such by these Regulations, Parts 3 to 8 apply only to the part of the holding inside the zone, and a reference to a holding in Parts 3 to 8 is a reference to that part.".

Substitution for regulations 7 to 10

3. For regulations 7 (designation of nitrate vulnerable zones), 8 (application for a declaration), 9 (proceedings before the appointed person) and 10 (effect of findings made by the appointed person) of the principal Regulations, substitute—

"Designation of nitrate vulnerable zones

7.—(1) In this Part—

"the appointed person" ("*y person penodedig*") means a person appointed by the Welsh Ministers;

"relevant holding" ("*daliad perthnasol*") means land and its associated buildings that are at the disposal of the occupier and which are used for the growing of crops in soil or rearing of livestock for agricultural purposes, and which are wholly or partly within an area which—

(a) the Agency recommends; and

(b) the Welsh Ministers are minded to accept (with or without amendment)

should be, or should continue to be, designated as a nitrate vulnerable zone for the purposes of these Regulations.

(2) The areas marked as nitrate vulnerable zones on the map marked "Nitrate Vulnerable

(**1**) S.I. 2008/3143 (W. 278), amended by S.I. 2010/489 (W. 55).

Zones Index Map 2008" ("*Parthau Perygl Nitradau Map Mynegai 2008*") and deposited at the offices of the Welsh Ministers at Cathays Park, Cardiff, CF10 3NQ are designated as nitrate vulnerable zones for the purposes of these Regulations.

(3) Nitrate vulnerable zones are areas of land that drain into polluted waters and that contribute to the pollution of those waters.

(4) To assist the Welsh Ministers in relation to their duties under regulation 11(3), the Agency must, on 1 June 2012, and at the latest every 4 years subsequently, make recommendations to the Welsh Ministers by reference to the matters mentioned in regulation 11(3)(a) to (c) as to which areas should be designated, or continue to be designated, as nitrate vulnerable zones for the purposes of these Regulations.

(5) Any recommendations as to the matters stated at regulation 7(4) which have been made by the Agency prior to 1 June 2012 have effect as if made on that date.

(6) The Welsh Ministers must publish such of the Agency's recommendations which the Welsh Ministers are minded to accept (with or without amendment) and send notice of the recommendations to any owner or occupier of a relevant holding.

(7) A notice must contain a reference to a page on a website maintained by the Agency or the Welsh Ministers where the relevant recommendation (with any amendment the Welsh Ministers are minded to make to it) can be found.

Appeals

8.—(1) The owner or occupier of a relevant holding who is sent a notice under regulation 7(6) may make an appeal against that notice to the Welsh Ministers.

(2) The appeal is to be made only on one or more of the grounds stated in paragraph (3).

(3) The grounds are that in relation to the relevant holding or any part of it, the recommendations of the Agency (subject to any amendment the Welsh Ministers are minded to make to them) should not be accepted by the Welsh Ministers because the relevant holding or any part of it—

(a) does not drain into water which—

(i) the Welsh Ministers are minded to identify, or continue to identify, as being polluted, or

(ii) has been similarly identified in England; or

(b) drains into water that the Welsh Ministers should not identify, or continue to identify, as being polluted.

(4) The appeal is to be based on either—

(a) data provided by the appellant; or

(b) evidence provided by the appellant that the data relied on by the Welsh Ministers is incorrect.

(5) The appeal must—

(a) be made in writing in the manner and form published by the Welsh Ministers;

(b) include details of all the evidence that the appellant intends to rely on; and

(c) be received by the Welsh Ministers no later than 35 days after the date on which the Welsh Ministers sent the notice to which the appeal relates.

(6) The Welsh Ministers must remit the appeal to the appointed person for consideration and determination.

Proceedings before the appointed person

9.—(1) If the appointed person is satisfied that a submitted appeal complies with the requirements of regulation 8 in all material particulars, the appointed person must proceed to determine the appeal.

(2) The procedure for determining the appeal is to be decided by the appointed person.

(3) But that is subject to the following provisions of this regulation.

(4) Before determining the appeal the appointed person must, allowing such time as is reasonable—

(a) invite the appellant and the Welsh Ministers to submit representations and supporting documents in relation to the appeal;.

(b) send to the Welsh Ministers a copy of any representations and supporting documents submitted by the appellant;

(c) send to the appellant a copy of any representations and supporting documents submitted by the Welsh Ministers;

(d) allow the appellant and the Welsh Ministers an opportunity to submit comments on each other's

representations and supporting documents to the appointed person.

(5) The appointed person may at any time request further information from the appellant or the Welsh Ministers.

(6) The appointed person may invite any person appearing to have a significant interest in an appeal to submit representations, but must allow the appellant and the Welsh Ministers an opportunity to submit comments on any representations made.

(7) The appointed person may disregard any representations, comments or documents which have been submitted other than in accordance with the provisions of these Regulations.

(8) The appointed person may, if satisfied that exceptional circumstances exist, convene an oral hearing.

(9) At an oral hearing the appellant and the Welsh Ministers have the right to appear, and the appointed person may permit any other party to appear.

(10) On determining an appeal, the appointed person must send a copy of the determination to all parties to the appeal.

(11) All parties to an appeal are to bear their own costs.

(12) An appeal may be withdrawn by the appellant at any time before it is determined by the appointed person.

(13) Withdrawal of an appeal is to be effected by the appellant giving notice in writing to the appointed person.

(14) If an appeal is withdrawn, the appointed person ceases to be under a duty to consider and determine it.

Effect of a determination made by the appointed person

10.—(1) The Welsh Ministers are bound by a determination of an appeal by the appointed person.

(2) The Welsh Ministers must publish on a website maintained by them all determinations of appeals by the appointed person.".

John Griffiths

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

5 May 2012

Explanatory Memorandum to The Nitrate Pollution Prevention (Wales) (Amendment) Regulations 2012

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

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Nitrate Pollution Prevention (Wales) Regulations 2008

John Griffiths

Minister for Environment and Sustainable Development

5 May 2012

1. Description

The EC Nitrates Directive (91/676/EEC) ("the Nitrates Directive") is intended to reduce water pollution caused by nitrates from agricultural sources and to prevent any further pollution. The Nitrates Directive is transposed in Wales by the Nitrate Pollution Prevention (Wales) Regulations 2008 (as amended) ("the 2008 Regulations")[1].

Since the introduction of the Nitrates Directive in 1991, Member States have been required to assess and designate areas as Nitrate Vulnerable Zones (NVZs) and produce an Action Programme of measures to reduce levels of nitrogen entering watercourses. Member States are required to review their implementation of the Nitrates Directive every four years. The outcome of the review is used to make appropriate amendments to the NVZs and/or the measures in the Nitrates Action Programme. A review is currently underway, and must be completed by the end of 2012.

The 2008 Regulations provide for appeals to be made against proposed designations, but the provisions relate specifically to the 2008 designations process. It is therefore necessary to replace them by making the present Regulations. This will ensure that persons affected by the emerging conclusions of the review will be notified of the Welsh Government's proposals and have an opportunity to appeal against them.

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

Section 3 of this Memorandum explains that these Regulations are made in reliance on section 2(2) of the European Communities Act 1972. By virtue of section 59(3) of the Government of Wales Act 2006, the Welsh Ministers are to determine whether an instrument made in exercise of the section 2(2) powers is to be subject to the negative or affirmative procedure.

These Regulations do not amend an Assembly Act or Measure, or an Act of Parliament, nor do they create offences, impose civil penalties or involve substantial government expenditure. The provision made by them consists of applying, to the current review of NVZ designations, a process for the making and determination of appeals. That process, in its key features, is the same as that provided by the 2008 Regulations, although subject to limited technical amendment and elaboration intended to improve clarity and certainty.

Accordingly, the Welsh Ministers have determined that these Regulations are to be subject to the negative procedure.

[1] S.I 2008/3143 (W.278), amended by S.I. 2010/489 (W.55)

3. Legislative background

Section 2(2) of the European Communities Act 1972 provides that a Minister of the Crown or government department may be designated by Order in Council for the purposes of making provision to implement any EU obligation of the United Kingdom, or dealing any matters arising out of or related to such obligations.

This power to designate was extended to the National Assembly for Wales by Section 29(1) of the Government of Wales Act 1998. The European Communities (Designation) (No.2) Order 2001[2] designated the Assembly for the purpose of section 2(2) in relation to the protection of waters against pollution caused by nitrates from agricultural sources. As this is the subject matter of the Nitrates Directive, it follows that the Assembly was empowered to make any legislation necessary to transpose the Directive. However, the Order authorised the Assembly only to make regulations which applied in relation to Wales.

By virtue of section 59 of, and paragraph 28 of Schedule 11 to, the Government of Wales Act 2006, the designation of the Assembly now has effect as a designation of the Welsh Ministers. In reliance on this designation, the Welsh Ministers have made the 2008 Regulations and the present Regulations, which, taken together, transpose the Nitrates Directive in relation to Wales.

4. Purpose & intended effect of the legislation

The 1991 Nitrates Directive requires Member States to establish Action Programmes, which set out specific good agricultural practice measures for farmers to follow in order to reduce nitrate pollution. It requires Member States to apply the Action Programme either throughout their national territory (whole Wales NVZ designation), or to specific areas where farmers have to implement the measures (with farmers in other areas being subject only to other national baseline standards).

The Nitrates Directive requires reviews of both the extent of the NVZs and the effectiveness of the Action Programme every four years. The outcomes of the reviews are to be used to make appropriate amendments (i.e. revise the NVZs and/or the Action Programme measures). A review is currently under way and must be completed by the end of 2012.

