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Constitutional and Legislative Affairs Committee

Meeting Venue:
Committee Room 2 – Senedd

Meeting date:
9 March 2015

Meeting time:
13.30

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 Evidence in relation to the Inquiry into Making Laws in the Fourth Assembly (Pages 1 – 123)

(Indicative time 1.30pm)

Dylan Hughes, First Legislative Counsel, Office of Legislative Counsel, Welsh Government
Huw Davies, Senior Legislative Counsel, Office of Legislative Counsel, Welsh Government
Terry Kowal, Senior Legislative Counsel, Office of Legislative Counsel, Welsh Government

CLA(4)-07-15 – Paper 1 – Written Evidence
CLA(4)-07-15 – Annex
CLA(4)-07-15 – Research Service Briefing

3 Evidence in relation to the Inquiry into Making Laws in the Fourth Assembly

(Indicative time 2.30pm)

Dr Ruth Fox, Director and Head of Research Hansard Society

CLA(4)-07-15 – Research Briefing

4 Instruments that raise no reporting issues under Standing Order 21.2 or 21.3 (Page 124)

CLA(4)-07-15 – Statutory Instruments with clear reports

<u>Affirmative Resolution Instruments</u>

CLA494 - The Firefighters' Pension Scheme (Wales) (Consequential Provisions) Regulations 2015

Affirmative procedure; Date made: Not stated; Date laid: 24 February 2015; Coming into force in accordance with regulation 1

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

<u>Composite Affirmative Resolution Instruments</u>

CLA493 - The Environmental Permitting (England and Wales) (Amendment) Regulations 2015 (Pages 125 - 189)

Composite Affirmative procedure; Date made: Not stated; Date laid: 23 February 2015; Coming into force in accordance with regulation 1(2)

CLA(4)-07-15 - Paper 3 – Report
CLA(4)-07-15 - Paper 4 – Regulations
CLA(4)-07-15 - Paper 5 – Explanatory Memorandum
CLA(4)-07-15 - Paper 6 – Transposition note

6 Papers to note (Pages 190 - 219)

CLA(4)-07-15 - Paper 7 - Written Statement: Social Services and Well-being (Wales) Act tranche 1 consultation outcomes

CLA(4)-07-15 – Paper 8 – Letter to the Chair of the Environment and Sustainability Committee: Planning (Wales) Bill

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

(xi) the committee is deliberating on the content, conclusions or recommendations of a report it proposes to publish; or is preparing itself to take evidence from any person;

Law in other Jurisdictions (Pages 220 - 236)
CLA(4)-07-15 – Paper 9 – Law in Other Jurisdictions

Y Gwir Anrh/Rt Hon Carwyn Jones AC/AM
Prif Weinidog Cymru/First Minister of Wales

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: LF/FM/0609/14

David Melding AM
Chair
Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
Cardiff

30th June 2014

Dear David

Thank you for your letter dated April 2014 inviting written evidence to the Constitutional and Legislative Affairs Committee Inquiry into making laws in the Fourth Assembly.

I attach a response on behalf of the Welsh Government which I trust you will find helpful.

Yours sincerely

CARWYN JONES

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CONSTITUTIONAL AND LEGISLATIVE AFFAIRS COMMITTEE: MAKING LAWS IN THE FOURTH ASSEMBLY

Response of the Welsh Government

This is the Welsh Government's response to the invitation to submit written evidence to the Constitutional and Legislative Affairs Committee's inquiry into making laws in the Fourth Assembly.

The Welsh Government notes the terms of reference set out in the Committee's letter of April 2014 and welcomes this opportunity to contribute to the inquiry. We are committed to producing high quality bilingual legislation which:

- endures;
- does not require frequent amending;
- avoids the courts having to decide what it means;
- gives effect to government policies;
- reduces compliance costs for users; and
- limits the scope for avoidance.

The Welsh Government is proud of its achievements in promoting an ambitious Legislative Programme during the Fourth Assembly. Legislation passed by the National Assembly has, and will have considerable benefit for the people of Wales. This ranges from wholesale reform of social services in Wales to changes in organ donation systems that should save many lives. Most recently the Housing (Wales) Bill, which we hope will shortly be passed, will among other matters introduce a radical new system of regulating private sector rented housing and improve and recast the law on homelessness.

