

Constitutional Affairs Committee

Report: CA(3)-07-11: 17 March 2011

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Time: 9.30 am

Venue: Committee Room 2, Senedd

Assembly Members in attendance

Janet Ryder, North Wales (Chair)
Alun Davies, Mid and West Wales
William Graham, South Wales East
Rhodri Morgan, Cardiff West
Kirsty Williams, Brecon and Radnorshire

Apologies.

There were no apologies.

The Committee reports to the Assembly as follows:

Instruments and Draft Instruments in respect of which the Assembly is not invited to pay special attention under Standing Order 15.2 or 15.3

Instruments subject to annulment pursuant to a resolution of the Assembly (Negative Procedure)

CA547 - The Recycling, Preparation for Re-use and Composting Targets (Definitions) (Wales) Order 2011

Procedure: Negative.

Date made: 25 February 2011.

Date laid: 1 March 2011.

Coming into force date: 30 March 2011

CA548 - The Marine Licensing (Application Fees) (Wales) Regulations 2011

Procedure: Negative.

Date made: 25 February 2011.

Date laid: 1 March 2011.

Coming into force date: 6 April 2011

CA549 - The Marine Licensing (Register of Licensing Information) (Wales) Regulations 2011

Procedure: Negative.

Date made: 25 February 2011.

Date laid: 1 March 2011.

Coming into force date: 6 April 2011

CA550 - The Marine Licensing (Exempted Activities) (Wales) Order 2011

Procedure: Negative.

Date made: 25 February 2011.

Date laid: 1 March 2011.

Coming into force date: 6 April 2011

CA554 - The Food (Jelly Mini-Cups) (Emergency Control) (Wales) (Revocation) Regulations 2011

Procedure: Negative

Date made: 2 March 2011

Date laid: 7 March 2011

Coming into force date: 31 March 2011.

CA555 - The Official Feed and Food Controls (Wales) (Amendment) Regulations 2011

Procedure: Negative

Date made: 2 March 2011

Date laid: 7 March 2011

Coming into force date: 1 April 2011

CA558 - The Home Energy Efficiency Schemes (Wales) Regulations 2011

Procedure: Negative.

Date made: 6 March 2011.

Date laid: 8 March 2011.

Coming into force date: 1 April 2011

CA559 - The Food Additives (Wales) (Amendment) Regulations 2011

Procedure: Negative

Date made: 5 March 2011.

Date laid: 8 March 2011.

Coming into force date: 31 March 2011

CA560 - The Cardiff and Vale College (Incorporation) Order 2011

Procedure: Negative.

Date made: 7 March 2011.

Date laid: 8 March 2011.

Coming into force date: 8 April 2011

CA561 - The Cardiff and Vale College Further Education Corporation (Government) Regulations 2011

Procedure: Negative.

Date made: 7 March 2011.

Date laid: 8 March 2011.

Coming into force date: 8 April 2011

CA562 - The Higher Education Act 2004 (Relevant Authority) (Designation) (Wales) Regulations 2011

Procedure: Negative.

Date made: 7 March 2011.

Date laid: 8 March 2011.

Coming into force date: 31 March 2011

CA569 - The Tuberculosis (Wales) Order 2011

Procedure: Negative.

Date made: 8 March 2011.

Date laid: 9 March 2011.

Coming into force date: 31 March 2011

Draft Instruments subject to approval pursuant to a resolution of the Assembly (Affirmative Procedure)

CA544 - The Marine Licensing (Appeals Against Licensing Decisions) (Wales) Regulations 2011

Procedure: Affirmative.

Date made: Not stated.

Date laid: 1 March 2011.

Coming into force: 6 April 2011

CA545 - The Marine Licensing (Notices Appeals) (Wales) Regulations 2011

Procedure: Affirmative.

Date made: Not stated.

Date laid: 1 March 2011.

Coming into force: 6 April 2011

CA546 - The Marine Licensing (Civil Sanctions) (Wales) Order 2011

Procedure: Affirmative.

Date made: Not stated.

Date laid: 1 March 2011.

Coming into force: 6 April 2011

CA563 - The Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011

Procedure: Affirmative.

Date made: 2011.

Date laid: Not stated.

Coming into force: In accordance with regulation 1(2)

Instruments not subject to either approval or annulment (No Procedure)

CA552 - Welsh Forms of Oaths and Affirmations (Government of Wales Act 2006) (Amendment) Order 2011

Procedure: No Procedure.
Date made: 1 March 2011.
Date laid: 3 March 2011.
Coming into force: 30 March 2011

Instruments and Draft Instruments in respect of which the Assembly is invited to pay special attention under Standing Orders 15.2 and/or 15.3

Instruments subject to annulment pursuant to a resolution of the Assembly (Negative Procedure)

CA553 - The Animal By-Products (Enforcement) (Wales) Regulations 2011

Procedure: Negative.
Date made: 2 March 2011
Date laid: 3 March 2011
Coming into force: 4 March 2011

CA570 - The Badger (Control Area) (Wales) Order 2011

Procedure: Negative.
Date made: 8 March 2011.
Date laid: 9 March 2011.
Coming into force date: 31 March 2011

Draft Instruments subject to approval pursuant to a resolution of the Assembly (Affirmative Procedure)

CA556 - The Sunbeds (Regulation) Act 2010 (Wales) Regulations 2011

Procedure: Affirmative
Date made: Not stated
Date laid: Not stated
Coming into force date: 31 October 2011

CA564 - The Equality Act 2010 (Specification of Relevant Welsh Authorities) Order 2011

Procedure: Affirmative.
Date made: 2011.
Date laid: Not stated.
Coming into force: In accordance with article 1.