The Welsh Government consulted on its review in December 2011. The consultation period closed on 16 March 2012. The consultation sought views on, amongst other matters, whether it was appropriate to continue with the current regime of designation of discrete NVZs, or to adopt a whole territory designation approach.

[2] SI 2001/2555

Details were given of the process which it was intended to follow if the discrete NVZ designation approach were to be adopted. This process consisted of Environment Agency recommendations to the Welsh Government, publication and notification to affected farmers of those recommendations which the Welsh Government was minded to accept, and a 28 day "window" for making of appeals, which would be handled by the Planning Inspectorate.

Following consideration of the consultation responses (see Section 5 below), the Welsh Government decided to continue the existing regime of discrete NVZ designations, and to give effect to its proposals for appeals.

Part 2 of the 2008 Regulations made provision for appeals and for the review of nitrate vulnerable zones, but the appeal provisions relate specifically to the 2008 designations process. It is therefore necessary to replace them, and that is the purpose of the present Regulations. The new provisions carry forward the key features of the previous provisions, but with elaboration of some details and technical changes to procedure which are intended to improve the clarity and effectiveness of the appeal process. The 2008 Regulations provided for designation of NVZs, but for affected persons to be able to apply for a declaration that land should not be designated. However, if that application was successful, the result was not a revocation of the designation but provision that the land should be treated as if it had not been designated. The present regulations make provision for a process of provisional designation (following recommendations by the Environment Agency), for appeals, and for the outcome of the appeals to be binding on the Welsh Government when it makes its final decision.

Regulation 2 revokes and replaces regulation 2 of the 2008 Regulations. Its purpose is to complement the provision made by Regulation 3 and clarify the application of the 2008 Regulations. Parts 3 to 8 of the 2008 Regulations comprise the Action Programme required by the Directive. However, the measures in the programme are only to be applied to land which has been designated as an NVZ. However, the remainder of the 2008 Regulations, as now amended, need to apply in relation to all of Wales. The new Regulation 2 gives effect to this**.**

Regulation 3 revokes and replaces Regulations 7, 8, 9 and 10 of the 2008 Regulations.

The **new Regulation 7**:

a) makes provision to recognise the Environment Agency's role in making recommendations to the Welsh Ministers as part of the review process, and for the Welsh Ministers to publish and notify to affected persons the recommendations they are minded to accept (with or without amendment)

b) retains the current definition and designation of NVZs. It is intended that any amendments made to the current designations following the conclusion of the appeals process will be given effect by a further amendment of the 2008 Regulations in due course.

The **new Regulation 8** provides the right to appeal in terms equivalent to the right to apply for a declaration under the 2008 Regulations. The first of the specified grounds has been expanded to deal with the possibility of cross-border scenarios, so that a farmer who wishes to assert that their land does not drain into polluted water can do so irrespective of whether the polluted water is in Wales or England.

In relation to the second appeal ground, it is recognised that it is in theory possible that a farmer in Wales will wish to challenge the "polluted" status of water in England, and that no provision is made for this. However, the subject matter of an appeal here would be a decision made by the Secretary of State in relation to water in England, and the Welsh Ministers' power to make the Regulations is limited to provision in relation to Wales. In any event, it is considered that this scenario (and its equivalent in relation to polluted water in Wales) is highly unlikely to arise in practice: if it should do so, the Welsh Government will work with Defra to ensure that any necessary further provision is made.

The **new Regulation 9** makes provision for the consideration and determination of appeals by a person appointed by the Welsh Ministers: as previously, it is intended that in practice this will be a Planning Inspectorate Inspector. The provision made about procedure broadly follows that made by the 2008 Regulations. However, to assist transparency and certainty, more detailed provision is made about aspects of the process (e.g. what is to happen if further information is needed or the appellant decides to withdraw their appeal). The provision made is modelled on the established process for planning appeals. In addition, to better reflect the independence of the appeal determination:

a) it is expressly provided that, except as specifically set out on the face of the Regulations, the process is a matter for the appointed person to decide.

b) the provision made by the 2008 Regulations to define the basis of the appointed person's determination has been omitted. This is now left to appointed person's discretion, but the normal public law principles relevant to appeal determinations will of course apply.

The **new Regulation 10** provides simply that the determinations of the appointed person are binding on the Welsh Ministers. The effect is the same as under the 2008 Regulations, namely that at the end of the process of review, the designations of NVZs will have effect in accordance with the appeal decisions.

5. Consultation

As stated above at Section 4, the Welsh Government recently consulted on the Review of Nitrate Vulnerable Zones in Wales. This consultation closed on the 16 March and asked for views on proposals to revise the coverage of Nitrate

Vulnerable Zones and modify the Nitrates Action Programme measures implemented within the Nitrate Vulnerable Zones.

The consultation included a section on the proposed appeals procedure, which would take effect as part of the process of the review if (and only if) the current approach of designating discrete NVZs were to be retained. It was considered unnecessary to ask any specific consultation question on the appeal proposals given that these amounted in essence to a continuation of the 2008 arrangements. However, respondents were asked to state, with reasons, whether they preferred the option of discrete designation (option 1) or the alternative of whole territory designation (option 2). As the appeal proposals formed an integral part of option1 it was open to respondents to comment on them if they wished. However, the only responses received simply endorsed the inclusion of an appeals process.

6. Regulatory Impact Assessment (RIA)

An RIA has not been undertaken as these amendments to Regulations do not create an additional regulatory burden. This is in line with Section 4.2 of the Welsh Ministers' RIA code which states that the Welsh Ministers policy is not to carry out an RIA:

"Where routine technical amendments or factual amendments are required to update regulations etc. that have no major policy impact. "

The Regulations provide only for a process for the making and determination of appeals in relation to the current NVZ review, thus securing continuation of the regime established by the 2008 Regulations. To improve clarity and certainty, that process includes limited technical amendment and elaboration of the provision made for appeals by the 2008 Regulations, but the key features and effect remain as before.

The previous RIA, drafted when the 2008 Regulations were made, assessed both the environmental and economic impact of the action programme measures on affected farmers. It used the total number of affected farmers to assess the impact across the whole of Wales.

Following the completion of the current review and the determination of any appeal, it is envisaged that an RIA will be produced when further amendment regulations are made early next year to give effect to any revisions to the designation of NVZs and to the action programme.

Given the subject matter and effect of the Regulations, it is considered that they do not have any effect relevant to the statutory duties at sections 77 – 79 of the Government of Wales Act 2006, or to the statutory partners (sections 72 – 75).

Constitutional and Legislative Affairs Committee

CLA(4)-11-12

CLA142

Constitutional and Legislative Affairs Committee Draft Report

Title: The Mental Health (Secondary Mental Health Services) (Wales) Order 2012

Procedure: Affirmative

This Order provides that, for the purposes of Parts 2 and 3 of the Mental Health (Wales) Measure 2010, local primary mental health support services made available in a particular local authority areas are not to be regarded as secondary mental health services in that local authority area.
The order further provides that services in England, Scotland or Northern Ireland which are the equivalent of secondary mental health services provided in Wales are to be regarded as secondary mental health services for certain purposes in Part 3 of the Measure.

Technical Scrutiny

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

Merits Scrutiny
[No points are identified for reporting under Standing Order 21.3 in respect of this instrument.]

OR

[Under Standing Order 21.3.(ii) the committee is invited to consider whether the Assembly should pay special attention to this instrument as it gives rise to issues of public policy likely to be of interest to the Assembly.

- Part 2 of the Measure contains requirements in respect of care co-ordination and care and treatment planning. Part 3 of the Measure enables eligible adults who have been discharged from secondary mental health services to refer themselves back to secondary services directly if they believe their mental health is deteriorating.
- Article 3 of the Order has the effect of excluding any service or treatment identified and made available as part of a local primary mental a health service in a local authority area under Part 1 of the Measure from the requirements of Parts 2 and 3 of the Measure.

- Consequently service providers (LHBs and local authorities) will not be required to appoint care co-ordinators or provide care and treatment plans for individuals accessing services or treatment which are regarded as local primary mental health support services within a local authority area. A further consequence is that a person who has been discharged from services delivered as part of local primary health support service will not be entitled to seek reassessment.
- The Order extends the entitlement of those eligible to receive an assessment under Part 3 of the Measure to persons who have received secondary mental health services (equivalent to those provided in Wales) in England, Scotland or Northern Ireland.]

Legal Advisers
Constitutional and Legislative Affairs committee

8 May 2012

Draft Order laid before the National Assembly for Wales under section 52(5)(a) of the Mental Health (Wales) Measure 2010, for approval by resolution of the National Assembly for Wales.

DRAFT WELSH STATUTORY INSTRUMENTS

2012 No. (W.)

MENTAL HEALTH, WALES

The Mental Health (Secondary Mental Health Services) (Wales) Order 2012

EXPLANATORY NOTE

(This note is not part of the Order)

Article 3 of this Order provides that, for the purposes of Parts 2 and 3 of the Mental Health (Wales) Measure 2010 ("the Measure"), local primary mental health support services made available in a particular local authority area under a scheme are not to be regarded as secondary mental health services in that local authority area.

The effect of article 3 is that the requirements surrounding coordination and care and treatment planning provided by Part 2 of the Measure do not apply to an individual who is only in receipt of services or treatment which are made available as local primary mental health support services in the local authority area in which that individual is usually resident. Also, an individual who has received only such services will not be eligible for assessment under Part 3 of the Measure.

