



Constitutional and Legislative Affairs Committee

Report: CLA(4)-03-13 : 21 January 2013

The Committee reports to the Assembly as follows:

1. Instruments that raise reporting issues under Standing Order 21.2 or 21.3

Negative Resolution Instruments

CLA201 – The Education (Student Support) (Wales) Regulations 2012

Negative Procedure

Date made: 12 December 2012

Date laid: 14 December 2012

Coming into force date: 4 January 2013

The committee noted the reporting points for these Regulations (annexed below) and were content.

Composite Negative Instruments

CLA205– The Environmental Permitting (England and Wales) (Amendment) Regulations 2013

Composite Negative Procedure

Coming into force in accordance with regulation 2(1) to (4)

The committee noted the reporting points for these Regulations (annexed below) and were content.

Super Affirmative Resolution Instruments

CLA189 – The Natural Resources Body for Wales (Functions) Order 2012

Super Affirmative Procedure

Coming into force: 1 April 2013

The committee noted the reporting points for the Order (annexed below) and the evidence submitted by RSPB Wales, Wales Environment Link and Wildlife Trust Wales.

Action: The Committee agreed to invite the Minister for Environment and Sustainable Development to its meeting on 4 February 2013 for a further scrutiny session.

The Committee resolved to exclude the public from the remainder of the meeting in accordance with Standing Order 17.42(ix), to consider its forward work programme.

The transcript of the committee's meeting is available on its website:

David Melding AM

Chair, Constitutional and Legislative Affairs Committee

21 January 2013

Constitutional and Legislative Affairs Committee Draft Report

Title: The Education (Student Support) (Wales) Regulations 2012

Procedure: Negative

These Regulations provide for financial support for students who are ordinarily resident in Wales taking designated higher education courses in respect of academic years beginning on or after 1 September 2013. They consolidate, with some changes, the Assembly Learning Grants and Loans (Higher Education) (Wales) (No.2) Regulations 2011 (“the 2011 (No. 2) Regulations”).

Technical Scrutiny

The following points are identified for reporting under Standing Order 21.2 in respect of this instrument:

1. In the English text of regulation 10(2)(b) there is a reference to ‘a new fee loan under regulation 25’; the Welsh refers to ‘fenthyciad at ffioedd o dan reoliad 25’. The word ‘newydd’ (new) is therefore missing from the Welsh text.

Later in the same paragraph the English text contains a cross-reference to regulation 23(4), whilst the Welsh text refers to regulation 23(3). The context suggests that the English reference is correct

[Standing Order 21.2(vii) – that there appear to be inconsistencies between the meaning of its English and Welsh texts.]

2. The English regulation 97(5)(a) has three sub-paragraphs; the Welsh has four. It appears that the final sub-paragraph in the Welsh text should be part of paragraph (a) rather than a further sub-paragraph.

[Standing Order 21.2(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 21.3 in respect of this instrument .

Legal Advisers

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CLA205 - Environmental Permitting (England and Wales) (Amendment) Regulations 2013

These composite Regulations amend the Environmental Permitting (England and Wales) Regulations 2010 in order to transpose Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control). The Directive is a recast, streamlining seven existing Directives into one. As a consequence of transposition, there will be stricter limits for air pollution, although there will be some flexibility to extend deadlines for power plants or to waive the rules for other installations in special cases, subject to certain conditions being met. The Regulations aim to improve health and environmental protection, while making the rules clearer and easier to implement.

Procedure: Affirmative

Technical Scrutiny

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

1. These Regulations have not been made bilingually.

[21.2(ix) – that it is not made or to be made in both English and Welsh].

The Welsh Government state in paragraph 2 of the explanatory memorandum that “this is a composite statutory instrument which applies to Wales and England only and is subject to the affirmative procedure in the National Assembly for Wales and in both Houses of Parliament. As with the 2010 Regulations, it is not considered practicable for this statutory instrument to be made bilingually.”

Merits Scrutiny

Under Standing Order 21.3 the Assembly is invited to pay special attention to the following instrument:-

1. The transposition deadline for implementing Directive 2010/75/EU for Member States is 7th January 2013. These Regulations are not due to go to Plenary until 29th January 2013. By the time these Regulations are debated and possibly approved (these Regulations come into force on the seventh day after the day on which they are made) they would have missed the transposition deadline.

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Title: The Natural Resources Body for Wales (Functions) Order 2012

The Natural Resources Body for Wales (Establishment) Order 2012 established a new statutory body, the Natural Resources Body for Wales and provided for its purpose, membership, procedure, financial governance and initial functions. This Order makes further provision about the Body, including provision about the modification and transfer of environmental functions to the Body.

Procedure: Enhanced Affirmative

The enhanced affirmative procedure:-

- Extends the period from the date on which a draft order was laid from 40 to 60 days
- Requires the Welsh Ministers to have regard to any representations, and resolution of the National Assembly for Wales and any recommendations of a committee charged with reporting on the draft Order made during the 60 day period
- Requires the draft Order to be re-laid before the Assembly with a statement summarising the changes, in the event that any material changes are made.

The revised draft order once laid will be subject to the normal affirmative procedure.

Technical Scrutiny

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

21.2 (i) – that there appears to be doubt as to whether it is intra vires

Preamble

The consent of the Secretary of State and Minister which is required under Section 17 of the Public Bodies Act 2011 has not yet been obtained¹.

Section 17 provides that:-

(1) The Secretary of State's consent is required for an order under section 13 or 14 which transfers a function to, or confers a function on—

(a) the Environment Agency,

(b) the Forestry Commissioners, or

(c) any other cross-border operator.