CA557 - The Recycling, Preparation for Re-use and Composting Targets (Monitoring and Penalties) (Wales) Regulations 2011

Procedure: Affirmative
Date made: Not stated
Date laid: 7 March 2011
Coming into force date: 30 March 2011

CA565 - The Government of Wales Act 2006 (Commencement of Assembly Act Provisions, Transitional and Saving Provisions and Modifications) Order 2011

Procedure: Affirmative.

Date made: 2011.

Date laid: Not stated.

Coming into force: 5 May 2011

The Committee agreed Reports under S.O.15.2 and S.O.15.3 on these statutory instruments, which are attached as Annexes 1-5.

Other Business

Oral Evidence from the Counsel General and Leader of the Legislative Programme John Griffiths AM

The Committee received an update from the Counsel General and Leader of the Legislative Programme John Griffiths AM in respect of his Review of Legislative Procedures and other relevant issues. The Counsel General was accompanied by Jeff Godfrey, Director of Legal Services, and Marion Stapleton, Head of the Government Business Unit

Resolution to Meet in Private

In accordance with Standing Order 10.37(vi) the Committee resolved to exclude the public from the remainder of the meeting to discuss the evidence on the update of the Counsel General's Review of the Legislative Procedures and other matters.

Janet Ryder AM

Chair, Constitutional Affairs Committee

17 March 2011

Annex 1

Constitutional Affairs Committee

(CA(3)-07-11)

CA553

Constitutional Affairs Committee Report

Title: The Animal By-Products (Enforcement) (Wales) Regulations 2011

Procedure: Negative

These Regulations enforce, in Wales, Regulation (EC) No. 1069/2009 of the European Parliament and of the Council on laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No. 1774/2002 (“the EU Control Regulation”). These Regulations also enforce, in Wales, Regulation No. 142/2011 implementing Regulation (EC) No. 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and implementing Council Directive 97/78/EC as regards certain samples and items exempt from veterinary checks at the border under that Directive (“the EU Implementing Regulation”) that provides technical supplementation of those requirements of the EU Control Regulation.

Technical Scrutiny

Under Standing Orders 15.2 the Assembly is invited to pay special attention to the following instrument:-

1. Regulation 24 (Powers of entry and additional powers) provides for an authorised person to enter premises at all reasonable hours for the purpose of ensuring the compliance of the EU Control Regulation, the EU Implementing Regulation and these Regulations. “Premises” are defined within these Regulations as including “any domestic premises”. Regulation 24 does not state either expressly or by way of implication that a warrant pursuant to regulation 25 must be applied for before the power of entry is exercised under regulation 24. Consequently, an authorised person appears to have the power to enter domestic premises without applying for a warrant under regulation 25.

1.1 The absence of a safeguard to apply for a warrant before an authorised person may enter domestic premises may constitute an infringement of Article 8 of the European Convention of Human Rights (“ECHR”) which provides for the right to respect for private and family

life, and home and correspondence and section 81 of the Government of Wales Act 2006 (“GOWA”), which states that Welsh Ministers have no power to make subordinate legislation which is incompatible with any of the Convention Rights.

These Regulations raise issues similar to those reported by the Committee in relation to the Eggs and Chicks (Wales) Regulations 2010 (“the Eggs Regulations”), regarding the possibility of entry without a warrant. These Regulations and the Eggs Regulations can be compared with the Eggs and Chicks (Wales) Regulations 2009 which contained no similar provision, as the 2009 Regulations relied on the power of entry contained in section 32 of the Food Safety Act 1990, which contained the safeguard of a requirement to obtain a warrant from a magistrate who had to be satisfied of certain requirements before the power of entry could be exercised. It is not apparent why the power of entry provision in these Regulations has no equivalent safeguard, and why the omission of such a safeguard has occurred Standing Order 15.2 (i) that there appears to be doubt as to whether it is *intra vires*). .

See further reporting point 1 under Standing Order 15.3 which deals with merits reporting points.

(Alternatively, regulation 25 may have been intended to provide such a safeguard, but the absence of a clear explanation on the face of the Regulations would constitute defective drafting reportable under Standing Order 15.2 (vi).

2. Paragraph 60 of Schedule 2 (Consequential Amendments) seeks to amend the Waste (England and Wales) Regulations 2011 (“the 2011 Regulations”). The 2011 Regulations are currently in draft form and have not yet been laid before Parliament or the National Assembly for Wales under section 2 (8) and (9) (d) and (e) of the Pollution Prevention and Control Act 1999, para 2 (2) of Schedule 2 to the European Communities Act 1972 and section 59 (3) of the Government of Wales Act 2006 for approval by resolution, and consequently have not yet been made as a UK draft statutory instrument.

2.1 Section 14 of the Interpretation Act 1978 states that where an Act confers power to make subordinate legislation, it implies unless the contrary intention appears, a power to...amend any instrument made under the power. However as 2011 Regulations are in draft form only, and have yet to be laid or made, it is doubtful whether such a power could be implied in this case, and consequently that the 2011 Regulations can be amended before properly being laid and made as a statutory instrument.

(Standing Order 15.2 (i) and (ii) that there appears to be doubt as to whether it is intra vires; and that it appears to make unusual or unexpected use of the powers conferred by the enactment under which it is made or to be made).

3. These Regulations are provided in English only.

(Standing Order 15.2 (ix) that it is not made or to be made in both English and Welsh).