Article 4 of this Order provides that services in England, Scotland or Northern Ireland which are the equivalent of secondary mental health services provided in Wales are to be regarded as secondary mental health services for certain purposes in Part 3 of the Measure.

The effect of article 4 is to enable adults who have received such services in England, Scotland or Northern Ireland but who are now resident in Wales to be entitled to assessment under Part 3 of the Measure, provided they satisfy the entitlement criteria provided in section 22 of the Measure.

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 Mental Health Legislation Team, Department for Health, Social Services and Children, Welsh Government, Cathays Park, Cardiff, CF10 3NQ.

Draft Order laid before the National Assembly for Wales under section 52(5)(a) of the Mental Health (Wales) Measure 2010, for approval by resolution of the National Assembly for Wales.

DRAFT WELSH STATUTORY INSTRUMENTS

2012 No. (W.)

MENTAL HEALTH, WALES

The Mental Health (Secondary Mental Health Services) (Wales) Order 2012

Made	*2012*
Coming into force	*6 June 2012*

The Welsh Ministers make this Order in exercise of the powers conferred by sections 49(4) and 52(2) of the Mental Health (Wales) Measure 2010(**1**).

A draft of this instrument, has been laid before the National Assembly for Wales in accordance with section 52(5)(a) of the Measure, and approved by resolution of the National Assembly for Wales.

Title, commencement and application

1.—(1) The title of this Order is the Mental Health (Secondary Mental Health Services) (Wales) Order 2012, and it comes into force on 6 June 2012.

(2) This Order applies in relation to Wales.

Interpretation

2. In this Order "the Measure" ("*y Mesur*") means the Mental Health (Wales) Measure 2010.

Meaning of secondary mental health services for the purposes of Parts 2 and 3 of the Measure

3. Services and treatment which are made available as local primary mental health support services(**1**) in a

(**1**) 2010 nawm 7.

particular local authority area under a scheme(**2**) are not to be regarded as secondary mental health services(**3**) for the purposes of Part 2 (coordination of and care planning for secondary mental health service users) and Part 3 (assessments of former users of secondary mental health services) of the Measure in that local authority area.

Meaning of secondary mental health services for the purposes of entitlement to assessment in Part 3 of the Measure

4. A service provided in England, Scotland or Northern Ireland which is the equivalent of a secondary mental health service provided in Wales is to be regarded as a secondary mental health service for the purposes of section 22 (entitlement to assessment) and section 23 (assessments: the relevant discharge period) of the Measure.

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

Date

(**1**) *See* section 5 (meaning of "local primary mental health support services") of the Measure for the meaning of local primary mental health support services.

(**2**) *See* section 2 (joint schemes for the provision of local primary mental health support services) and section 4 (failures to agree schemes) of the Measure regarding schemes for the provision of local primary mental health support services in local authority areas.

(**3**) *See* section 49 (meaning of secondary mental health services) of the Measure for the meaning of secondary mental health services.

Explanatory Memorandum to the Mental Health (Secondary Mental Health Services) (Wales) Order 2012

This Explanatory Memorandum has been prepared by the Department for Health, Social Services and Children and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Mental Health (Secondary Mental Health Services) (Wales) Order 2012. I am satisfied that the benefits outweigh any costs.

Lesley Griffiths AM

Minister for Health and Social Services

1 May 2012

Description

1. The Mental Health (Secondary Mental Health Services) (Wales) Order 2012 makes provision which:

    a. amends the existing definition of secondary mental health services provided at section 49 of the Measure so that services provided as local primary mental health support services (within the meaning of section 5 of the Mental Health (Wales) Measure 2010 ('the Measure')) in a local authority area are not regarded as secondary mental health services for the purposes of Parts 2 and 3 within that local authority area. This means that the requirements surrounding care coordination and care and treatment planning set out in Part 2 of the Measure do not apply to individuals who are only in receipt of what are regarded - within the local authority area in which those individuals are usually resident - as local primary mental health services. Also, individuals who have received only such services will not be eligible for assessment under Part 3 of the Measure.

    b. extends the existing definition of secondary mental health services provided at section 49 of the Measure to include certain services provided in other parts of the UK for the purposes of sections 22 (entitlement to assessment) and 23 (assessments: the relevant discharge period) of the Measure. This enables adults who have received such services, but who are now usually resident in Wales, to request assessment under Part 3 of the Measure (provided that they satisfy the eligibility criteria provided in section 22 of the Measure).

Matters of special interest to the Constitutional and Legislative Affairs Committee

2. This Order contains articles which relate to Parts 1, 2 and 3 of the Measure. It is the second piece of subordinate legislation to be made relating to Part 2 of the Measure (the first being the Mental Health (Care coordination and Care and Treatment Planning) (Wales) Regulations 2011), and the second to be made relating to Part 3 (the first being the Mental Health (Assessment of Former Users of Secondary Mental Health Services) (Wales) Regulations 2011)[1].

[1] The Mental Health (Primary Care Referrals and Eligibility to Conduct Primary Mental Health Assessments (Wales) Regulations 2012 (relating to Part 1 of the Measure) and the Mental Health (Regional Provision) (Wales) Regulations 2012 (relating to Parts 1 and 3 of the Measure) are both scheduled for consideration by the National Assembly for Wales in May 2012. If the Mental Health (Regional Provision) (Wales) Regulations 2012 are approved by the Assembly and made by the Welsh Ministers, references to 'local authority areas' in this Explanatory Memorandum and Regulatory Impact Assessment should be read as 'regions'.

Legislative background

3. This Order may be made in exercise of powers conferred on the Welsh Ministers by sections 49(4) and 52(2) of the Measure.

4. This Order is subject to the affirmative procedure.

Purpose and intended effect of the legislation

5. This Order affects Parts 2 and Part 3 of the Mental Health (Wales) Measure 2010 - although it uses the definition of Local Primary Mental Health Support Services under Part 1.

Part 1 Local Primary Mental Health Support Services

6. Part 1 of the Measure aims to strengthen the role of primary care in the delivery of mental health services by ensuring that throughout Wales there will be local primary care mental health support services. These will be delivered by Local Health Boards ('LHBs') and local authorities in partnership, and it is expected that these services will operate either within, or alongside, existing GP practices.

Part 2 – Coordination of and Care Planning for Secondary Mental Health Service Users

7. Part 2 of the Measure seeks to provide that all relevant patients (of any age) who have been accepted into secondary mental health services in Wales have a dedicated care coordinator and care and treatment plan, and that service providers (LHBs and local authorities) act in a coordinated manner to improve the effectiveness of the mental health services provided to an individual.

Part 3 – Assessments of Former Users of Secondary Mental Health Services

8. Part 3 of the Measure will enable eligible adults who have been discharged from secondary mental health services, but who subsequently believe that their mental health is deteriorating to such a point as to require such care and treatment again, to refer themselves back to secondary services directly, without necessarily needing to first go to their general practitioner or elsewhere for a referral.

9. To this end, Part 3 of the Measure requires 'local mental health partners' in each local authority area (i.e. the relevant LHB and local authority) to agree arrangements for dealing with requests from former users of secondary mental health services for assessment of their mental health.

Part 6 – Miscellaneous and Supplemental, section 49: Meaning of Secondary Mental Health Services

10. Section 49(1) of the Measure provides that secondary mental health services are:

(a) a service in the form of treatment for an individual's mental disorder which is provided under Part 1 of the National Health Service (Wales) Act 2006;

(b) a service provided under section 117 of the Mental Health Act 1983;

(c) a community care service the main purpose of which is to meet a need related to an adult's mental health;

(d) a service provided for a child under Part III of the Children Act 1989 the main purpose of which is to meet a need related to that child's mental health.

12. Section 49(2) goes on to provide that a service is not to be taken as being provided under Part 1 of the NHS (Wales) Act 2006 if that service is provided under:

(a) section 41 of that Act;

(b) a general medical services contract entered into by a Local Health Board under section 42 of that Act;

(c) arrangements for the provision of primary medical services entered into by a Local Health Board under section 50 of that Act;

(d) Schedule 1 to that Act.

13. The main effect of section 49(2) is to exclude services provided under a General Medical Services contract from being considered as a secondary mental health service for the purposes of the Measure.

14. The definition provided by section 49 means that, in effect, all services provided to an individual for the treatment of, or to meet needs related to, their mental health - except those which are delivered as part of the General Medical Services contract - are considered to be secondary mental health services. This includes services provided as part of local primary mental health support services.

15. This Order amends the definition of secondary mental health services at section 49 by providing that services and treatments made available and provided as part of a local primary mental health support service (within the meaning of section 5 of the Measure) in a particular local authority area are not to be considered as secondary mental health services for the purposes of Parts 2 and 3 of the Measure in that local authority area.

16. Separately, this Order also provides that services in England, Scotland and Northern Ireland that are the equivalent of secondary mental health services provided in Wales are to be regarded as secondary mental health services for the purposes of sections 22 (entitlement to assessment) and 23 (assessments: the relevant discharge period) in Part 3 of the Measure.

Effect of this Order: Exemption of Local Primary Mental Health Support Services from Meaning of Secondary Mental Health Services

17. This Order has the effect of excluding any service or treatment identified and made available as part of a local primary mental health support service in a local authority area under Part 1 of the Measure from the requirements of Parts 2 and 3 of the Measure in that local authority area. This is because Article 3 provides that any such services or treatment are not to be considered as a secondary mental health service for the purposes of Parts 2 and 3 of the Measure (schemes for the identification and provision of local primary mental health support services are agreed by a Local Health Board and local authority under section 2 of the Measure, or made under section 4 of the Measure).