Although we are not quite comparing like with like, it is notable that so far in this Assembly the number of pages of primary legislation passed is approximately 700 pages (including the Housing Bill). By July 2010 the comparable figure (in relation to Measures) was 239. In general, and including the larger Measures passed later in the Third Assembly, on average the legislative output of the Government has doubled during this Assembly.

Developing law is something that is easier said than done, even for governments and legislatures with centuries of experience and an abundance of expertise. In Wales it is still something that is relatively new to both the Welsh Government as the promoter of the majority of legislation, and to the National Assembly as a fully fledged legislature. Despite the achievements to date, the Welsh Government's highest organisational priority is to ensure that it is able to deliver well thought-out and well drafted legislation that meets the policy aspirations of Ministers for consideration by the Assembly.

Our response is set out in 4 Parts and an Annex of accompanying notes, as follows:

PART 1

Legislation development (general)

Policy development

1. The Welsh Government recognises that before embarking on the process of developing legislation, it is important to have clearly defined policy objectives and a strong evidence base to underpin them. It is essential that all those involved in developing legislation understand in some detail, firstly, how existing systems (where relevant) operate both in law and in practice and, secondly, exactly what change is desired and for what purpose and outcome. Policy development benefits from the discipline of involving lawyers, legislative counsel and economic and financial experts to challenge the proposals in order to ensure that they are robust. Challenge is important not only when the legislation is scrutinised by the legislature, but also by Ministers, civil servants and members of the public.

2. An essential part of the process is identifying whether legislation is required at all. Legislation is not always the most effective or appropriate way to implement policy and the need for it should be tested thoroughly during the policy development cycle. Informed consideration of the options available to deal with an identified problem may lead to the conclusion that legislation is unnecessary perhaps because existing powers may be used or a different approach could be taken through enhanced enforcement or changes in guidance or codes of practice. Legislation is an option to be brought forward only after comprehensive consideration of all the available options. Part of this process involves identifying potential conflicts or inconsistencies with other policies or other pieces of legislation also being developed by the Welsh Government, or indeed other governments and legislatures, and should be done as early as possible.

3. The policy development cycle approach of the Welsh Government applies to all proposals for legislation. This involves a five stage process of (1) evaluating the current position, (2) considering the case for change, (3) identifying options for change, (4) choosing a preferred option and (5) implementing the change. It includes:
    - identifying the social, economic and environmental objectives of the policy and the outcomes;
    - using evidence to develop a series of options;
    - identifying the different impacts that the policy might have;
    - assessing whether the policy will result in benefits that are sustainable;
    - economic appraisal;
    - programme and project management; and
    - monitoring and evaluation.

4. The rigorous process involved in the development of effective policies, and where relevant supporting primary legislation should not be underestimated. This is one reason why the Welsh Government has developed a comprehensive legislative development training programme and adopted a flexible resourcing policy for key work areas.

Consultation

5. The Welsh Government is committed to developing and implementing policy and legislation in an open way; a process assisted by engaging and consulting on a policy proposal both within Government and externally. This includes consultation with the UK Government, not least because of the complexity of the devolution settlement. The purpose of external engagement and consultation is to make information available to the public, listen to a wide range of interests, obtain more and better information from affected parties, and to be more responsive to what is heard. Consultation does not necessarily of course lead to consensus, but it is a process that permits a two-way flow of ideas and information between members of society and the Welsh Government. Experience suggests that formal consultations are always best complemented by more informal engagement, including discussions with stakeholders at meetings, seminars and workshops to ensure as wide a range of stakeholder views and opinions can be sought.

6. Such engagement and consultation not only improves understanding of a situation but can also assist to avoid piecemeal reform of one part of a system which may be interconnected with others.

7. The ultimate test for any piece of legislation is that it does what it was intended to do and benefits the people. Post-legislative scrutiny is an important matter for the Welsh Government which notes the recommendations of the Law Commission of England and Wales in a report published in October 2006:
   - the approach to post legislative scrutiny should be evolutionary (consistent with the way in which the system of government has developed);
   - it should build upon what is already in place; and
   - more systematic post-legislative scrutiny may take different forms.

