

National Assembly for Wales
Constitutional Affairs Committee

Review of Statutory Instruments:
technical reporting points
September 2009 – July 2010

December 2010



The National Assembly for Wales is the democratically elected body that represents the interests of Wales and its people, makes laws for Wales and holds the Welsh Government to account.

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Constitutional Affairs Committee

The Constitutional Affairs Committee must consider and report on any of the matters set out in Standing Order 15.2 and may consider and report on any of the matters set out in Standing Orders 15.3, and 15.6.

Powers

The Constitutional Affairs Committee was established in June 2007 (as the Subordinate Legislation Committee). Its powers are set out in the National Assembly for Wales' Standing Orders, particularly SO 15. These are available at www.assemblywales.org

Committee membership

<i>Committee Member</i>	<i>Party</i>	<i>Constituency or Region</i>
Janet Ryder (Chair)	Plaid Cymru	North Wales
Alun Davies	Labour	Mid and West Wales
Kirsty Williams	Welsh Liberal Democrats	Brecon and Radnorshire
William Graham	Welsh Conservatives	South Wales East
Rhodri Morgan	Labour	Cardiff West

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Review of Statutory Instruments - Technical reporting points September 2009 – July 2010

Introduction and remit of the Constitutional Affairs Committee (“the Committee”)

1. Subject to Standing Order 15.7, the Committee must consider all statutory instruments or draft statutory instruments required by any enactment to be laid before the Assembly and report on whether the Assembly should pay special attention to the instrument or draft on any of the following grounds:-

- doubt as to whether the legislation is within the Assembly’s powers;
- the legislation appears to make unusual or unexpected use of the powers under which it is made;
- it is excluded from challenge in the courts;
- it appears to have authorised retrospective effect;
- its form or meaning needs further explanation;
- its drafting appears to be defective;
- it fails to fulfil statutory or other legal requirements;
- there appear to be inconsistencies between the English and Welsh texts;
- that it uses gender specific language;
- that there appears to have been unjustifiable delay in publishing it or laying it before the Assembly.

Reporting points and statistics

2. During the reporting period (September 2009 to July 2010) the Committee considered **151** pieces of legislation.

3. The Committee invited the Assembly to pay special attention on technical grounds to **31** pieces of legislation. Of these pieces of legislation reported on, there were a total of **62** reporting points. The Government agreed with the majority of the reporting points made but in 4 of the 31 pieces of legislation reported on, the Government disagreed with the reporting points.

4. In some cases those defects reported were capable of correction on publication: **13(16 if correction slip issued for CA384)** out of the total of

62. The reasons why the Committee invited the Assembly to pay special attention to Statutory Instruments were as follows:

- the drafting appeared to be defective - **40**
- inconsistencies between the Welsh and English texts - **16**
- the form of meaning required further explanation - **1**
- there was a doubt as to whether the legislation was within the powers of the Assembly - **2**
- the drafting used gender specific language - **1**
- the regulations have only been made in English - **2**

Observations

5. In general, the number of reporting points has been similar to last year with the majority of reporting points made for defective drafting, followed by inconsistencies between the Welsh and English texts.

One particular concern was that 15 reporting points was identified in one single set of regulations (CA428 The National Health Service (Pharmaceutical Services) (Amendment) (Wales) Regulations 2010). This was deemed to be unacceptable and the Committee wrote to the Minister concerned to notify their concerns.

6. The Committee should note that in an increasing number of instances, the legal advisers to the Committee have been asked to comment on early drafts of legislation. This resulted in a number of drafting and other points being corrected prior to formal submission of the legislation to the Committee.

7. At the time of writing there were two outstanding queries with the Welsh Assembly Government:-

1) SLC 375 - The Official Feed and Food Controls (Wales) Regulations 2009 - Three reporting points were made. The Government said it would issue amending Regulations. There do not appear to have been any further amending regulations made. We are awaiting further information from the Welsh Assembly Legal Services team.

2) SLC 384 - The Council Tax (Alteration of Lists and Appeals) (Amendment) (Wales) Regulations 2010 - A correction slip should have been issued to rectify the reporting points made. It is not clear from our review that this has been done.