18. In practice this means that the provisions of Parts 2 and 3 of the Measure are disapplied in respect of any service or treatment which is identified and made available as part of a local primary mental health support service in a local authority area under Part 1 of the Measure. Service providers (LHBs and local authorities) will not be required to appoint care coordinators or provide care and treatment plans for individuals accessing services or treatment which are regarded as local primary mental health support services within a local authority area. Similarly, where individuals have received services delivered as part of local primary mental health support services, they will not be entitled to seek reassessment within 3 years of being discharged from such a service.

19. This ensures that the requirements for care and treatment planning under part 2, which are intended to improve the coordination of mental health services for people with complex or enduring needs, do not apply to services delivered as part of local primary mental health support services, and that the entitlement to request assessment following discharge applies only to those individuals who have previously received mental health services for complex or enduring needs.

20. This approach clarifies the Welsh Government's policy intention, and removes ambiguity as to which services are to be considered as secondary mental health services for the purposes of Parts 2 and 3 of the Measure.

Effect of this Order: Extension

21. This order has the effect of ensuring that people who meet the eligibility criteria provided in section 22 of the Measure and who have previously received what are regarded as secondary mental health services in other parts of the United Kingdom, but who are currently resident in Wales, have the same entitlement to request an assessment as individuals who have previously received secondary mental health services delivered in Wales.

REGULATORY IMPACT ASSESSMENT

Options

22. This section of the Regulatory Impact Assessment (RIA) presents two different options in relation to the policy objectives of the proposed Order (see Section 4 of Part 1 of this document). Both of the options are analysed in terms of how far they would achieve the Government's objectives, along with the risks associated with each. The costs and benefits of each option are set out in Section 7 of this RIA.

22. The options are:

- Option 1 - Do nothing;
- Option 2 - Deliver the policy objectives through the Order.

Option 1 – Do nothing

23. This option proposes not making the Order.

24. Failing to make Article 3 of this Order, which excludes services made available and provided under a joint scheme as part of the local primary mental health support services in a particular local authority area from the meaning of secondary mental health services in that local authority area, would mean that many local primary mental health support services would be subject to the requirements surrounding care coordination and care and treatment planning under Part 2 of the Measure. This was not the intended effect of Part 2 of the Measure. Services provided under Part 1 of the Measure are intended to strengthen primary care services through the functions set out in section 5 of the Measure and are expected to provide a bridge between General Practitioner services and secondary mental health services.

25. Local primary mental health support services are intended to increase capacity at primary care level to offer assessment, brief therapy interventions, onward referral, advice and information for people of all ages. If such services were subject to the requirements of Part 2, which are designed to improve care coordination and planning for people with severe and enduring mental health problems, this would increase the administrative processes to a level that is disproportionate for the effective delivery of these services.

26. Not excluding local primary mental health support services from Parts 2 and 3 by Order would not therefore prevent the overall operation of Part 2 or Part 3 of the measure, but it is likely to have a detrimental effect upon the operation of Part 1 which is undesirable.

27. In relation to Part 3 of the Measure, if services provided as part of local primary mental health support services are not excluded from being considered as

secondary mental health services for the purposes of Part 3, then the entitlement to request reassessment directly from secondary mental health services would extend to individuals who had received these services. Again, this was not the intended effect of this Part of the Measure, which was designed to ensure a direct route back to specialist services for those individuals with complex or enduring mental health problems.

28. Article 4 of the Order enables services provided in England, Scotland and Northern Ireland which are the equivalent of secondary mental health services provided in Wales to be regarded as secondary mental health services for certain purposes in Part 3 of the Measure. Failing to make Article 4, would mean that individuals who had previously received such secondary mental health services in another part of the UK, but who were now usually resident in Wales, would not be entitled to request reassessment directly from secondary mental health services.

30. Not providing for this in the Order would not therefore prevent the overall operation of Part 3 of the Measure. It would however leave a disparity in entitlement for people living in Wales based on where in the United Kingdom they had previously received secondary mental health services. This would also impact upon people from Wales who had been sent to a prison outside Wales and whilst in custody had received secondary mental health services. On their return to Wales such individuals would not have a right to request a reassessment of their mental health should they feel it was deteriorating.

31. The Welsh Government therefore considers that not making this Order would significantly undermine the operation and intentions of Parts 2 and 3 of the Measure.

Option 2 – Make Order

32. This option proposes making the Order.

33. Article 3 of the Order will ensure that there is certainty amongst service providers as to which services are to be considered as secondary mental health services, by clarifying that local primary mental health support services identified and made available in a local joint scheme agreed under Part 1 of the Measure are not to be considered as secondary mental health services for the purposes of Parts 2 and 3.

34. This approach will allow the local mental health partners responsible for providing local primary mental health services for an area to consider and determine the mental health services that will be included in their local joint scheme for local primary mental health support services in the knowledge that all other mental health services delivered in the area (other than under the General Medical Services Contract) will therefore be considered to be secondary mental health services. Any services which are not made available and provided under the joint scheme for local primary mental health support services will be subject to the requirements of Parts 2 and 3 of the Measure.

35. This will provide local mental health partners with flexibility to build upon the primary care-based services which are already being provided (except those delivered under the General Medical Services Contract), and to design appropriate pathways as part of a continuum of mental health service provision.

36. This approach will also serve to avoid unnecessary or excessive bureaucracy associated with service delivery within local primary mental health support services.

37. This Order is considered central to the operation of the Measure, but there are some limited risks associated with making it: local determination of what will be included in the local mental health partners' joint scheme for the delivery of local primary mental health support services, and therefore locally determining what will be considered secondary mental health services, could lead to variation between different parts of Wales.

38. It could also be the case that an intervention offered as a treatment in relation to a person's mental health is delivered as part of a Part 1 local primary mental health support service in one area of Wales, but in another area it is not and is therefore delivered as a secondary mental health service. This would mean that in one area the requirements for the appointment of a care coordinator and production of a care plan would apply, along with the right to request assessment under part 3 when discharged from the service, and in the other it would not.

39. However, it is considered unlikely that local mental health partners would agree that the cornerstones of community mental health services for people with severe and enduring mental health problems would be delivered through a Part 1 scheme, and it is such specialist services that the requirements of Parts 2 and 3 are intended to support.

40. To further mitigate any risk the Welsh Government will issue further guidance to service providers in relation to this matter.

41. Article 4 of this Order will ensure that people who have previously received services which are the equivalent of secondary mental health services provided in Wales in other parts of the United Kingdom, but who are currently resident in Wales, receive the same right to request an assessment as individuals who have previously received secondary mental health services delivered in Wales. Examples may include individuals who have travelled to other parts of the United Kingdom for employment or on holiday and have required treatment from a community mental health team, or admission to a psychiatric hospital, or prisoners who have been in prison outside of Wales and whilst in custody have received secondary mental health services, such as Prison Inreach, or have needed to be admitted to a psychiatric hospital.

42. This Article also ensures that where an individual has moved to reside in Wales, having previously been resident elsewhere in the United Kingdom and having received services in that place which are the equivalent of secondary mental health services provided in Wales, they have the same right to request an

assessment as a former recipient of Welsh secondary mental health services. This Article will ensure equity of access for such individuals.

Costs and benefits

43. The costs associated with developing and delivering local primary mental health support services under Part 1 of the Measure, care and treatment planning under Part 2 and assessments of former users of secondary mental health services under Part 3 are set out in the Explanatory Memorandum to the Measure[2]. This Order will not impact on the costs set out in that document.

Costs and benefits of Option 1 (do nothing)

44. The potential costs to LHBs and local authorities in *not* making this Order arise from their being required to implement the care and treatment planning duties of Part 2 for local primary mental health support services. This would be likely to increase the time required for care and treatment planning, which would have the effect of reducing time and available resources for delivering interventions. Such a possible effect runs counter to the principle of proportionality for care and treatment planning as set out in the Code of Practice to Parts 2 and 3 of the Measure.

45. In relation to Part 3, costs may also arise if service providers are required to conduct assessments of individuals who have previously received services delivered as part of local primary mental health support services. Other potential costs relate to the inability of people who, whilst now living in Wales, have previously received secondary mental health services elsewhere in the United Kingdom: lack of entitlement to assessment could result in the possibility of potential for intervention being delayed, with more intensive and costly interventions perhaps being required if the individual's condition were to further deteriorate as a result of their not being able to access prompt assessment under the Part 3 provisions.

46. There are no discernable benefits in not making the Order.

Costs and benefits of Option 2 (make Order)

47. It is not anticipated that any additional costs beyond those set out in relation to Parts 1, 2 and 3 in the Explanatory Memorandum which accompanied the Measure would be incurred by local authorities or LHBs as a result of this Order.

48. The intended effect of the Measure is that the requirements of Part 2 should ensure effective coordination and planning of care for people with severe mental health problems whose complex care needs could not be met in a primary care setting, and that access to assessment under Part 3 would be available to

[2] http://www.assemblywales.org/bus-home/bus-legislation/bus-legmeasures/business-legislation-measures-mhs-2.htm

individuals who had received specialist services for severe or enduring mental health problems.

49. Providing entitlement to request an assessment to individuals currently resident in Wales who previously received secondary mental health services elsewhere in the United Kingdom is not expected to introduce a significant additional burden upon services.