Management of the legislative programme

8. As First Minister I oversee decisions on the content and management of the Welsh Government's Legislative Programme, supported by the Legislative Programme Board (a group consisting of senior officials including the Permanent Secretary, Directors General, the Director of Governance, the Director of Legal Services and First Legislative Counsel). Day to day management of the Programme is undertaken by a dedicated team (the Legislative Programme Unit (LPU)), which produces detailed timetables for each phase of development and scrutiny of each bill in the Programme. These timetables are reviewed routinely by LPU, and by the Office of the Legislative Counsel (OLC), the office tasked with drafting the Government's legislation.

9. Timetabling the Legislative Programme takes into account a number of factors such as the size and complexity of a bill, its urgency, drafting legislation in both English and Welsh, and the time available for Assembly scrutiny both in committee and plenary. This is an art not a science and must be subject to regular review in order to ensure that the deadlines set are met. This is, however, a process that works well and brings discipline to the legislative development process.

10. Progress on individual bills is also monitored through governance arrangements involving project boards reporting to the Senior Responsible Officer ("SRO") appointed for each bill. Project boards and SROs undertake assessments on progress and other risk factors and report regularly to the Legislative Programme Board. Additionally, Departments have internal governance arrangements for the purposes of reporting to the Minister in charge of a bill.

Capacity to legislate

11. Since receipt of primary legislative powers much has been done to improve the Government's capacity to legislate. OLC, for example, has doubled in size over this period and is continuing to expand with further recruitment having commenced recently. The office has been restructured to enable recruitment of experienced Parliamentary Counsel. More generally, the Welsh civil service has placed considerable emphasis on developing the legislation skills of officials. The Legislative Programme Board has put in place an extensive legislative improvement programme and probably the most thorough legislation education programme in the United Kingdom.

12. A concern for the Welsh Government is the time available for Members to properly scrutinise bills, something that is in the best interests of all concerned. This is particularly the case in so far as Committee time is concerned, especially where bills are introduced shortly after one another and fall under the scrutiny remit of the same subject Committee. Effective and appropriate scrutiny by Members is a key part of the legislative process, providing the necessary challenge and consideration of changes in law.

13. The Government is mindful of Business Committee's concerns on this point, and has increased the information provided on the introduction of current and future Bills to assist with that Committee's planning. There is an effective working relationship between LPU and Assembly Commission officials which allows for forward planning to be undertaken, as much as is possible, and we are committed to working together wherever possible to ensure scrutiny outcomes are not compromised. However, it is not always appropriate for the Government to defer introduction of Bills to allow a Committee to conclude its considerations of an earlier Bill or another inquiry it is undertaking. This is an area Members may want to consider further.

Non-government bills and amendments

14. The role and place of Member Bills in the democratic process is an important one. But it is recognised that developing effective and workable legislation is an exacting process and can be particularly problematic for Members who do not have access to the machinery of government and its policy development, legal and drafting expertise. Policy expertise in particular is crucial because of the need to understand how proposals would work in practice and how they would impact on other areas of government. If there are problems in relation to either then the legislation could be difficult or impossible to implement.

15. There have been occasions where Bills have been developed independently of existing laws and systems, presumably as it can be a more straightforward way of setting out the policy the Member wishes to pursue. As a case in point the Government sought to make significant changes during the amending Stages to the Regulated Mobile Homes Sites Bill (later the Mobile Homes (Wales) Act 2013) mainly because it created a new system of regulation that seemed to be intended to sit alongside an existing system – something which could have created confusion and added bureaucracy. For similar reasons the Government engaged with the Member in Charge of the Bill relating to recovery of medical costs for asbestos diseases, so it was drafted using a different approach to that initially envisaged, prior to it being introduced. On other occasions Member Bills (and indeed Measures) have sought, in our view, to be overly prescriptive in the way they set out matters on the face of the Bill when they have not been subject to a comprehensive policy development phase and full consultation. Flexibility is required in such circumstances; the Playing Fields Measure was recast partly for this reason. Significant amendment was also required to the Domestic Fire Safety Measure for policy and drafting reasons.