4. It is unclear from regulation 8 (Collection centres for feeding in relation to Article 18 (1) of the EU Control Regulation), due to the lack of clarity of missing text, whether “a processing plant for Category 2 material is authorised as a collection centre for Category 2 material” for “the purposes of Article 18 (1) of the EU Control Regulation...”

(Standing Order 15.2 (vi) that its drafting appears to be defective or it fails to fulfil statutory requirements).

5. Paragraph (a) of Regulation 12 (Notifications of competent authority in respect of registration), does not read correctly and consequently lacks clarity, failing to confirm effective notification provisions concerning the operator.

6. Paragraph 1 of regulation 16 (Appeals procedure), erroneously refers to a “notification” being made in regulation 15 (2), as opposed to a “decision”.

(Standing Order 15.2 (vi) that its drafting appears to be defective or it fails to fulfil statutory requirements).

7. Sub-paragraph (b) paragraph (1) of regulation 21 (Enforcement authority), refers to “the 1984 Act” (which is only referred to once) and without being defined until paragraph (6), which appears on the subsequent page. Consequently, given that the 1984 Act is only referred to once and is defined on the subsequent page, the reference to the Act as “the 1984 Act” is superfluous and the definition could be provided the first time it appears in order to provide clarity to the reader.

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirements).

8. Schedule 1 (Animal By-Product Requirements), paragraphs 9 and 10, refer to “Registration of operators, establishments and plants” and “Approval of establishments and plants” respectively, when the provisions should refer to “Registration of operators, establishments

or plants” and “Approval of establishments or plants” respectively in order properly to reflect the titles of Articles 23 and 24 of the EU Control Regulation.

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirements).

9. Schedule 1 (Animal By-Products Requirements), paragraph 11 refers to “General hygiene conditions” when the correct title of Article 25 of the EU Control Regulation to which it refers is “General hygiene requirements”.

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirements).

10. Column 3 of Paragraph 23 (Controls for dispatch) of Schedule 1 (Animal By-Product Requirements), erroneously refers to the EC Control Regulation when the Articles to which column 3 refers (Articles 11, 12 and 31 respectively) actually pertain to the EC Implementing Regulation.

11. Paragraph 17 (b) of Schedule 2 (Animal By-Products Requirements) which makes amendments to the Products of Animal Origin (Import and Export) Regulations 1996 (“the Animal 1996 Regulations”), refers to paragraph 15 being the requisite paragraph which deals with wild game, when the title of the paragraph within the 1996 Regulations that deals with wild game is 13. The paragraph within Schedule 3 of the 1996 Regulations which deals with wild game is incorrectly numbered 13 when it should already be numbered 15, so in the first instance the paragraph needs amendment so that it is correctly numbered 15 before the current amendment proposed by regulation 17 (b) in the current Regulations will operate effectively.

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirement).

12. Paragraph 19 of Schedule 2 of these Regulations which amends the Foot and Mouth Disease (Wales) Order 2006 (“the 2006 Order”), refers to an insertion within article 2 (1) (interpretation) of the 2006 Order, when the correct article within the 2006 Order which deals with the interpretation provisions is article 3.

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirement).

13. The form of wording which paragraph 20 of Schedule 2 to these Regulations states is required to be substituted by a new form of wording within article 26 (slaughter; control of faecal material) of the 2006 Order does not already exist in its entirety within article 26.

Paragraph 20 states that “point 5 of Section II in Part A of Chapter III of Annex VIII to Regulation (EC) No. 1774/2002 of the European Parliament and of the Council laying down health rules concerning animal by-products not intended for human consumption, as amended” is the current form of wording within article 26 when the correct form of wording reads as “point 5 of Section II in Part A of Chapter III of Annex VIII to Regulation (EC) No. 1774/2002 and under the authority of a licence granted by the National Assembly of Wales.”

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirement).

14. Paragraphs 21 to 23 of Schedule 2 to these Regulations which substitute a form of wording for a new form of wording within the 2006 Order refers to the form of wording to be substituted “as amended”. For example paragraph 21 substitutes “Regulations (EC No. 1774/2002, as amended” when the words “as amended” do not exist within article 27 (2) (c) (slaughter: isolation of things liable to spread disease). Consequently, the aims to be achieved by the substitution will not be met. Regulation (EU) No. 1069/2009 which substitutes EC No. 1774/2002 when inserted will not be inserted “as amended”.

Substitutions of this nature occur on nine occasions within the 2006 Order and due to the inaccuracy will fail on each occasion.

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirement).

15. Paragraph 27 of Schedule 2 to these Regulations which amends the Animals and Animal Products (Import and Export) (Wales) Regulation 2006 (“Animal Import and Export Regulations 2006”) substitutes a new provision for paragraph 7 (Animal waste) within Part 1 of Schedule 3 of the Animal Import and Export Regulations 2006. The new provision to be substituted is erroneously numbered paragraph 8, when as it is substituting paragraph 7 it should also be numbered 7.

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirement).

16. Paragraph 41 of Schedule 2 to these Regulations refers to sub-paragraph (1) within paragraph (2) of article 14 of the Avian Influenza (H5N1 in Poultry) (Wales) Order 2006 (“Avian 2006 Order”) which is to be substituted for the exiting paragraph 2 of article 14. Sub-paragraph 2 states that a veterinary inspector or an inspector acting under the direction of a veterinary inspector may not grant or direct the grant of a licence under sub-paragraph (1)...”. Sub-paragraph (1) of paragraph (2) of article 14, does not refer to the granting or the directing of the

granting of licences, and so the reference to sub-paragraph (1) is incorrect.