Annex 1

Technical Reporting points September 2009 – July 2010

No	Name of Statutory Instrument/draft Statutory Instrument with reporting points	Date of Meeting	Technical Reporting points	Government response and current status
SLS330	Education (Miscellaneous Amendments relating to safeguarding Children) (Wales) Regulations 2009	7.10.09	There is one drafting error [Standing Order 15.2 (vi)] and one reporting point for an inconsistency between the Welsh and English texts. [Standing Order 15.2 (vii)].	The Government accepted the reporting points and said that it would lay an amending SI to correct the mistakes in time for it to commence no later than 6 November.
SLC337	The Food Labelling (Nutrition Information) (Wales) Regulations 2009	31.10.09	The Table substituted by Schedule 2 to the Regulations sets out minerals in respect of which nutrition claims may be made, both as regards the substances included and the recommended daily allowances. The Recommended Daily Amount shown for Potassium in the Regulations is 200mg. However, the corresponding amount shown in the Commission Directive being implemented is 2,000mg. [Standing Order 15.2(vi) – defective drafting]	The Government accepted the points made. This was a drafting error and the correct Recommended Daily Amount shown for Potassium should have been 2000mg. The Government said that it would make amending Regulations within three months to rectify the error. Amending Regulations were made five months later on the 25 th March 2010.
SLC343	The Public Transport Users' Committee for	11.11.09	There is an inconsistency between the English and Welsh text [Standing Order 15.2 (vii)].	The point was accepted and an amending Order was drafted almost immediately to allow it to come into force on 25 th November

	Wales (Establishment) Order 2009			2009 to rectify the error.
SLC346	The Hazardous Waste (Wales) (Amendment) Regulations 2009	11.11.09	There is an ambiguity between the Welsh and English texts. [Standing Order 15.2(vii)]	The ambiguity noted in the Welsh language version of the 2009 Regulations was accepted by the Government and amended in subsequent regulations that amended the Hazardous Waste (Wales) Regulations 2005.
SLC350	The Contaminants in Food (Wales) (Amendment) Regulations 2009	18.11.09	Defective drafting under 15.2 (vi). However this error is recognised as a typographical error that can be corrected upon publication.	The error was corrected upon publication.
SLC354	The Children Act 1989 (Amendment of Miscellaneous Regulations) (Wales) Regulations 2009	2.12.09	The power specified as being exercised by the Welsh Ministers to make these Regulations is section 76C of the Children Act 1989 (“the 1989 Act”), which does not exist. [Standing Order 15.2 (i) that there appears to be doubt as to whether it is intra vires], and [Standing Order 15.2 (vi), that its drafting appears to be defective or it fails to fulfill statutory requirements].	The Government accepts both points raised and these errors were rectified by subsequent regulations made in December 2009, allowing the regulations to come into effect on the same date already set of 20 January 2010.
SLC358	The Common Agricultural Policy Single Payment and Support Schemes (Wales) (Amendment) Regulations 2009	12.12.09	These Regulations have been made in English only, as were the principal Regulations. [Standing Order 15.2 (ix)]	The point was accepted by the Government. The Government said that these amendment Regulations would be revoked when the principal Regulations were revoked and remade. The principal Regulations were remade in English and Welsh on July 22 nd 2010.
SLC367	<u>The Private and Voluntary Health Care (Wales) (Amendment) Regulations 2009</u>	14.01.10	There is an inconsistency between the meaning of its English and Welsh texts in regulation 3(1). (Standing Order 15.2 (vii))	The Government accepted that there was a difference between the Welsh and English text But they did not believe that the additional wording in the Welsh text made any difference to the legal meaning of regulation 3(1), or the operation of the regulations, even