16. To date no Member Bills have been passed without significant amendment (or replacement) by the Government. This is not a criticism. For the reasons set out above, the involvement of the Government of the day is in many respects unavoidable and producing a bill in isolation of the machinery of government will always be particularly difficult.

17. It remains to be seen how Committee Bills will be developed and brought forward, but the Government continues to see a role for itself in using the machinery of government to legislate on matters for which there is full cross party consensus and agreement that there is a need for legislative reform (the Public Audit (Wales) Act 2013 being such an example).

18. Further work is also required to consider what more (if anything) could be done to facilitate non-government amendments that are accepted by the Assembly. It is considerably more difficult for any person who has not been involved in the initial drafting of a bill to draft technically accurate amendments. Further consideration should also be given to reaching a common understanding so far as possible of the legislative competence basis for non-government provisions in Assembly Bills. The issue here is that once passed it is for the Counsel General to consider whether to refer a Bill to the Supreme Court under section 112 of the Government of Wales Act 2006 or to defend such a Bill if referred by a UK Government Law Officer. In addition the points made above about the machinery of government also apply here.

Legislative drafting software

19. OLC have experienced difficulties during this Assembly with the legislative drafting software procured jointly by the Welsh Government and the Assembly Commission in 2010. From OLC's perspective the legislative drafting software was intended to ease the burden of drafting and preparing legislation, but has, in so far as amendments are concerned, proved to have the opposite effect. Using the software in the amending stages is, for various reasons, time consuming and resource intensive.

Legislative Counsel have to spend extensive time ensuring that amendments are produced within a very specific electronic format at the expense of spending enough time ensuring that the content is technically accurate and well drafted.

PART 2

Procedural matters and scrutiny

Scrutiny

20. When considering the appropriate level of scrutiny for bills, while certain standards in relation to transparency and consultation must be followed in all cases, in the Government's view much depends on the specific circumstances of each bill proposal. There are undoubtedly circumstances in which it would be appropriate to publish a draft bill prior to introduction, or to allow for more time for Stage 1 scrutiny, or indeed to proceed to a Report Stage. This could be the case, for example, in circumstances where a bill is particularly complex, and has a more significant impact on the public, or where a bill makes extensive reform and is very lengthy. Conversely however, there will be occasions where time may be of the essence or where a bill's provisions are uncontroversial. In such circumstances further consultation or scrutiny would either be inappropriate, disproportionate or not possible.

21. The use of a Report stage is a matter for the Member in Charge of the Bill to propose and should be considered on a case by case basis. The Report Stage was particularly important during the passage of the Bill which became the Mobile Homes (Wales) Act 2013 due to the extensive recasting (and indeed expansion) of the Bill at Stage 2. The Report Stage afforded proper consideration of the large amount of amendments that had been tabled at Stages 2 and 3, which had essentially transformed the Bill as introduced and ensured there was a period of reflection on the Bill. It was also an essential stage of the passage of the Social Services and Well-being (Wales) Act 2014 given the size and complexity of the Bill and the number of amendments tabled.

22. The extent to which Bills may be expedited through scrutiny on the other hand is a matter first of all for section 111 of the Government of Wales Act 2006 and the National Assembly's Standing Orders. This Assembly's Standing Orders make clear provision for a 'fast track' procedure of curtailed scrutiny for bills where the need arises and Business Committee consider appropriate. The Government is of the view that there will be times when it will be appropriate or necessary for bills to be fast-tracked. The National Health Service (Finance) (Wales) Act 2014, for example, was required to be in force for the start of the next financial year (2014/15), to avoid up to a year's delay in commencement if that date was missed, as the Bill implemented the recommendations made in a report by the Wales Audit Office in July 2012. The fast track process was agreed by the National Assembly for Wales and enabled the Bill to go through the legislative process in the shortest possible time meaning that the very tight timescale for the Bill could be met. The Government considered that the policy within this Bill was one which had been extensively debated and considered by three Assembly committees prior to introduction. There had, therefore, been scrutiny and examination of the policy before the legislation was proposed. It is also worth noting that this Bill was on a single, very narrow, policy. Had this not been the case, we may not have proposed a curtailed scrutiny process.