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirement).

17. Schedule 3, column 1 of these Regulations refers to the Animal By-Products (Wales) Regulations 2006 to be revoked. Consequently it is not known what Regulations it is intended are to be revoked.

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirement).

18. The Products of Animal Origin (Third Country Imports) (Wales) Regulations 2006 (S.I. 2006/376"), are not in existence or/and the title and the S.I. reference is inaccurate. S.I. 2006/376 refers to the Penalty Charges (Exemption from Criminal Proceedings) Regulations (Northern Ireland) 2006, and the Stirling (Electoral Arrangements) Order 2006 respectively. Consequently it is not certain what Regulations the provision is intended to revoke.

(Standing Order 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirement).

Merits Scrutiny

Under Standing Order 15.3 the Assembly is invited to pay special attention to the following instrument:-

1. Power of entry:-Human Rights Implications

This reporting point is based on the assumption that regulations 24 and 25 were intended to be drafted as they appear. If the intention was to make regulation 24 subject to regulation 25, the problem lies with the drafting rather than the intention, and the drafting should be corrected before the power is misused.

The carrying out of a search on a private dwelling house without a warrant pursuant to regulation 24 of these Regulations must be legitimate in order to secure the aim to be achieved. The power of entry within regulation 24 does not make the entry conditional upon a warrant being applied for within regulation 25, and does not require notice to be given to an occupier of a dwelling-house beforehand either. This provision can be compared with the Eggs and Chicks (Wales) Regulations 2010 where at least a notice period of 24 hours must be given to the occupier, however even in that scenario if the occupier was not present at the premises when notice was served, then it was possible that no notice may be received by the occupier

prior to an entry being carried out, which would be tantamount to a power of entry demanded as of right, as in these Regulations.

1.2. Is the entry and intrusion of privacy proportionate to the legitimate aim being pursued? The legitimate aim being pursued would be ensuring compliance with the Regulations, and therefore the prevention of a crime. A person guilty of contravening regulation 17 (1) (Offence in respect of EU Control Regulation) and 18 (Offence of obstruction) under regulation 20 would be liable on summary conviction to a fine not exceeding the statutory maximum or to imprisonment not exceeding three months or both; or on conviction on indictment, to a fine or to imprisonment for a term not exceeding two years, or both.

1.3 Consequently is a power of entry into a dwelling house without a warrant and without notice proportionate to the severity of the crime, for example the obstruction of an authorised person? Compare, for example the situation where Police can only enter premises without a warrant if a serious or dangerous incident has taken place, such as a breach of the peace or prevention thereof, enforcing an arrest warrant, arresting a person in connection with certain offences, recapturing someone who has escaped from custody and save life or prevent serious damage to property.

1.4. The Committee may wish to consider the following:-

The Code of Practice under the Powers of Entry Bill which applied to private premises as well as business premises stated that “Any exercise of a power of entry to private property is likely to involve a conflict with the right to private life guaranteed by Article 8 of the ECHR.” A power of entry without consent should only be used when it is necessary to achieve its purpose, and the way in which the power is used must be proportionate to that purpose. The Bill has not become law, but it was intended that the Bill provide for the regulation of the power of entry in respect of both specified primary and secondary legislation within the Bill.

1.5 The European Court of Human Rights takes a robust approach to powers of entry, search and seizure. These powers are invasive and must be accompanied by clear justification in order to meet the requirements of Article 8(2) ECHR that any interference with the right to respect for private life and the home is necessary. The legislative framework for these powers must afford adequate and effective safeguards against abuse in practice. Whether the safeguards in the Bill are adequate to meet the requirements of Article 8(2) ECHR will depend on the nature, scope and duration of the proposed powers of entry, search and seizure, the circumstances in which they will be authorised, the identity of the individuals authorised to conduct them, and the remedies provided by national law. An individual adversely

affected by the exercise of these powers must have access to an effective remedy for any alleged breach of their Convention rights as guaranteed by Article 13 ECHR.

1.6 The Joint Committee on considering the Tribunals Courts and Enforcement then Bill found that the Bill proposed that, in certain circumstances, a certified enforcement agent would be able to enter any "relevant premises" without a warrant. Relevant premises are any premises where an enforcement agent "reasonably believes" that the debtor "usually lives" or carries on a trade or business (including third party premises). If powers of entry without a warrant are intended to be limited to the premises identified by the information in the relevant judgment, warrant or writ, then the Committee considered that this should be clearly expressed on the face of the Bill. The Committee recommended that the Bill be amended accordingly and stated that it is important to ensure that these new statutory powers are not misunderstood, or misrepresented, in order to protect the rights of debtors' families and third parties against unnecessary or disproportionate invasions of their right to respect for their private life.

1.7 The Committee welcomed the Government's amendment to clarify that the use of force to gain re-entry to premises used to carry out a trade or business without a warrant did not extend to the use of force to enter a dwelling or to do anything in a dwelling. The Committee considered that this amendment would ensure that reasonable force is not used by any certified enforcement agent to access any premises used in whole, or in part, as a residential property, without prior judicial authorisation, and that the amendment would provide a valuable safeguard for the rights of debtors and third parties to respect for private life and home, as guaranteed by Article 8 ECHR.

1.8 With the above in mind the carrying out of a search on a private dwelling house without a warrant pursuant to regulation 25 of these Regulations, may not be proportionate to secure a legitimate aim under these Regulations, and consequently may be disproportionate to the legitimate aim pursued and breach Article 8 of the ECHR.