				though strictly speaking the literal meaning of the text might differ. The Government decided therefore not to amend the regulations.
SLC369	The Children Act 1989 (Amendment of Miscellaneous Regulations) (No. 2) (Wales) Regulations 2009	14.01.10	Regulation 3 (6) in the English text refers to “a body corporate” being substituted for “organisation”, whereas regulation 3 (6) in the Welsh text refers in the English insertion to “a corporate body” being substituted for “organisation”. [SO 15.2 (vii) applies, that there appear to be inconsistencies between the meaning of its English and Welsh texts].	The Government said that it accepted that there was an inconsistency between the English and Welsh texts. However, it believed that there was no difference in meaning between "corporate body" and "body corporate" and "organisation" was correctly defined in both texts. Therefore no confusion was caused by the error. The Government did not propose to take any action at this time but would review the matter at the next suitable opportunity.
SLC370	The Rural Development Programmes (Wales) (Amendment) Regulations 2009	14.01.10	The Welsh text contained an incorrect cross reference. [Standing Order 15.2 (vii)]	The Government accepted there was an error and this was rectified on publication.
SLC372	<u>The Town and Country Planning (Environmental Impact Assessment) (Undetermined Reviews of Old Mineral Permissions) (Wales) Regulations 2009</u>	14.01.10; 21.01.10	There were three separate reporting points for defective drafting. [Standing Order 15.2 (vi)].	The Government accepted the three points. The two typographical errors were corrected upon publication. The erroneous definition of “sensitive area” did not cause any immediate problems and it would be removed when the government brought forward legislation to amend the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999.
SLC373	The Assembly Learning Grants	28.01.10	There are two reporting points. The first is an inconsistency between the Welsh and English texts and secondly a reference is	The Government accepted the reporting points and said it intended to correct the

	(European University Institute) (Wales) Regulations 2009		made to regulation 33, which does not exist. [S.O. 15.2 (vii) that there appear to be inconsistencies between the meaning of its English and Welsh texts] and [S.O. 15.2 (vi) that its drafting appears to be defective or it fails to fulfil statutory requirements].	errors at the earliest opportunity which was likely to arise within the next 6 months and in any event before 1 September 2010. Amending regulations were made on the 10 th of July 2010.
SLC375	The Official Feed and Food Controls (Wales) Regulations 2009	28.01.10	There are three reporting points in total. Two reporting points for defective drafting and one for an inconsistency between the Welsh and English texts. [Standing Orders 15.2 (vi) and (vii) respectively.	The Government accepted the reporting points and said it would bring amending regulations forward as soon as possible to rectify the errors. These errors were rectified by the Animal Feed (Wales) Regulations 2010.
SLC376	The Food (Jelly Mini-Cups) (Emergency Control) (Wales) Regulations 2009	28.01.10	Two points for defective drafting are identified and one for an inconsistency between the Welsh and English texts that dealt with penalties/length of prison term for contravention of the regulations. [Standing Order 15.2(vi) and (vii)]	The Government accepted the reporting points and it intended to bring forward amending legislation at the earliest opportunity. Amending regulations were subsequently made on the 28 th April 2010, which corrected the errors.
SLC379	The Common Agricultural Policy Single Payment and Support Schemes (Cross Compliance) (Wales) (Amendment) Regulations 2010	21.10.10	These Regulations have been made in English only, as were the 2004 Regulations being amended. [Standing Order 15.2(ix)]	The government said that the principal 2004 Regulations would be revoked and remade, in English and in Welsh, during 2010 and when this was done, the amendment 2010 Regulations would be revoked. The principal Regulations were remade in English and Welsh on July 22nd 2010.
SLC381	The Private Water Supplies (Wales) Regulations 2010	28.01.10	A regulation stated that a local authority had to submit records by a certain date specified in a schedule. No date was specified in the schedule causing uncertainty. [S.O. 15.2 (vi) that its drafting appears defective or it fails to fulfil statutory requirements].	The Government accepted the point and said it would make Regulations to amend the Private Water Supplies (Wales) Regulations 2010. Subsequent Regulations rectifying the error were made on the 26 th January 2010.