Summary

50. **Option 2 (make Order)** best meets the Government's objectives.

Consultation

51. In winter 2011/12 the Welsh Government undertook a formal 12 week consultation on the Order. 36 written responses were received, including from Local Health Boards in Wales.

52. A detailed consultation report has been published on the Welsh Government's website, but a summary of the views received is set out in the following paragraphs.

53. Stakeholder opinion was divided in regard to whether the Order provided certainty about what would be considered secondary mental health services, with 50% of those who responded to the question believing that it would, and 50% disagreeing. Many respondents observed that such certainty would only be provided when local primary mental health support schemes had been agreed by LHBs and local authorities. Several respondents suggested that unless the Welsh Government issued clear guidance regarding those services it considered as appropriate for delivery as local primary mental health support services and those which it considered should more appropriately be delivered within secondary services, a 'postcode lottery' may emerge, with different services being provided in primary or secondary care in different areas.

54. By contrast, several stakeholders argued that it was correct that service providers should be able to determine for themselves those services which would be delivered within primary or secondary care. These respondents felt that local service planners and providers would be best-placed to understand the demographics, characteristics and demands of local populations and draw up local primary mental health support service schemes which were appropriate to those circumstances. A number of stakeholders also felt that service providers should not include services within their primary care scheme simply to avoid the care coordination and care and treatment planning requirements of Part 2 of the Measure. Several asked that the Welsh Government include a clear statement on this matter in its forthcoming guidance on primary/secondary mental health services.

55. The Welsh Government agrees that, ultimately, certainty as to which mental health services are to be delivered within secondary mental health services and which as part of local primary mental health support services will only be provided when local primary mental health support service joint schemes have been agreed for each LHB region by LHBs and local authorities. However, the Welsh Government is content that the approach proposed in the Order provides a workable mechanism whereby mental health service providers are able to determine at a local level which of the services they deliver are to be considered as secondary mental health services, and as such subject to the provisions of Parts 2 and 3 of the Measure. Consultation responses indicate that this approach has adequate support in principle, and recognises that many of the issues raised by respondents relate to uncertainty at the time of consultation as to which services might be subsequently be delivered with primary or secondary care in local areas under such arrangements.

56. On 20 March 2012, the Welsh Government published *Policy Implementation Guidance on Local Primary Mental health Support Services and Secondary mental Health Services for the Purposes of the Mental Health (Wales) Measure 2010 and Related Subordinate legislation*[3]. This document provides guidance to LHBs and local authorities as to what is meant by 'local primary mental health support services' and 'secondary mental health services' for the purposes of the Measure, and the subordinate legislation which underpins it; the principles which informed the development of the Measure and the aims the legislation is seeking to achieve, and examples of the types of services the Welsh Government would consider to be most appropriately delivered, and conditions which might most appropriately be managed, within primary and secondary care settings under Parts 1, 2 and 3 of the Measure.

57. Given that this guidance addresses many of the concerns raised by some stakeholders in their consultation responses, providing greater clarity and illustrative examples around primary and secondary services, and in the light of the fact that there was no majority against introducing the legislation (and that over 90% of respondents believed that the Order should be made), officials believe it is appropriate to lay the Order before the National Assembly for Wales for its consideration.

Competition assessment

58. The competition filter is required to be completed if the subordinate legislation affects business, charities and/or the voluntary sector. The filter is therefore not required in respect of this Order.

Post implementation review

59. Section 48 of the Measure places the Welsh Ministers under a duty to the review the operation of Measure, and to publish a report of the findings of the review.

[3] http://wales.gov.uk/topics/health/publications/health/guidance/measure/?lang=en

60. The report must be published no later than four years after the commencement of the principal provisions of Parts 1, 2, 3 and 4 of the Measure.

61. It is intended that the review relating to Parts 1, 2 and 3, will take account of this Order.

62. The reports of such reviews must be placed before the National Assembly for Wales, in accordance with section 48(9) of the Measure.

Constitutional and Legislative Affairs Committee Report

CLA143

Title: The Mink Keeping (Prohibition) (Wales) Order 2012

This Order, in exercise of the power granted by section 10 of the Destructive Imported Animals Act 1932, prohibits the keeping of mink in Wales.

Procedure: **Affirmative**

Technical Scrutiny

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

Merits Scrutiny

The following points are identified for reporting under Standing Order 21.3 in respect of this instrument at this stage:-

- the previous Order, prohibiting the keeping of Minks, lapsed in 2004 due to an administrative oversight. The prohibition that this Order seeks to introduce has not, therefore, been in force for around 8 years;
- the Welsh Government has not received any applications to keep mink in the last five years and they do not anticipate the introduction of this Order affecting any groups in Wales;
- there has been no consultation on this proposal and purportedly no public interest in the issue in the last five years;
- the main justification for introducing this Order is because not doing so could undermine efforts to eradicate mink from localised areas or the benefits that competition from otters is having on mink numbers and distribution.

The Committee is concerned that:

- no evidence has been provided to support the reason for introducing the Order. Furthermore, such evidence as there is (of the practical effect of there being no prohibition for the last 8 years) suggests that the need for the Order is now questionable;
- the Order is being introduced simply to regularise an administrative oversight that appears to have had no practical effect for at least 5 years (possibly 8).

The Committee agreed to the report to the Assembly under Standing Order 21.3:

- that the matter gives rise to a matter of public policy likely to be of interest to the Assembly; and
- that the proposed Order may now be inappropriate in view of changed circumstances since the lapsed 2004 Order was made.

Legal Advisers
Constitutional and Legislative Affairs Committee

May 2012

Order made by the Minister for Environment and Sustainable Development, one of the Welsh Ministers, laid before the National Assembly for Wales under section 10(1) of the Destructive Imported Animals Act 1932, for approval by resolution of the National Assembly for Wales.

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

2012 No. (W.)

ANIMALS, WALES

DESTRUCTIVE ANIMALS

The Mink Keeping (Prohibition) (Wales) Order 2012

EXPLANATORY NOTE

(This note is not part of the Order)

This Order, in exercise of the power granted by section 10 of the Destructive Imported Animals Act 1932 ("the Act"), prohibits the keeping of mink in Wales.

Section 10 of the Act provides that, in relation to an Order made pursuant to that section, the provisions of the Act apply as they apply to musk rats, subject to such exceptions and modifications as may be specified in the Order. In this Order, exceptions are made in relation to sections 5(2) and 6(1)(f) of the Act. Section 5(2) of the Act relates to the duty on occupiers of land to give notice of the presence on their land of mink not kept under a license. Section 6(1)(f) of the Act provides for an offence where an occupier of land fails to give such notice under section 5(2).

A regulatory impact assessment has not been produced for this Order as no impact on the costs of business or the voluntary sector is foreseen.

Order made by the Minister for Environment and Sustainable Development, one of the Welsh Ministers, laid before the National Assembly for Wales under section 10(1) of the Destructive Imported Animals Act 1932, for approval by resolution of the National Assembly for Wales.

WELSH STATUTORY INSTRUMENTS

2012 No. (W.)

ANIMALS, WALES

DESTRUCTIVE ANIMALS

The Mink Keeping (Prohibition) (Wales) Order 2012

Made *8 May 2012*

Laid before the National Assembly for Wales *8 May 2012*

Coming into force *1 June 2012*

The Welsh Ministers, being satisfied that by reason of the destructive habits of the non-indigenous mammalian species which are the subject of this Order it is desirable to prohibit or control the keeping of them and to destroy any which may be at large, and in exercise of the powers conferred by section 10(1) of the Destructive Imported Animals Act 1932(**1**) and now vested in them(**2**), make the following Order:

(**1**) 1932 c. 12; section 11(interpretation) was amended by S.I. 1992/3302.

(**2**) The functions of the Minister of Agriculture, Fisheries and Food under section 10 of the Act transferred to that Minister and the Secretary of State for Wales jointly by virtue of the Transfer of Functions (Wales) Order 1969 (S.I. 1969/388). Those functions, in so far as they are exercisable in relation to Wales, were transferred to the National Assembly for Wales by virtue of article 2 of, and Schedule 1 to, the National Assembly for Wales (Transfer of Functions) Order 1999 (S.I. 1999/672), and were vested in the Welsh Ministers by virtue of section 162 of, and paragraph 30 of Schedule 11 to, the Government of Wales Act 2006 (c. 32). The 1999 Order provides for an exception to the transfer of functions under section 10 of the Act where the exercise of the functions relates to importation of animals to which that Act relates but that exception is not relevant to this Order.

Title, application and commencement

1.—(1) The title of this Order is the Mink Keeping (Prohibition) (Wales) Order 2012.

(2) This Order applies in relation to Wales.

(3) This Order comes into force on 1 June 2012.

Interpretation

2. In this Order—

(a) "the Act" (*"y Ddeddf"*) means the Destructive Imported Animals Act 1932; and

(b) "mink" (*"minc"*) means the animal of the species *mustela vison*.

Prohibition on the keeping of mink

3.—(1) The keeping of mink is prohibited.

(2) In the application of the Act in relation to mink, the following are to be omitted—

(a) section 5(2) and,

(b) section 6(1), paragraph (f) and the reference to a penalty in the case of an offence under paragraph (f).

John Griffiths

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

8 May 2012

Explanatory Memorandum to The Mink Keeping Order (Wales) 2012.

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

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Mink Keeping Order (Wales) 2012.