2. Delay, Breach of 21 day rule and providing the Regulations in English only

The European Regulation that these Regulations seek to enforce date back to February 2009, and consequently at least two years have elapsed within which legislation could have been enacted in order to give effect to the purposes of the 2009 EC Regulation ("the Control Regulation"). Despite, this these Regulations have breached the 21 day rule. The Minister's response to this was provided in a letter to the Presiding Officer dated 3rd March 2011 which states that "the requirement to breach the 21 day rule arises primarily because of

delays in finalising the Implementing Regulations at an EU level, combined with further delays in finalising the legal text of the draft Statutory Instrument.” Both the EU Control Regulation and the EC Implementing Regulation came into force on 4 March 2011. However knowing that both Regulations were coming into force on this date, it is not clear why these Regulations were not prepared and laid at an earlier date so as not to breach the 21 day rule.

2.1 Statutory Instrument Practice (4th edition November 2006) at paragraph 4.13.2 states that the 21 day period is to be treated as a minimum period in advance of an instrument coming into force. The Explanatory Memorandum states that “due to the public and animal health risks associated with a prolonged enforcement gap, it is necessary to breach the 21 day rule and produce the S.I. in English only in this instance.”

2.2 On the other hand, when an instrument creates offences, as in this case, the 21 day rule is particularly important as it provides some assurance that members of the public can become aware of their legal duties before they come into force. In this case the Regulations were made on the 2nd March and came into force two days later. As this draft report is being prepared on the 14th March, these Regulations have still not been published, so individuals have no way of knowing that their conduct may be illegal.

3. Disproportionality of penalty

Regulation 20 (Penalties) of these Regulations does not limit the penalties to any of the offences. So a person found guilty of a summary only offence under regulation 18 (a) (Offence of obstruction) could potentially be fined an amount not exceeding the statutory maximum (which is £5,000) or to imprisonment not exceeding three months or both. As a comparison, a person found guilty of a summary offence of wilfully obstructing a police officer provided under section 89 of the Police Act 1996, as well as having a term of imprisonment imposed (previously one month but now 51 weeks as amended by the Criminal Justice Act 2003) could also be subject to a fine not exceeding level 3 which equates to £1,000. There is a substantial discrepancy in the amount of the fines that can be imposed for similar offences. Is the penalty disproportionate to the offence being committed?

Janet Ryder AM
Chair, Constitutional Affairs Committee

17 March 2011

The Government has responded as follows:

The Animal By-Products (Enforcement) (Wales) Regulations 2011

"The Regulations were made urgently on the specific instructions of the Office of the Chief Veterinary Officer to ensure that there was no enforcement gap between the revocation of EC Regulation 1774/2002 (regarding animal by-products issues) and the coming into force of its successor, EC Regulation 1069/2009, on 4th March 2011. Had there been an enforcement gap, certain activities that were subject to criminal penalties under the EC Regulation 1069/2009 from 4th March 2011, would have evaded prosecution. In addition, an enforcement gap would have put the Welsh Ministers at risk of infraction proceedings by the Commission.

The government's intention was to make the Regulations urgently in English only and in breach of the 21 day rule to ensure that there was no enforcement gap. It has always been intended that these English only Regulations would be a temporary short-term measure, to be followed at the earliest opportunity by bilingual Regulations which would revoke the English only Regulations. The bilingual Regulations will largely mirror the Defra Regulations (when they come into force in England) to ensure a commonality of enforcement provisions across the Member State as a whole. It is not known when the Defra Regulations will come into force, but as a result of their late implementation, there is currently an enforcement gap in England.

The government wishes to stress that ensuring no enforcement gap by bringing the Regulations into force on 4th March 2011 was essential to ensure that any risks to animal and human health from animal by-product issues were reduced to a minimum. Such risks could have been severe and without implementing legislation, breaches of the European legislation could have been unenforceable."

Annex 2

Constitutional Affairs Committee

(CA(3)-07-11)

CA570

Constitutional Affairs Committee Report

Title: The Badger (Control Area) (Wales) Order 2011

Procedure: Negative

The Order authorises the destruction of wild badgers in the control area to reduce the incidence of tuberculosis there. The control area comprises land in the counties of Ceredigion, Carmarthenshire and Pembrokeshire. The Order provides that the destruction of wild badgers must be accomplished by trapping and either shooting or giving a lethal injection, or by shooting without trapping. The carcass of a badger so destroyed is the property of the Welsh Ministers and may not be removed without their authority. It also makes it an offence to protect badgers with the intention of preventing their destruction and otherwise obstructing the implementing of the Order.

Technical Scrutiny

No points are identified for reporting under Standing Order 15.2 in respect of this instrument.

Merits Scrutiny

The following points are identified for reporting under Standing Order 15.3(ii) in respect of this instrument – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly.

1. This Order revokes the Tuberculosis Eradication (Wales) Order 2009, which was quashed in July of 2010 by the Court of Appeal at the end of legal proceedings brought by the Badger Trust. (Since the previous Order has been quashed by the courts it does not strictly need to be revoked but this provision may be intended to make it as clear as possible that the previous Order no longer has any effect.)
2. The previous Order was quashed on a number of grounds relating to the Minister's reasons for making the Order. The Minister was required by the Animal Health Act 1981 to be satisfied that the cull would result in a substantial reduction in the incidence of TB in the area to which the Order related and this was expressed to be the

whole of Wales even though the intention was actually to carry out a cull in a limited area. As a result, the consultation exercise carried out by the Minister, and the evidence which she took into account, did not relate to the whole of the area (the whole of Wales) to which the Order applied.