23. Expediting bills through scrutiny, or ‘fast-tracking’, is different to the Government proposing a bill be considered by the Assembly as a Government Emergency Bill. In the case of the Agricultural Sector (Wales) Bill, the arguments to protect agricultural workers urgently against action taken by the UK Government were set out before the National Assembly in detail. Although this Bill progressed through the Assembly as an Emergency Bill it did so on a longer timetable than that provided for in Standing Orders and the Member in Charge did appear before the relevant committees. The Minister was able to provide evidence of the need for urgency and respond to questions in committee as well as Plenary.

24. Looking ahead, the Government envisages that it may also be appropriate to deal with certain financial or tax revenue issues through an alternative scrutiny process, and this should also be the case in order to facilitate consolidation and the development of a Welsh ‘Statute Book’.

The balance between what is included in primary and subordinate legislation.

25. An issue that has been of considerable interest to Members while scrutinising bills is the balance between what is included on the face of a bill and what is appropriate to be brought forward as subordinate legislation. Assembly Members are rightly concerned to ensure that executive powers to make subordinate legislation are appropriately given in the first place and, where they are given, they should be properly scrutinised. The Welsh Government seeks to follow the standard approach adopted by Parliament and is mindful of the Committee’s recommendations on the matter and the importance of moving away from framework bills.

26. There are a number of reasons why legislation is split between primary legislation and subordinate legislation. There is first of all merit in keeping bills as clear, simple and short as possible, in other words keeping them less cluttered by detail.

27. There is also significantly greater flexibility in making subordinate legislation as it is not subject to the same timetable constraints as Assembly Bills and it enables the law to be updated to match changing circumstances or for the law to be corrected or amended in the light of experience.

28. If this process works well, it would help the Assembly to focus on the essential points, policy and principle, in its scrutiny.

29. In response to the Assembly’s previous concerns that the use of affirmative and negative Assembly procedures was not sufficiently transparent or evident, the Counsel General issued guidance in January 2012 (see Note 1 in the Annex) which set out the factors that the Government should take into account when proposing a procedure. These guidelines recognise that in each case there is a balance to be struck between scrutiny by the Assembly, consumption of Assembly (or Committee) time (something that will become increasingly important as time goes on), the significance of the provisions in question, and the making of legislation in the most efficacious manner. Although the guidance is clear about the circumstances under which the Government would use a particular procedure, Members still seek to influence the use of the procedures

and routinely object to the position the Government has taken (seeking the affirmative procedure when the Government proposes the negative procedure, and a 'super' affirmative procedure – even when it is unclear what this means in the particular context – when the Government proposes the affirmative procedure).

30. Generally speaking the Government considers that the correct balance has been struck during this Assembly, though remains conscious of the criticism it has received at times in this respect. During the course of the Social Services and Well-being (Wales) Act's passage through the National Assembly, the Government received criticism in relation to a power conferred on the Welsh Ministers to make regulations to determine whether a person is entitled to social services. It was suggested that the Government was somehow reducing Assembly Members' ability to influence such matters, but this was not correct. The Act in fact expanded the National Assembly's influence by providing for greater transparency and accountability in relation to such matters. Previously, an adult's entitlement to social services was dependent on various approvals and directions given by the Secretary of State in the exercise of his or her powers under the National Assistance Act 1948. Those approvals and directions (made in 1993) were not subject to any form of Parliamentary procedure, nor are they easily available to the public. A child's entitlement to social services, specifically, was dependent on discretionary decisions taken by local authorities in the exercise of their target duty under section 17 of the Children Act 1989. In exercising their discretion, local authorities had to have regard to guidance made by the Welsh Ministers. The guidance had not been subject to any form of Assembly procedure, nor was it easily accessible. The Social Services and Well-being (Wales) Act 2014 sweeps away these arrangements and replaces them with a system under which eligibility criteria will be published in regulations that will be subject to the 'super' affirmative procedure.

31. Similar points could be made about other provisions of the Act too. For example, the Welsh Ministers previously held a significant degree of influence over local authorities' exercise of their social services functions by means of general directions. Again those directions were not subject to any form of Assembly procedure. These provisions were replaced with a system under which this influence will be exercised by means of published Codes. The Act places a duty on the Welsh Ministers to consult on draft Codes before they must be laid before the National Assembly. If the Assembly resolves that they should not be made, the Welsh Ministers will not be able to issue those Codes. So, once again, the Act provides for greater control by the legislature over the executive.