John Griffiths

Minister for Environment and Sustainable Development

8 May 2012

1. Description

This Order prohibits the keeping of mink in Wales.

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

Section 10 of the Destructive Imported Animals Act 1932 sets out the procedure to be followed in relation to this SI; 'an order made under this section shall be of no effect until a resolution approving it has been passed by each House of Parliament' This means that the Welsh Ministers may make this Order, but that it can not be of effect until approved by resolution of the Assembly.

3. Legislative background

The Mink Keeping (Prohibition) (Wales) Order 2012 will be made under section 10 of the Destructive Imported Animals Act 1932. This Act regulates the keeping of certain specified imported animals that are considered destructive. The Act was originally introduced after muskrat established a breeding population in the United Kingdom following escapes from fur farms. Subsequently, the controls specified in the Act have been applied to other species by Orders issued under the Act. Currently, Orders apply to the muskrat, grey squirrel, coypu and non-indigenous rabbits.

Since fur farming was banned by the Fur Farming (Prohibition) Act 2000 only so called 'special licences' for the keeping of mink have been issued. These permit the keeping of mink for exhibition, or for purposes of scientific research or other exceptional purposes (Section 8(1) of the 1932 Act).

4. Purpose & intended effect of the legislation

The purpose of this legislation is to control the keeping of mink in Wales, as they are considered animals that are destructive to the natural environment under the Destructive Imported Animals Act 1932.

Due to earlier escapes from fur farms, mink have become widespread and well-established within the natural environment, and this has been identified as a major factor in the decline of the native water vole. De-regulating the keeping of mink is not considered appropriate at this time as it would undermine efforts to eradicate mink from localised areas.

It has been the long standing policy of the UK Government and Devolved Administrations to prohibit the keeping of mink, and the Mink Keeping (Wales) Order 2000 was introduced as part of this policy. However in 2004 this Order was allowed to lapse as a result of an administrative oversight. Introduction of the Mink Keeping (Wales) Order 2012 will ensure that the keeping of mink is prohibited across the United Kingdom.

The Welsh Government has not received any applications to keep mink in the last five years, thus it is anticipated that there are no groups in Wales who would be affected by the introduction of this Order.

5. Consultation

Consultation on this proposal was not conducted. It has been the long standing policy of the UK Government and Devolved Administrations to prohibit the keeping of mink, and the Mink Keeping (Wales) Order 2000 was introduced as part of this policy. De-regulating the keeping of mink could appear to undermine efforts to eradicate mink from localised areas or the benefits that competition from otters is having on mink numbers and distribution.

There has been no public interest in this issue in the last five years, and as such the Minister for Environment & Sustainable Development agreed that consultation on the re-introduction of the Mink Keeping Order was not necessary.

6. Regulatory Impact Assessment (RIA)

A Regulatory Impact Assessment has not been completed for this Order as it has no impacts on the cost to business.

CLA WJ 28

Inquiry into the establishment of a separate Welsh jurisdiction
Response from Mr Emyr Lewis and Professor Dan Wincott (Cardiff University)

MEMORANDUM TO THE CONSTITUTIONAL AND LEGISLATIVE AFFAIRS COMMITTEE OF THE NATIONAL ASSEMBLY'S INQUIRY INTO THE ESTABLISHMENT OF A SEPARATE WELSH JURISDICTION

Professor Dan Wincott

Blackwell Professor of Law and Society at Cardiff Law School
Co-Chair of the Wales Governance Centre, Cardiff University

Emyr Lewis

Partner, Morgan Cole Solicitors
Senior Fellow Wales Governance Centre, Cardiff University

Summary

1.1 Jurisdiction relates to the question of "Who has legal authority within a particular legal framework to do what in respect of what, whom and where?"

1.2 Within the framework of the UK constitution, there already exist a distinct Welsh legislative and executive jurisdiction, and in certain limited areas, judicial jurisdiction through distinct tribunals and other fora for particular types of cases.

1.3 The concept of jurisdiction within the UK is complex. Even the currently recognised jurisdictions can only be said to be "separate" up to a point.

1.4 There already exists such a thing as a body of law which applies to Wales. The differences between this and the law which applies in England are likely to increase over time.

1.5 It is essential that Courts in Wales decide cases on the basis of distinct Welsh Law and that Lawyers can advise and represent their clients on this basis.

1.6 There is a need to plan now for the increasing divergence that appears to be an inevitable consequence of political reality.

1.7 Whatever happens, lawyers advising clients in Wales and judges hearing cases in Wales must have the necessary knowledge of Welsh law.

1.8 Jurisdiction over only devolved matters, as in a federal state, would not be in accordance with the UK model, and could create intractable problems.

1.9 Detailed analysis is needed of how cross-border issues work between current UK jurisdictions, and how these might work for a Welsh jurisdiction and of the likely economic costs and benefits of a distinct Welsh jurisdiction.

1.10 If there were to be a distinct Welsh jurisdiction, the Northern Ireland model seems a suitable precedent. This would have implications for the Supreme Court.

2. The word "jurisdiction"

2.1 The word "jurisdicton" is capable of meaning several different things, and of being applied in several different contexts.

2.2 For instance, at one end of the scale, in international law, jurisdiction is spoken of as an aspect of the sovereignty of states. States are said to have legislative, executive or judicial jurisdiction in respect of their territory and their people. This means that they have the legal authority within the framework of international law, to make, to implement and to enforce binding laws which apply at least within their territory, and may apply in respect of their people outside their territory. In this context, jurisdiction is described as an aspect of the sovereignty of the state.

2.3 At the other end of the scale, in the context of Magistrates' Courts "jurisdiction" is used to describe the extent of the powers of the courts to hear and determine cases etc. So, magistrates are said to have no jurisdiction to hear criminal cases of particular kinds, which must be heard in the Crown Court. Magistrates' Courts in coastal areas have jurisdiction in respect of certain crimes committed on board ship. Before the law was changed in 2006, Magistrates' Courts had jurisdiction to hear civil cases only in relation to their local area.

2.4 If there is a general theme which runs through these uses of the word, it is the question "Who has legal authority within a particular legal framework to do what in respect of what, whom and where?"

2.5 So, if we look at Wales today, we can say that:

2.5.1 the Welsh Assembly has legislative jurisdiction by having legal authority to make laws relating to the subjects in Schedule 7 of the Government of Wales Act 2006; which apply only in relation to Wales and which do not extend beyond England and Wales;

2.5.2 the Welsh Ministers have executive jurisdiction by having legal authority to take executive action within Wales in respect of the areas devolved to them.

3. "Separate" Jurisdiction

3.1 In the context of recent developments in Welsh law, the word "jurisdiction" has tended to be used in the context of a "separate" or "distinct" legal jurisdiction for Wales, referring to the creation (or possibly, more accurately, re-establishment) of a distinct system of courts for Wales.

3.2 In considering jurisdiction, it is useful to bear in mind, however, that jurisdiction in the sense of legal authority to do things can be quite a complex and many-layered phenomenon. For instance, jurisdiction may be exclusive or not exclusive, conditional or unconditional.

3.3 So, for instance, the Welsh Assembly's legislative jurisdiction is not exclusive, since the UK Parliament retains concurrent power to legislate over all devolved areas (the requirement for Assembly consent if Parliament legislates is a matter of convention, not law). The Welsh Ministers' executive jurisdiction is in some cases exclusive, in others concurrent with UK Ministers and in others conditional on Treasury consent.

3.4 In the case of judicial jurisdiction, there is also variety and complexity.

3.5 In the Court system, the Courts of England and Wales, of Scotland and of Northern Ireland have exclusive jurisdiction over most cases which arise in the respective territories, but they are all subject to the ultimate authority of the Supreme Court of the United Kingdom, and all these courts are subject to, and can be overruled by, the European Court of Justice in certain cases.

3.6 Outside the Court system, in some areas, it can be said that a distinct Welsh jurisdiction already exists. In many areas, there are distinct Welsh Tribunals or other fora, with jurisdiction over Welsh cases. Some of these are administered by the Welsh Government, some are not. One tribunal has been created by legislation of the Welsh Assembly, and has no counterpart outside Wales.[1] There is no reason why other tribunals (or indeed arguably courts) cannot be created by the Welsh Assembly to resolve cases relating to matters within its legislative competence.

3.7 So it is important to recognise (1) that a jurisdiction for Wales would only be separate up to a point; and (2) in respect of certain limited cases, there is already a distinct Welsh jurisdiction.

4. A body of "Welsh law"

4.1 Many of the most strongly articulated arguments for and against introducing a distinct jurisdiction (including some of those quoted in the Committee's scoping paper) are based on principle. Our focus in the rest of this paper is largely on what appear to us to be practical aspects of the question. We consider it worthwhile nevertheless to address one argument of principle, namely that notwithstanding devolution there is only one law of England and Wales, and consequently there should be only one system of courts.

[1] See section 120 Welsh Language (Wales) Measure 2011

4.2 It is stated that in the UK there are three legal jurisdictions: (1) England and Wales, (2) Scotland and (3) Northern Ireland.[2] Each jurisdiction has its own body of law, and its own court system. In the case of Scotland, Scots law (and Courts) pre-dates the union, and differs in many fundamental respects from the law of England and Wales. In the case of Northern Ireland, there is less difference in substantive law. The separate Northern Ireland Courts have their origin in the Government of Ireland Act 1920, which effected the partition of Ireland. Previously there had been one system of courts in Ireland. Even after 1920, there remained an all-Ireland Court of Appeal.