3. The Court was also not satisfied that the Minister applied the correct legal test when deciding whether the cull would result in a “substantial” reduction in the incidence of bovine tuberculosis nor that she had carried out a proper balancing exercise between the conflicting impacts of the Order on animal health and nature conservation.

4. After the original Order was quashed, the Welsh Government launched a new consultation exercise which started on 20 September 2010 and closed on 17 December 2010. The consultation related to the control area now referred to in the current Order. The Explanatory Memorandum also contains information to show that the Minister has considered issues that had not apparently been considered prior to the making of the original Order. Nevertheless, this general issue is of such public interest that opponents of the plan will, no doubt, be considering whether further litigation stands a realistic prospect of success.

Janet Ryder AM
Chair, Constitutional Affairs Committee

17 March 2011

Annex 3

Constitutional Affairs Committee

(CA(3)-07-11)

CA564

Constitutional Affairs Committee Report

Title: The Equality Act 2010 (Specification of Relevant Welsh Authorities) Order 2011

Procedure: Negative

This Order amends the list of authorities specified in Part 2 of Schedule 19 to the Equality Act 2010 (“the Act”). These authorities are subject to the public sector equality duty (“general duty”) set out in section 149 of the Act, by virtue of section 150 of the Act, to have due regard, when exercising their functions, to the need to—

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

They will also be subject to the range of specific public sector equality duties for Wales (the specific duties) set out in the draft ‘Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011’.

Technical Scrutiny

No points are identified for reporting under Standing Order 15.2 in respect of this instrument.

Merits Scrutiny

The Committee makes the following report to the Assembly under Standing Order 15.3(ii) that this draft Order is of political or legal importance and gives rise to issues of public policy likely to be of interest to the Assembly.

Background

The draft Order specifies which Welsh public authorities should be subject to both the public sector equality duty and specific additional equality duties applicable only in Wales.

Among the bodies to be included as subject to both the general duty and the specific duties is the Public Service Ombudsman for Wales.

Consideration by the Constitutional Affairs Committee

The Ombudsman says he is fully committed to carrying out his functions in accord with the principles underpinning the Equality Act. However, he has requested an exemption from the specific duties and from the general duty in respect of his casework functions.

The Ombudsman's reasons for seeking this exemption are set out in a letter responding to the Welsh Government's consultation on the matter, the text of which is annexed to this report. Some of his main arguments for seeking exemption can be summarised as follows:

- **Constitutional and in Principle** – Ombudsmen are independent of Government and it is inappropriate for Government to be able to direct him on his duties or the way in which he exercises them.
- **Casework and Enforcement** – The way in which the Ombudsman carries out casework carries legal protections to safeguard the independence of his office. It is inappropriate for the Welsh Government (which falls within the Ombudsman's jurisdiction) to be able to direct him as to the extent of his duties or the way in which he should exercise them. Moreover, the protections that the Ombudsman enjoys would prevent the Equalities and Human Rights Commission from effectively enforcing the duties.
- **Quasi-judicial nature of the Ombudsman's role** – His role is quasi-judicial and it would be anomalous to apply the duties to such a role. He has also pointed out that his counterparts in England are to be granted exemption. Apart from the different treatment accorded to offices carrying out essentially the same role, he believes this could lead to practical difficulties in the conduct of joint investigations.

The Explanatory Memorandum accompanying the Order says:

“Careful consideration has been given to the Ombudsman's case for exemption and appropriate weight has been accorded to his response. However, the Assembly Government is not convinced that the application of the general and specific duties to the work of the Ombudsman would be an obstacle to the work of the Ombudsman.”

This appears to be a rather cursory response to what is a serious and well-argued case that makes a number of important constitutional and legal arguments. We consider that the Government should provide a fuller explanation of its reasoning.

The Committee believes that the Welsh Government needs to reconsider carefully the Ombudsman's request for exemption. If, on reflection, the Government concludes that an exemption would be appropriate, they should bring forward an amending Order at the earliest opportunity.

Janet Ryder AM
Chair, Constitutional Affairs Committee

17 March 2011

ANNEX to CA564 - The Equality Act 2010 (Specification of Relevant Welsh Authorities) Order 2011

Response of the Public Services Ombudsman for Wales
to the Welsh Assembly Government's consultation on the
Equality Act 2010: Performance of the Public Sector Equality Duties in
Wales

1. As Public Services Ombudsman for Wales (PSOW), I investigate complaints made by members of the public who believe they have suffered hardship or injustice through maladministration or service failure on the part of a body in my jurisdiction. I also consider complaints that members of local authorities in Wales have breached their Code of Conduct.
2. I welcome the opportunity to respond formally to the Welsh Assembly Government's consultation on the draft Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011. In particular, I reaffirm that I am fully supportive of, and committed to, the principles underpinning the Equality Act 2010 and strongly endorse the proposition that the manner in which I carry out my functions should accord with those principles.
3. However, I have concerns regarding the proposal at the bottom of page 8 of the consultation document (i.e. that the office of the Public Services Ombudsman or Wales be added to Part 2 of Schedule 19 to the Act). In particular, I do not believe that the casework element of the Ombudsman's functions should be subject to either the general duty, nor to the specific duties which may be imposed by Welsh Ministers. This raises issues of both a constitutional and practical nature, which I set out below:
 - (a) Constitutional - In the constitutional context it is important not to lose sight of the need for Ombudsmen to be completely independent of the Executive, integral to which is the freedom from any interference with either the nature of their duties or the way in which they carry them out, in order that the public can be confident that the work of my office is impartial and objective.
 - (b) Casework and Enforcement - In relation to casework, the Public Services Ombudsman (Wales) Act 2005 (the Act) states that the procedure for conducting an investigation is "to be such as the Ombudsman thinks appropriate in the circumstances of the case" (S13(3) refers). The Act also sets out a range of mechanisms by which the Ombudsman has to account for the discharge of his statutory powers, responsibilities and duties. Insofar as challenging the way he exercises discretion in relation to the initial decision to investigate, the way in which it is conducted or the eventual outcome is concerned, the

only avenue of challenge available is by an application for judicial review.