PART 3

Drafting practices

General

32. The drafting accuracy and completeness of a bill upon introduction is reliant upon three factors. The first is the time available both to develop the policy which is to be reflected in the bill (including adequate time for comprehensive, quality policy and legal instructions to be prepared), and to complete the meticulous process of drafting accurate and accessible legislation in two languages. The second factor is the expertise of those involved, not only the drafters of the legislation but also other members of Bill Teams. The third factor is the procedures established to ensure there are sufficient quality assurance checks of legislation so as to ensure it is accurate and no mistakes have been made.

33. There will inevitably be tensions between the amount of time considered necessary to ensure that the quality of legislation is not compromised while meeting the political demands to progress legislation so that desired reform is implemented as soon as possible. However, the introduction of a bill is one step in a long process of development, challenge and scrutiny with consideration of the detail of bills continuing throughout that process. As the Welsh Government has previously stated, amendments to bills at Stages 2 and 3 of the scrutiny process should be regarded as a sign that the development process is working and that various issues continue to be taken into account until a bill is passed.

34. Expertise and quality assurance checks are essential. It requires specialist expertise and a system of checks involving those with such expertise. Within Government this primarily involves officials from central service departments: the Legal Services Department, OLC, the Office of the Counsel General, jurilinguists and the LPU. Each has different but complementary roles and responsibilities that are intended to ensure that the content of bills has been subject to robust challenge and is as well thought out and well drafted as possible. The system that has developed is based on best practice in other jurisdictions.

35. More generally there is much that can be learnt from the legislative development systems of other jurisdiction both within the UK and across the Commonwealth. Officials from the Welsh Government have been members of the Commonwealth Association of Legislative Counsel since the beginning of the Third Assembly and it was through contacts made in that organisation (and the assistance of the Foreign Office) that four days of valuable meetings were arranged for the Counsel General with politicians and officials from the New South Wales and New Zealand Governments in 2012.

36. The Counsel General has a statutory function under section 112 of the Government of Wales Act 2006 to consider whether to refer a bill to the Supreme Court to determine a question of legislative competence but also has a vital role to play in ensuring that Acts of the Assembly are accessible and comply with the rule of law.

37. In so far as the expertise of officials is concerned, a significant development during the Fourth Assembly has been the restructuring and expansion of OLC, the Government's specialist legislative drafting office. The UK Government's drafting office, the Office of the Parliamentary Counsel (OPC), has been in existence since 1869. The Office of the Legislative Counsel in Belfast was formed upon partition in 1920 and an Office of the Scottish Parliamentary Counsel also existed for many years under the guise of the, pre-devolution, Lord Advocate's Department. OLC in Wales, by contrast has been started from scratch, albeit with assistance from OPC. Whilst still in its infancy in comparison to other parts of the UK the work of OLC was commended in the report of the similar Committee inquiry into Assembly Measures and early in this Assembly it also received the praise of Supreme Court Judge Lord Hope who remarked during the Local Government Byelaws Bill case that the Bill was "very well drafted", and noted that the Welsh drafters were "using their own lines, but applying the same standards" as Parliamentary Counsel.

38. It had become clear, notwithstanding this, that a combination of increased demand due to the size of the Legislative Programme, and less support from OPC, meant that the office had to expand. This was not as straightforward as it may appear due to the specialist nature of legislative drafting and the very limited pool of experienced drafters available across the UK. The Office was, therefore, restructured primarily so as to enable recruitment of experienced Parliamentary Counsel. Although still a small office, OLC has now doubled in size and currently has three members with many years' experience of working at OPC and another who has been recruited from the Office of the Scottish Parliamentary Counsel. This has been added to the experience that had already been developed by 'home grown' drafters. OLC has also retained the services of a consultant legislative drafter with over 30 years of experience of drafting Westminster Bills for OPC. OLC strives to achieve the same standards as those set by OPC, an Office that has been highly respected both within government and globally for many years. There are arrangements in place for OLC to receive occasional technical assistance from OPC on a case-by-case basis, though this is now something that happens considerably less frequently.