(2) The Secretary of State's consent is required for an order under section 13 or 14 made by virtue of section 15 which in any other way modifies the non-devolved functions of a person referred to in subsection (1).

(3) A Minister's consent is required for an order under section 13 or 14 which transfers a function to, or modifies the functions of, the Minister.

21.2 (v) That for any particular reason its form or meaning needs further explanation

Articles 5, 6 & 7

“local enactment” is not defined which could lead to uncertainty as these Articles in effect tidy up other legislation that is not specifically referred to in any of the Schedules.

¹ Page 3 of the Explanatory Memorandum states that the Order will not be made without obtaining the necessary consent.

Schedule 3

Welsh Language (Wales) Measure 2011

Paragraph 4 (2) – As the Environment Agency still exercise functions in relation to Wales it should still be subject to the Welsh Language (Wales) Measure 2011. The effect of the amendment would be to remove the EA from the requirement to comply with welsh language standards.

Schedule 4

General Drainage Charges (Relevant Quotient) Regulations 1993

Paragraph 31 (3) –The reference to the Flood and Coastal Erosion Risk Management (Levies) (England and Wales) Regulations 2011 refers to the Environment Agency (Levies) (England and Wales) Regulations 2011 which are renamed later in the Order. This is confusing to the reader who would be assisted by a suitable footnote.

21.2 (vi) that its drafting appears to be defective or it fails to fulfil statutory requirements

Schedule 2

Forestry Act 1967

Paragraph 42 (3) - The reference to subsection 4 (a) is incorrect and should refer to subsection (4).

Highways Act 1980

Paragraph 102 (3) – It is not clear whether the reference to “organisation” is in respect of the first or second occasion where it occurs.

Water Resources Act 1991

Paragraph 198 (2) – There is no reference to the Environment Agency in section 118(b).

Clean Air Act 1993

Paragraph 256 - The reference to 'appropriate authority' should refer to 'appropriate agency'.

Schedule 3

Control of Pesticides Regulations 1986

Paragraph 20 (2)

This should refer to (if the area in which the intended aerial application is to take place in Wales).

Plant Health (Export Certification) (Forestry) (Great Britain) Order 2004

Paragraph 158 (3) (b) and (5) - the date cannot just be substituted as the 2005 Order refers to Plant Health (Forestry) Order 2005, rather than the Plant Health (Forestry) **(Great Britain)** Order 1993.

Welsh Language Schemes (Public Bodies) Order 1996

Paragraph 72 - Because the Environment Agency still exercise functions in relation to Wales they should still be subject to the Order. The effect of the amendment is to remove the EA from the requirement to prepare a Welsh language scheme under the Welsh Language Act 1993.

Bathing Water Regulations 2008

Paragraph 232 - Paragraph 231 changes all references to Agency without excepting regulation 2, there is no definition to omit and the definition does not then make sense.

Paragraph 233 - The reference is to 'Agency' rather than 'Environment Agency'

Infrastructure Planning (National Policy Statement Consultation) Regulations 2009

Paragraph 260 (2) (a) - the entry should refer to ‘forests and woodlands’ rather than ‘forests or woodlands’.

Regional Flood and Coastal Committees (England and Wales) Regulations 2011

Paragraph 317 (2) - The reference to ‘opening words’ in this paragraph does not make sense.

Waste (England and Wales) Regulations 2011

Paragraph 325 - There is no reference to the Environment Agency or the Agency in regulation 3.

Greenhouse Gas Emissions Trading Scheme Regulations 2012

Paragraph 334 - the reference to regulation 21 is incorrect and should refer to regulation 20.

Paragraph 335 - the reference to regulation 28 is incorrect and should refer to regulation 27.

Paragraph 336 - the reference to regulation 48 (5) is incorrect and should refer to regulation 45 (5).

Paragraph 337 - the reference to regulation 87 is incorrect and should refer to regulation 86.

Paragraph 338 - the reference to regulation 89 is incorrect and should refer to regulation 87.

Paragraph 339 - the reference does not make sense.

Schedule 5

Wildlife and Countryside (Sites of Special Scientific Interest, Appeals) (Wales) Regulations 2002

Paragraph 6 - “the Countryside Council for Wales” only appears on one occasion.

Merits Scrutiny

Under Standing Order 21.3 the Assembly is invited to pay special attention to the following instrument:-

This Order is being brought forward under the powers contained in Sections 13 to 15 of the Public Bodies Act 2011.

The Legal Briefing note dated November 2012 (at Annex A) provides further background information to the Order.

The Committee has received correspondence which amongst other matters highlights issues as to whether various provisions of the Order introduced by Schedule 1 are ultra vires, because they do not meet the test under Section 16 of the Public Bodies Act 2011 in that they remove necessary protections.

The test under the Act is whether **the Welsh Ministers consider** that:

- (a) the Order does not remove any necessary protection, and
- (b) the Order does not prevent any person from continuing to exercise any right or freedom which that person might reasonably be expected to continue to exercise.

Within the preamble to the Order, the Welsh Ministers state that they consider that the Order

does not remove any necessary protection or prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise

At page 11 of the Explanatory Memorandum, it states:-

In drafting this Order we have followed the general principle that we are transferring the existing functions of the three bodies in a manner which retains all existing protections and does not add any new restrictions on individual rights or freedoms.

It would be difficult for the Committee to anticipate the practical effect of particular provisions within the Order; however should the Committee wish, evidence could be taken from the Minister for

Environment and Sustainable Development as to the statement made within the preamble, prior to the final Order being laid.

Legal Advisers

Constitutional and Legislative Affairs Committee

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