I believe that it is inappropriate for the Welsh Assembly Government (a body falling within the Ombudsman's jurisdiction) to be able (via regulations made under the Equality Act 2010) to direct him as to the extent of his duties or the way in which he should exercise them. The fact that the Welsh Assembly Government could direct the PSOW to act in a particular way could be seen by the citizens of Wales as compromising the independence of the Ombudsman's office.

Insofar as the imposition of the specific duties on PSOW is concerned, these duties are enforceable by the Equalities and Human Rights Commission (the Commission). The enforcement powers of the Commission are set out in the Equality Act 2006 and they include the power to require a body to produce information to the Commission. The procedures it is required to follow when conducting enforcement inquiries, investigations and assessments are set out in Schedule 2 of the 2006 Act.

Section 26 of the Act precludes PSOW from disclosing any information obtained either in deciding whether to investigate, during the course of an investigation or in resolving a complaint. The section also precludes the PSOW, any of his staff or advisers being called to give evidence in relation to such information. In addition section 13(2) of the Act stipulates that investigations must be conducted in private, as must any action taken to resolve complaints outside of an investigation. Similar legislative provisions apply to investigations of complaints of breaches of the Code of Conduct by elected members.

Furthermore the Commission would have no power to question the procedure adopted by the Ombudsman in relation to his consideration of cases because (as set out above) the Act provides the Ombudsman with discretion to decide on what procedures should apply. It is possible however that the Commission could seek to challenge the Ombudsman's exercise of discretion by judicial review (if it had the standing to do so).

Neither the Equality Act 2010, nor regulations made pursuant to it, override these statutory restrictions. In the light of this it is questionable what useful purpose would be served by making PSOW subject to the specific duties given the resulting limitations on the Commission's enforcement powers.

In this connection it should be noted that PSOW is exempt from having to disclose information in response to an FOI request if that request relates to information falling within the scope of section 26 of the Act (see above) by virtue of section 44 of the Freedom of Information Act 2000.

(c) Quasi-judicial nature of the Ombudsman's role - This is also significant, as is the position occupied by Ombudsmen in the judicial landscape. In a consultation paper published in July 2008 [Consultation Paper 187] entitled: Administrative Redress: Public Bodies and the Citizen, the Law Commission referred to Ombudsmen (with particular reference to the Public Sector Ombudsmen) as one of the four pillars of administrative justice.

The Law Commission published its report in May 2010 [Law Com No 322] Part 5 of which looks at Ombudsmen. Paragraph 5.2 states: "In our consultation paper we stated that we considered the public sector ombudsmen to be a vital "pillar" of administrative justice. In coming to this conclusion, we asserted that internal complaint mechanisms resolve the vast majority of individual cases and should almost always be the initial mechanism that an aggrieved citizen turns to. We acknowledge that tribunals have an important role - one that has been made more effective by the reforms contained in the Tribunals, Courts and Enforcement Act 2007. There remains a distinct function for the courts, especially when considering the mechanisms available to the Administrative Court. However, alongside these mechanisms, we concluded that the public sector ombudsmen have developed into a vital part of the regime for public sector redress."

In September 2010 the Law Commission published a further consultation paper [Consultation Paper 192] focusing on the Public Services Ombudsmen and in this paper PSOW was described as "the most modern of the ombudsmen" and the Act as an exemplar of good practice.

The UK Government's Equalities Office accepts the significance of an ombudsman's quasi-judicial role in respect of the Parliamentary and Health Services Ombudsman and the Local Government Ombudsmen in England in that neither is going to be subject to the specific duties and the "case working functions" of both are to be excluded from the general duty. To fly in the face of what has been agreed in respect of public sector colleagues in England, with whom PSOW has a close working relationship, would be unjustifiable and inappropriate. This would be most unfortunate given the high esteem with which the Act governing PSOW's work is held. A further example of which is the fact that in the consultation paper issued in relation to the proposed reform of the Office of the Northern Ireland Ombudsman, the Welsh Act is relied on as the model to follow. The principle of the independence of the Public Sector Ombudsmen from government is internationally recognised as fundamental: any weakening of this position would result in Wales being seen as having a second class Ombudsman service.

Furthermore the inconsistency between Wales and England could result in practical difficulties in the context of the rights conferred on PSOW by section 25 of the Act to consult and co-operate with colleagues in England, given that such “consultation and co-operation” extends to conducting joint investigations and publishing joint reports.

4. To summarise, the principles espoused in the Equality Act 2010 are central to the values of the PSOW and to every aspect of the office’s work. I welcome the proposal that the general equality duty should apply to the Ombudsman’s role as an employer, to procurement functions and to other non-casework functions. However, for the reasons outlined above, I believe that it would be wholly inappropriate for the general duty to extend to the Ombudsman’s casework functions and for the office to be subject to the specific duties.