Bilingual legislation/deddfwriaeth ddwyieithog

39. The fact that the National Assembly legislates in both the English and Welsh language is a huge achievement, and one which is generally under- appreciated. The implications that this has for the process of drafting and scrutinising legislation are not widely understood. Drafting legislation bilingually first of all means that all Assembly Bills are twice the size of an equivalent bill drafted in other jurisdictions (in the United Kingdom at least), and means that further checks and balances are required within the system to ensure that the drafting of both languages is accurate and equivalent. This is achieved through the joint efforts of Legislative Counsel and a specialist team of jurilinguists who produce the first draft of the text in the second language, before continuing to work with Legislative Counsel to perfect and edit the text and ensure that both texts have the same legal effect. The task of producing legislation that is drafted in a modern fashion and in plain language applies equally, of course, to both of these languages. Drafting legislation is a task that is famously complex, and drafting it in two languages is even more challenging.

There is considerable scope for error, in particular when drafting and amending large bills. The Social Services and Well-being (Wales) Act 2014 is 378 pages long in total (189 pages in each language). Producing bilingual primary legislation at that scale is a big task.

40. While the need to draft in both languages brings its risks, both in terms of the resource involved and the potential for discrepancies between languages, it also brings with it an unique opportunity to improve the standard of both languages. This is because in producing a second language text, bills are subject to an additional editorial process which has the potential to assist the clarity of the law. This is for a number of reasons but the most significant are that in producing a second text, the original text must be fully understood. Any ambiguity should therefore be identified as part of that process. In addition, due to the differing syntax of the English and Welsh languages the drafter who considers the structure and clarity of the text in the second language will often be able to re-visit and improve the text of the first language drafted. It also provides an opportunity for further thought to be given to the terminology used to describe key concepts.

41. The fact that Welsh legislation is bilingual should in itself also be an aid to accessibility; giving the reader the choice of reading the law in the language he or she is most comfortable. Readers of European legislation (for example) will be aware that the ability to read a complex provision in another language can sometimes aid the reader's understanding.

Plain language

42. Legislation should be drafted in modern standard Welsh and English and generally speaking should reflect ordinary usage. This means that a drafter of legislation should, in general:

- use simple and familiar words rather than complex expressions and unusual words;
- avoid using foreign words;
- avoid using archaic words;
- avoid using jargon, especially governmental shorthand expressions and unexplained acronyms; and
- avoid including too many different ideas in each sentence (see further Note 1 in the annex).

43. Sometimes it is not possible or sensible to express complex concepts in language that is easy for any person to understand. Technical expressions may be appropriate where such terms are well understood by the main audience of the legislation. This may also be the case if any attempt to render their meaning in everyday language would lead to long-winded provisions that are difficult to understand or uncertain in effect. In pursuing plain language drafting, it is essential however that there should not be any loss of precision or of any necessary detail. The Welsh Government endorses the New South Wales Parliamentary Counsel's Office's policy on plain language. That Office first of all makes clear that plain language is not simple language; plain language is clear,

intelligible English. It is not simplistic English. It does not involve any loss of precision.

44. The second point made by that Office is that their policy in relation to plain English is an on-going process and has its limitations:

> *"it is recognised that the adoption of plain language is an ongoing process and that not every document will necessarily be a perfect embodiment of plain language. It should be appreciated that there are degrees of plain language, while the Office agrees that legislation should be expressed in as plain and formal language as possible, there are a number of on-going factors that contribute to complexity, including the following:*
>
> - *policies that are to be implemented by legislation are often themselves very complex, although even complex policy can be presented in a clear and user-friendly way,*
> - *the drafter has to keep in mind at least three audiences, each with different requirements: Parliament itself, the public or section of the public to whom the legislation is directed and the courts and the legal system,*
> - *the complexity of the surrounding written and unwritten law on a particular subject makes it very difficult and time-consuming to introduce concepts in a different form,*
> - *a plain language document generally takes longer to produce than a document that is not in plain language".*

45. Judgements have to be made, therefore, as to how legislation should be drafted to ensure that the person who will be affected best understands it. A balance has to be struck between drafting provisions that are understandable for expert users and provisions that can be used and applied every day by persons with no legal training. This is ultimately a matter of judgement for the instructing officials and the drafter. The fact that legislation must be technically precise and effective should also of course always be kept in mind. Precision and effectiveness cannot be compromised in the interest of clarity; and over-simplification, therefore, can result in legislation failing to have its intended result.