SLC384	The Council Tax (Alteration of Lists and Appeals) (Amendment) (Wales) Regulations 2010	4.02.10	There are three separate reporting points for defective drafting. [S.O. 15.2 (VI)].	The Government accepted the three errors that were of a typographical nature which need correcting. It said it would contact the Office of Public Sector Information and the Stationery Office to discuss the possibility of issuing a correction slip.
CA395	Community Health Councils (Constitution, Membership and Procedures) (Wales) Regulations 2010	4.03.10	The reference to the establishment of a council provided within the definition of "district of a Council" should be to article 3 and not to article 4 of the Community Health Councils Establishment, Transfer of Functions and Abolition) (Wales) Order 2010 ("The 2010 Order"). This is because article 3 of the 2010 Order provides for the establishment of Community Health Councils, and not article 4. [Standing Order 15.2 (vi) that its drafting appears to be defective or it fails to fulfil statutory requirements].	<p>The Government accepted the reporting point. The Minister intended to review the operation of the Community Health Councils (Constitution, Membership and Procedures) (Wales) Regulations 2010 by 31 March 2012. The reporting point identified would then be corrected as part of that review. In the meantime, Community Health Councils and those who are responsible for appointing CHC members i.e. local authorities and selected voluntary organisations, would be written to to advise them of the drafting error and the fact that it would be corrected when the Regulations were amended.</p> <p>The Committee noted the Government response but was concerned that any correction would not be made until March 2012 at the earliest. The Committee agreed to write to the Minister indicating its concerns.</p>
CA397	The School Funding (Wales) Regulations 2010	4.03.10	There are two separate reporting points both in relation to incorrect references. [Standing Order 15.2 (vi) –defective drafting].	The Government accepted the reporting points and said that they would be corrected the next time the regulations are amended. The next amending regulations are expected in April 2011.
CA399	Housing Renewal Grants (Amendment)	4.03.10	The substitution made into the principal Regulations by regulation 3(5)(c) contains gender specific language ("him" in sub-paragraph (i) and "his" in sub-paragraph(ii) without a	The government said that the use of gender specific language ('his' and 'him') was unavoidable in these amending Regulations

	(Wales) Regulations 2010		corresponding "her"). [Standing Order 15.2(viii)]	because the Regulations amend the Housing Renewal Grants Regulations 1996 ("the principal regulations") which apply in England and Wales. To change the wording in so few places could give rise to inconsistencies and could cause confusion to the reader. Officials are looking into consolidating the Housing Renewal Grants Regulations, which are updated almost yearly to take account of annual changes in benefits and this is something that will be considered when drafting any future consolidating Regulations for Wales to ensure that they would avoid the use of 'gender-specific' language."
CA405	<u>The Planning (Hazardous Substances) (A) (W) Regulations</u>	11.03.10	Two separate reporting points on grounds of technical scrutiny are identified. One on the grounds of defective drafting [S.O. 15.2 (vi)] and the other on an inconsistency between the Welsh and English texts.	The Government accepted the two points and these were corrected immediately upon publication.
CA418	The Accounts and Audit (Wales) (Amendment) Regulations 2010	25.03.10	There are two separate reporting points both in relation to incorrect references. [Standing Order 15.2 (vi) -defective drafting].	The Government accepted that two errors had been made and these were subsequently corrected on publication.
CA421	The Valuation Tribunal for Wales Regulations 2010	25.03.10	There is one reporting point due to an inconsistency between the Welsh and English texts. [Standing Order 15.2(vii)].	The Government accept that an error has been made in the Welsh version of these Regulations as indicated in the report and it was corrected on publication.
CA424	The Independent Review of Determinations (Adoption and Fostering) (Wales)	25.03.10	There is one reporting point due to defective drafting. [Standing Order 15.2(vi)].	The Government accept that an error has been made in the Welsh version of these Regulations as indicated in the report and it was corrected on publication.