4.3 A striking example of the way in which the twin issues (a discrete body of law and a separate court system) are brought together in discussions of a "separate" or "distinct" jurisdiction for Wales can be found in an extract from a joint Memorandum from the then Secretary of State for Wales and the then First Minister for Wales to the Welsh Affairs Committee, as quoted in paragraph 374 of the Explanatory Notes to the Government of Wales Act 2006. The extract (appended to this Note) explains that a "conferred powers" as opposed to a "reserved powers" model of legislative devolution is appropriate to Wales because England and Wales is (and implicitly should remain) a single jurisdiction. The link between separate laws and a separate jurisdiction is made explicit in the following passage:

If the Assembly had the same general power to legislate as the Scottish Parliament then the consequences for the unity of the England and Wales legal jurisdiction would be considerable. The courts would, as time went by, be increasingly called upon to apply fundamentally different basic principles of law and rules of law of general application which were different in Wales from those which applied in England. The practical consequence would be the need for different systems of legal education, different sets of judges and lawyers and different courts. England and Wales would become separate legal jurisdictions.

4.4 It is worth noting that the devolution dispensation in Wales has been subject to very rapid and far-reaching change since 1998 – and particularly since 2006. The evidence suggests that at the time of drafting the architects of the Government of Wales Act 2006 expected Part 3 to remain in force for a considerable period of time, as did many commentators. The Explanatory Notes might be read as referring to the highly original, and arguably idiosyncratic, systems of competence transfer and legislation created for Wales under Part 3 of the Government of Wales Act 2006 (at least in the early years of Schedule 5), but might be regarded as rather less persuasive in relation to Part 4. (Moreover, some commentary on the 'jurisdiction' question between 2006 and 2011 (and in particular the referendum on the switch from Part 3 to Part 4) may have been predicated on an assumption of Part 3 remaining in force for rather longer than it did.)

4.5 In the context of the present legislative powers of the National Assembly, the view expressed in the Explanatory Notes needs to be considered in the light of two significant aspects of Part 4 of the Government of Wales Act 2006 (which came into force after last year's referendum);

4.5.1 The Assembly can legislate in respect of matters which **relate to** subjects under headings in Schedule 7

4.5.2 This applies unless Schedule 7 **expressly excludes** a particular matter, or another part of the 2006 Act **expressly restricts or prohibits** the Assembly from legislating.

4.6 This means that the *basic principles of law and rules of law of general application* to which the Explanatory Note refers, and which it appears to consider immutable, can themselves be changed by a provision of an Act of the Assembly, provided the enactment in question relates to a Schedule 7 subject, and the change is not excluded by Schedule 7 or otherwise restricted or prohibited.

4.7 An example is given by the law in relation to the smacking of children.

4.7.1 Parents (and others *in loco parentis*, such as teachers) can avoid conviction for certain types of assault against children if the court accepts that what was happening was reasonable

[2] Although Himsworth submits that 'precise authority' for this proposition is 'difficult to cite' and that 'perhaps the most direct *statutory* reference is now to be found in s 41(1) of the Constitutional Reform Act 2005 (2007) MLR at 33

chastisement of the child. While the scope of the defence has been substantially restricted by Acts of Parliament, the defence still exists and can be said to be a *basic principle of law*, since it forms part of the Common Law of England and Wales.[3]

4.7.2 Under Heading 15 of Schedule 7 of the 2006 Act (Social Welfare), the Assembly has the power to make laws relating to "protection and well-being of children".

4.7.3 If it be accepted that an Act removing the defence of reasonable chastisement in all cases would relate to the protection and well-being of Children, then unless there is an express exclusion, prohibition or restriction which would prevent the Assembly from passing such an Act, the Assembly can do so. There is no such exclusion, prohibition or restriction. Other examples could be given where it would be possible for the Assembly to change *basic principles of law and rules of law of general application*.

4.8 It is generally accepted that the law which applies in Wales is already different from that which applies in England, and all the signs are that the differences will increase. If our analysis above is correct, the scope for divergence is perhaps greater than the architects of the 2006 Act envisaged. The adoption of a conferred powers model, as opposed to a reserved powers model, does not decrease the likelihood of a body of law emerging in Wales which is significantly different from the law which applies in England.

4.9 It should also be borne in mind, of course, that divergence is not driven by legislation in Cardiff only. Increasingly the UK Government is bringing forward in Parliament England-only legislation in areas where Wales has not seen the need to change the law.[4]

4.10 In the light of these developments, it does not appear to us to be a sustainable point of view to say that there is no "Welsh law" and no "English law", just one law of England and Wales that is substantively different either side of Offa's Dyke. It may be, as some commentators have suggested, that there comes a "tipping point" at which the degree of difference is such that one can speak of "Welsh law", and that the point has not yet been reached. That seems however to be more of a metaphysical than a practical approach to the question.

4.11 In our view, the practical question is not whether the law of England and Wales retains its mystic unity notwithstanding divergence, but whether there should be a distinct court system for Wales, and if so how should it operate. That, in our view, is what is meant by a distinct Welsh legal jurisdiction.

5. Divergent laws and a jurisdiction

5.1 What might the implications of a distinct body of Welsh Law be for the legal system? Whether it be called a separate Welsh jurisdiction or in the words of Jack Straw "organic development of greater autonomy of the Welsh system" at a minimum, it is essential that Courts in Wales decide cases on the basis of distinct Welsh Law – and that Lawyers can advise and represent their clients on this basis as well. From the perspective of individual citizens of or visitors to Wales, it must be the case that they are entitled to expect that the lawyers who advise them and the judges who hear their cases are well versed in the law which applies.

5.2 In principle, this might happen within a single 'England and Wales' jurisdiction. However, even within this system – and before the shift to Part 4 of Government of Wales Act 2006 – a series of changes to the organisation/administration of the Courts has delineated Wales increasingly clearly as a distinct territory (the changes are described nicely in the call for evidence). Furthermore, in terms of the day-to-day lives of many legal practitioners and their clients, there is already a material difference in many

[3] e.g. *R v Griffin* (1869) 11 Cox CC 402

[4] The legal consequences may be felt in unanticipated areas, which have nothing to do with devolved legislative competence. For instance, it is arguable that recent and proposed reforms in the health system in England are turning health service bodies into economic operators who compete in a market place, with potentially far-reaching consequences for how the law of public procurement and state aid affects them and the NHS in England generally.

areas between what happens in Wales and what happens in England. Legislative momentum and/or inertia in Cardiff and London are likely to increase the difference.

5.3 The possibility exists that some elements of a Welsh Judiciary might emerge as judges working within these territorially delineated Courts decide on matters of distinctive Welsh Law. Should this happen in a gradual, ad hoc and unmanaged manner, that is unlikely to be satisfactory. In our view it is preferable to plan now for the increasing divergence that appears to be an inevitable consequence of political reality.

6. Legal Training, Education and the Professions

6.1 Regardless of whether a distinct court system is developed, lawyers advising clients in Wales, and judges hearing cases in Wales will need to be able to show that they are competent to do so.

6.2 If the concepts of a unified jurisdiction and single law of England and Wales hold sway, it seems to follow that the law which applies in Wales (and how it applies) should be as much part of the training of all professional lawyers in England and Wales as is the law which applies in England (and how that applies).

6.3 Should the unified jurisdiction of England and Wales be maintained, there will be nonetheless a need to ensure that lawyers practicing in Wales can demonstrate competence in the law which applies in Wales, including primary law, and have access to appropriate legal training and education. This need will grow as and when the substance of the laws applying in Wales and those applying in England diverge. A test of competence to practice as a lawyer in Wales might become necessary. Similar considerations will apply to the need for special training for judges sitting in Wales

6.4 If there were to be established a distinct Welsh jurisdiction, all lawyers qualified in England and Wales at the time of its creation could continue to work in both jurisdictions, and similarly all England and Wales judges might sit in Wales.

6.5 The creation of a distinct jurisdiction for Wales would raise questions about the qualifications required to practice as a lawyer within it. There would also be a question about whether lawyers could normally continue to practice on both sides of Offa's Dyke after the creation of a distinct jurisdiction in Wales. Similar considerations would apply to the appointment of judges.

6.6 As far as the academic stage of legal education is concerned, there is no reason why the arrangements which currently exist in respect of Northern Ireland should not apply to Wales. This academic stage of the qualifying law degree is basically the same. Students with degrees from law schools in England and Wales are qualified to enter the professional stage of legal education in Northern Ireland (although they must have studied the Law of Evidence, a criterion which would not apply in respect of Wales). The implications of a distinct jurisdiction in Wales for the professional stage of legal education require further consideration.

7. Distinct Jurisdiction over devolved areas only?

7.1 Most Federal States within the common law family (the US, Canada, Australia) have both Federal and State jurisdictions and there are Courts of each of these jurisdictions that operate within every State.

7.2 The system of jurisdictions in operation within the UK is different, in that (aside from the Supreme Court of the United Kingdom – and previously the Appellate Committee of the House of Lords and, for some purposes, the Judicial Committee of the Privy Council) each of these jurisdictions in effect deals with all matters of law within its defined territory (whether or not legislative competence over that issue has been devolved. Indeed, in the recent era, the jurisdictions have existed without any devolution of legislative competence).