Public Services Ombudsman for Wales
December 2010

Annex 4

Constitutional Affairs Committee

(CA(3)-07-11)

CA557

Constitutional Affairs Committee Report

Title: The Recycling, Preparation for Re-use and Composting Targets (Monitoring and Penalties) (Wales) Regulations 2011

Procedure: Affirmative

Section 3 of The Waste (Wales) Measure 2010 (“the Measure”) establishes statutory targets for the percentage of a local authority’s municipal waste which must be recycled, prepared for re-use and composted (“the targets”). The Measure imposes liability on a local authority to a financial penalty if it fails to meet a target. These Regulations supplement the Measure, by making detailed provision for the monitoring and enforcement of the targets.

Technical Scrutiny

The following point is identified for reporting under S.O. 15.2 in respect of this instrument:-
Regulation 3 (1) deals with provisions in relation to the Monitoring authority. The English text states that “the Environment Agency is the monitoring authority for the purposes of the targets.” However the Welsh version states that the Environment Agency is the monitoring authority for the purpose of the recycling, preparation for re-use and composting targets.” The “targets” have been clearly defined in both the Welsh and English texts but there is nevertheless a clear material difference between regulation 3(1) of the Welsh and English texts. Standing Order 15.2 (vii) that there appear to be inconsistencies between the meaning of its English and Welsh texts.

Merits Scrutiny

No points are identified for reporting under Standing Order 15.3 in respect of this instrument at this stage.

Janet Ryder AM

Chair, Constitutional Affairs Committee

17 March 2011

The Government has responded as follows:

The Recycling, Preparation for Re-Use and Composting Targets (Monitoring and Penalties)(Wales) Regulations 2011

Response to the issues that have been raised by the Legal Advisers to the Constitutional Affairs Committee

There is, as the draft report says, a difference between regulation 3(1) of the Welsh and English texts. However, the meaning of both provisions is the same, on account of the definition of "targets" in regulation 2. The inconsistency is in relation to the words used, as opposed to their effect or actual meaning. Accordingly, the error will be corrected on publication.

Annex 5

Constitutional Affairs Committee

(CA(3)-07-11)

CA565

Constitutional Affairs Committee Report

Title: The Government of Wales Act 2006 (Commencement of Assembly Act Provisions, Transitional and Saving Provisions and Modifications) Order 2011

Procedure: Negative

This Order commences the Assembly Act provisions in Part 4 of the Government of Wales Act 2006 (c. 32) (“the Act”) and makes transitional and saving provisions and modifications in relation to the commencement of that Part. It also repeals certain legislation that becomes redundant on the coming into force of the Order.

Technical Scrutiny

No points are identified for reporting under Standing Order 15.2 in respect of this instrument.

Merits Scrutiny

The following points are identified for reporting under Standing Order 15.3(ii) in respect of this instrument.

1. This Order commences the Assembly Act provisions of the Government of Wales Act 2006 (Part 4 and Schedule 7) with effect from 5 May 2011. This means that the National Assembly will be able to consider Bills from the outset.
2. The Order makes consequential amendments to ensure that Measures awaiting Royal Approval under Part 3 of the Act can still receive Royal Approval despite the fact that Part 3 will have ceased to have effect from the 5th May pursuant to section 106(1) of the Act.
3. Paragraph 4.7 of the Explanatory Memorandum explains why the Order does not amend section 67 of the Education and Skills Act 2008 to enable it to apply to Acts of the Assembly. In view of the existence of an existing power under section 150 of the Government of Wales Act 2006, it is not clear why section 67 of the 2008 Act was not simply revoked.

Janet Ryder AM
Chair, Constitutional Affairs Committee

17 March 2011

Annex 6

Constitutional Affairs Committee

(CA(3)-07-11)

CA556

Constitutional Affairs Committee Report

Title: The Sunbeds (Regulation) Act 2010 (Wales) Regulations 2011

Procedure: Affirmative

These Regulations make provisions relating to sunbed use. They impose: a duty on a person who carries on a sunbed business on domestic premises to prevent sunbed use on those premises by persons aged under 18; a requirement for a person who carries on a sunbed business to supervise the use of sunbeds on the business's premises; a prohibition on the sale or hire of sunbeds to persons aged under 18; requirements for the provision of information to sunbed users; and requirements relating to the use of protective eyewear by sunbed users. The Regulations are made pursuant to powers contained in the Sunbeds (Regulation) Act 2010 (the Act), they apply in relation to Wales and come into force on 31 October 2011. The terms "sunbed", "sunbed business", "domestic premises" and "premises" are defined in the Act.

Technical Scrutiny

No points are identified for reporting under Standing Orders 15.2 in respect of this instrument.

Merits Scrutiny

The Committee noted that these Regulations were meant to restrict the use of sunbeds in a way that helped meet concerns about their use. They offered greater protection against unsupervised use of sunbeds and for those who were particularly vulnerable to the effect of sunbed radiation, such as young people or those with very fair skin types, or were otherwise unaware of the health dangers from exposure to sunbed radiation.

The Committee also noted that although the Regulations were the result of Private Members' Legislation in the UK Parliament, they nevertheless addressed many of the recommendations from the Health, Wellbeing and Local Government Committee's inquiry into the use of sunbeds.

The Committee agreed to report to the Assembly under Standing Order 15.3(ii) that the Regulations gave rise to matters of public policy likely to be of interest to the Assembly.

Janet Ryder AM
Chair, Constitutional Affairs Committee

17 March 2011