	Regulations 2010			
CA425	<u>The Natural Mineral Water, Spring Water and Bottled Drinking Water (Wales) (Amendment) Regulations 2010</u>	25.03.10	There is one technical reporting point due to incorrect referencing in the welsh text. [Standing Order 15.2(vi)].	The Government accepted the reporting point and subsequently corrected the errors on publication.
CA428	The National Health Service (Pharmaceutical Services) (Amendment) (Wales) Regulations 2010	22.04.10	Thirteen separate reporting points have been identified in relation to defective drafting [S.O. 15.2 (vi)] and two reporting points for inconsistencies between the Welsh and English texts [S.O. 15.2 (vii)].	<p>The Government accepted the reporting points and these were corrected in subsequent amendment regulations that were made on the 21st June 2010.</p> <p>Committee Consideration of Government Response</p> <p>The Committee noted that the Government had accepted that there were 15 errors in these regulations and was concerned at such a relatively large number of errors in one set of regulations. The Committee agreed to draw these concerns to the attention of the Assembly and, separately, to write to the Minister drawing her attention to its concerns.</p> <p>The Committee welcomed the Government's intention to amend the errors through amending regulations. However, the Committee was concerned that the deadline for this was as long as two months. In view of the number of errors identified, the Committee agreed that one month would be a more appropriate deadline. The Committee agreed to write to the Minister confirming its</p>

				view on this point concerns.
CA440	<u>The Census (Wales) Regulations 2010</u>	13.05.10	There is one reporting point here under Standing Order 15.2 (v) - that for any particular reason its form or meaning needs further explanation. This reporting point included an issue of consistency in the English text and also an issue of translation.	<p>The Government did not agree with the point made in relation to consistency and believed that the distinction between “<i>incapable</i>” and “<i>unable</i>” in the English regulations was a valid one within the scheme of that particular regulation.</p> <p>However, the Government did accept that there was room for debate about how best to translate “<i>incapable</i>” and “<i>unable</i>” (the University of Wales 4-volume Dictionary of the Welsh Language confirms that, in addition to “<i>fai</i>”, “<i>methu</i>” can convey being either incapable <i>or</i> unable). The Government said that it would explore the possibility of making suitable clarificatory amendments to the Welsh text immediately upon publication or, if necessary, making amending regulations.</p> <p>In view of its response to the consistency point and the translation point, the government invited the Committee to accept that the meaning of the test to be applied is clear from the English version of regulation 10(5).</p>
CA444	<u>The Tuberculosis (Wales) Order 2010</u>	20.05.10	There is one reporting point for an inconsistency between the Welsh and English texts [S.O. 15.2 (vii)], and one reporting point for defective drafting [S.O. 15.2 (vi)].	The Government did not think agree that there was necessarily a problem caused by the inconsistency between the Welsh and English text but decided however to take steps to change the wording to improve the

				<p>consistency.</p> <p>The Government also disagreed with the defective drafting point but nonetheless made corrections before publication.</p>
CA453	The Health and Social Care Act 2008 (Commencement No. 4, Transitional and Savings Provisions) (Wales) Order 2010	24.06.10	There is one reporting point for an inconsistency between the Welsh and English texts. [Standing Order 15.2 (vii)].	The Government accepted the reporting point and this was corrected on publication.
CA459	The Eggs and Chicks (Wales) Regulations 2010	8.07.10	There is one reporting point for an inconsistency between the Welsh and English and for defective drafting. [Standing Order 15.2 (vii) and (vi)], and one reporting point that there appears to be a doubt as to whether powers given under the regulations are intra vires [Standing Order 15.2 (i)].	<p>The Government accepted the reporting point relating to defective drafting and an inconsistency between the Welsh and English texts. This was corrected upon publication.</p> <p>However, the Government did not accept the reporting point that powers given under the Regulations to enter into a private dwelling house were intra vires by infringing Article 8 of the European Charter for Human Rights. The Government said that the powers created in regulation 19 correspond with those set out in section 32 of the Food Safety Act 1990 and corresponding Regulations made in England.</p>

List of written evidence

8. The Committee considered the following written evidence. All written evidence can be viewed in full at www.assemblywales.org

<i>Document</i>	<i>Reference</i>
Review of Statutory Instruments - Technical reporting points September 2009 – July 2010	CA(3)-23-10(p1)
Review of Statutory Instruments - Technical reporting points September 2009 – July 2010 – Annex 1	CA(3)-23-10(p1) Annex
Letter from the Chair to the Counsel General and Leader of the Legislative Programme John Griffiths AM	CA(3)-28-10(p1)
Response of the Counsel General and Leader of the Legislative Programme John Griffiths AM	CA(3)-28-10(p2)