7.3 A possible objection to the creation of a distinct jurisdiction (in the sense of a Court system) in Wales might be that it would not be appropriate for issues over which the National Assembly did not have legislative competence – i.e. non-devolved issues – potentially to be decided differently in the Welsh

courts and in the English ones. On the other hand, precisely that possibility exists at the moment in both Scotland and Northern Ireland.[5]

7.4 Furthermore the prospect of squabbles over which court should have jurisdiction seems more likely where jurisdiction is thematically rather than territorially defined. This is even more so given that the conferred powers model of legislative devolution means that it is by no means clear what is excluded from the Assembly's legislative competence.

7.5 It is also conceivable that there could exist separate exclusive jurisdiction in respect of certain types of cases. It could be argued for instance that, even if nothing else happens, the Administrative Court in Wales should have exclusive jurisdiction over judicial review cases in Wales. The current arrangements require cases which relate to Wales but are issued in London to be transferred to Wales, but it can take a disproportionately long time before the papers reach a judge who makes a decision on the transfer.

8. Barriers and Costs - the need for detailed analysis

8.1 In order to understand properly the implications of a distinct Welsh jurisdiction, there is a lot of detailed work that needs to be done. In our view, the two areas which require the closest attention are cross-border issues and costs.

8.2 Jack Straw, as quoted in the Committee's scoping paper, has spoken of "enormous practical implications" of a move to a separate Welsh jurisdiction. The issues he raises are largely technical matters relating to the relationship between the courts in England (where, of course, a new jurisdiction will also be created) and those in Wales. He is undoubtedly right in rasing the issues. Once more, however, there are precedents. There is no reason in principle why cross-border issues between Wales and other jurisdictions within the UK should not be treated in the same way as those between the three existing jurisdictions. We need to understand how these work, and whether and to what extent they would need to apply differently to Wales, bearing in mind for instance that Wales' land border with England is longer and more densely populated than Scotland's.

8.3 In relation to costs, there is a need for a detailed analysis of the current economics of the administration of justice in England and Wales. Suitable methods for allocating current expenditure equitably between England and Wales would need to be considered in order to determine how much better or worse off Wales might be if it had its own court system with its own budget. To what extent might savings in London overheads be outweighed by loss of economies of scale? To what extent might it be possible to direct funding to issues such as ensuring access to justice to people in remote and deprived communities?

9. The possible components of a Welsh jurisdiction and the impact on the Supreme Court

9.1 If the Northern Ireland model were to be followed, there would be a Welsh Lord Chief Justice and Court of Appeal, mirroring the position in England and Wales. Equity suggests, and we would agree, that Wales should have the same model, but it need not necessarily be so. We consider, however that a Welsh Law Commission would be essential, in that it would be able to prioritise consideration of those issues which are important for the people of Wales.

9.2 A further set of questions is raised about The Supreme Court of the UK. There is some debate in Scotland about whether this Court (particularly in bringing together roles played by the House of Lords and the Judicial Committee of the Privy Council) is (or is becoming) a UK Court, as its name might suggest (whereas the House of Lords was understood to sit as a Scots Law court in relation to Scottish cases). At present the membership of the Supreme Court is usually understood to include members representing each of the three jurisdictions (one Northern Ireland and two Scots as well as the "England and Wales" judges). Should a Welsh jurisdiction be created, there might be a presumption that there

[5] Indeed, in the case of Scotland, Himsworth makes a powerful argument that the jurisdictional difference as between 'Scotland' and 'England and Wales' has generated instances in which different forms of citizenship rights have emerged from the same non-devolved law on either side of Hadrian's Wall.

should also be a Welsh judge on the Supreme Court. It could also be argued that the existence, and over time the growing significance, of a distinct body of Welsh primary law might suggest that there should in any event be a judge with expertise in Welsh law on the Supreme Court.

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol
Constitutional and Legislative Affairs Committee

Cynulliad Cenedlaethol Cymru
National Assembly for Wales

John Griffiths
Minister for Environment and
Sustainable Development
5th Floor
Tŷ Hywel
Cardiff Bay
CF99 1NA

26 April 2012

Dear Minister

CLA124 - The Controlled Waste (England and Wales) Regulations 2012

The Constitutional and Legislative Affairs Committee considered the above Statutory Instrument at its meeting on 23 April 2012 and agreed that I should bring to your attention the Committee's report made under Standing Order 21.3 on the merits of the Instrument.

The Committee agreed to invite the Assembly to pay special attention to this Instrument on the grounds "that 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 24 April 2012 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.

Additionally, the Committee noted that the Regulations will allow local authorities to charge for the collection and disposal of waste arising from non-domestic properties (with some exceptions) whereas now they only charge for collection. I would be grateful if you could clarify why the Regulations are following the negative rather than the affirmative procedure on this occasion despite the fact that they introduce a new type of charge.

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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

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

Llywodraeth Cymru
Welsh Government

Eich cyf/Your ref: CLA 124
Ein cyf/Our ref: SF/JG/1573/12

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4 May 2012

Dear David,

CLA124 - The Controlled Waste (England and Wales) Regulations 2012

Thank you for your letter of 26 April regarding the Constitutional and Legislative Affairs Committee report on the Controlled Waste Regulations 2012. You have asked me to consider the report and to respond to the points made.

I note the general point on merits scrutiny and that the draft instrument gives rise to issues of public policy likely to be of interest to the Assembly. With regard to scrutiny, the proposals were of course subject to full public consultation. The response from local authorities in particular indicated that it was necessary to bring the legislation up to date and address the anomaly whereby certain waste producers were in effect being provided by a free waste disposal service at the expense of local tax payers. The changes which give local authorities the power to charge for these services if they think it appropriate, will also encourage waste producers to reduce the amount of waste they send for disposal.

On the other two matters regarding the instrument being made in both English and Welsh and following the negative rather than affirmative procedure please see my advice as follows. In relation to the technical point under Standing Order 21.2 (ix), that the instrument was not made bilingually, the regulations update earlier joint England and Wales regulations. As European requirements to manage waste sustainably in accordance with the waste hierarchy and the issues facing local authorities in Wales are substantially the same as in England a decision was made to revise the regulations on a composite basis. The regulations are therefore subject to approval by both the National Assembly for Wales and by Parliament. It was therefore not considered reasonably practicable for this Instrument to be made bilingually.

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Llinell Ymholiadau Cymraeg 0845 010 4400
Correspondence.John.Griffiths@wales.gsi.gov.uk

In relation to the question raised in the penultimate paragraph of your letter, seeking clarification as to why the negative Assembly procedure was followed, the regulations were made in reliance on enabling powers conferred by both a designation of the Welsh Ministers (in relation to the prevention, reduction and management of waste) under section 2(2) of the European Communities Act 1972 (ECA1972), and powers exercisable by the Welsh Ministers, under sections 45(3), 75(7)(d) and (8), and 96(2)(b) of the Environmental Protection Act 1990 (EPA1990).

The provision to introduce the ability of waste collection authorities to charge for disposal of waste from certain sources was enacted solely in reliance on the enabling powers in the EPA1990, specifically section 75(8). Section 161 of that Act (Regulations, orders and directions), in effect requires that a statutory instrument containing regulations under that Act, is to be subject to the negative procedure. The 1990 Act does not, therefore, provide for any choice in relation to Assembly procedure.

The part of the regulations made under the powers under section 2(2) ECA is a relatively minor transposition of certain provisions of the Waste Framework Directive 2008, for example, in relation to animal by-products as being a type of waste excluded from the scope of the Directive. Whilst Welsh Ministers in exercise of powers pursuant to a designation under section 2(2) of ECA 1972 have a choice as to the Assembly procedure in the circumstances it was considered appropriate to follow the negative procedure in relation to these regulations.

Yours sincerely,

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

Cynulliad Cenedlaethol Cymru
National Assembly for Wales

Constitutional and Legislative Affairs Committee

Report: CLA(4)-10-12 : 14 May 2012

The Committee reports to the Assembly as follows:

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

Negative Resolution Instruments

CLA138 – The Fire and Rescue Authorities (Improvement Plans) (Wales) Order 2012
Procedure: Negative.
Date made: 21 April 2012.
Date laid: 25 April 2012.
Coming in to force date: 21 May 2012

CLA139 – The Assembly Learning Grants and Loans (Higher Education) (Wales) (No.2) (Amendment) (No.2) Regulations 2012
Procedure: Negative.
Date made: 26 April 2012.
Date laid: 27 April 2012.
Coming in to force date: 18 May 2012

CLA140 – The Civil Enforcement of Parking Contraventions (County of Ceredigion) Designation Order 2012
Procedure: Negative.
Date made: 29 April 2012.
Date laid: 1 May 2012.
Coming into force date: 4 June 2012

CLA141 – The Food Additives (Wales) (Amendment) and the Extraction Solvents in Food (Amendment) (Wales) Regulations 2012
Procedure: Negative.
Date made: 27 April 2012.
Date laid: 2 May 2012.
Coming into force date: 23 May 2012

Affirmative Resolution Instruments

None

Instruments that raise reporting issues under Standing Order 21.2 or 21.3

Negative Resolution Instruments

None

Affirmative Resolution Instruments

None

Other Business

Committee Inquiries: Inquiry into the establishment of a separate Welsh jurisdiction

The Committee took oral evidence from Professor R. Gwynedd Parry, Professor of Law and Legal History, Director of the Hywel Dda Institute, Swansea University.

Resolution to Meet in Private

In accordance with Standing Order 17.42(vi) the Committee resolved to exclude the public from the remainder of the meeting to discuss the evidence submitted thus far on the Inquiry into the establishment of a separate Welsh jurisdiction.

David Melding AM
Chair, Constitutional and Legislative Affairs Committee

14 May 2012

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

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