Overview sections

46. In so far as overview sections are concerned OLC's drafting guidelines provide that:

> *"a section at the beginning of a Bill, or of a Part or a Chapter explaining what is to follow may help the reader to navigate the reader around a larger piece of legislation where the table of contents is too long to give a clear picture. An overview provision may be helpful in shorter pieces of legislation; for example if the substantive provisions are on an obscure topic or potentially difficult for all or part of the likely readership.*
>
> *An overview is, typically, a brief summary of the content of an Act, Part, Chapter, group of sections or Schedule. It may also contain signposts to other relevant provisions. Its purpose is to assist the reader in navigating legislative material. An overview will generally have no*

operative effect of its own, it may be contrasted with a purpose section intended to effect the interpretation of the provision."

47. Overview provisions are used by OLC routinely, though not in all bills. They have been used primarily as a tool for navigating larger bills or bills which contain a strong procedural element (something which is quite common) in order to assist the reader to inform an initial understanding of the effect of the legislation. So, for example, in the Food Hygiene Rating (Wales) Act 2013 the overview section at the beginning is intended to help the reader to overcome the fact that the Act contains a number of procedural provisions which are difficult to set out in order (in other words the chronology of the system itself does not always match the chronology of the key provisions in the legislation itself). Although the National Health Service Finance (Wales) Act 2014 was a very short Act, it was used here to explain the effect of a relatively complex textual amendment made to the National Health Service Act 2006 without requiring the reader to read the amendment in context (i.e. incorporated into the 2006 Act).

48. However, there are drawbacks to overview provisions. The first concerns the argument that as an overview is intended merely to have explanatory effect, it should be contained in the Explanatory Notes to an Act rather in the Act itself. The counter to the argument however, is that many would find it preferable to have a basic explanation incorporated into the main document i.e. the Act rather than having to look for this in a second document. The benefit is that it will assist clarity of the legislation in its own right. As developments in publication technology emerge, and the way in which people read legislation changes, this may in future not be necessary but at present the Welsh Government takes the view that some explanatory material in the main document is beneficial. Another danger is that the provision in the overview section could become inaccurate (or 'toxic') during amending stages either because it is overlooked or as a result of a late amendment during amending stages to a bill. There are also two other avoidable dangers when using overview sections. The first is that unless carefully worded the overview section could be confused with the substantive sections which follow, and the second is that overviews can become too long – which arguably defeats the object.

49. Ideally this would be remedied by reconsidering the use of long titles in legislation and the Welsh Government's preference would be that an overview could replace the long title to a Bill and be incorporated without being part of the operative provisions themselves. This would enable amendments to be made to an overview section as a printing change after substantive amendments have been agreed (in a similar way as amendments are made to section headings).

Drafting techniques

50. The question of what constitutes good practice in drafting technique can be divisible into two parts: a process element and a technical element.

51. Within the Welsh Government, the process element involves ensuring that the drafting of a bill is built on good foundations and that those who are developing a bill understand the role and use of legislation. This means (among other things) avoiding unnecessary legislation, and allowing adequate time to fully explore the

policy issues underpinning a potential bill. This is influenced by both political and organisational matters.

52. Drafting legislation is (or should be) an inherently subjective process, to some extent at least. Drafters need a certain amount of freedom when they work; constraint can limit innovation and remove the flexibility needed to produce what the drafter might consider the best possible draft, in all the circumstances. However, some constraint is useful; adherence to agreed principles of good drafting, and the principle that there are areas where consistency/uniformity is a good thing. Following the recent structural changes in, and expansion of, OLC, the Office is increasingly instigating what might be regarded as best practice by the drafting community:

- the 'four-eyes' practice (at least two drafters looking at all provisions drafted);
- the availability of drafters with different backgrounds and levels of experience in order to solve problems, work collegiately, and deliver the drafting of the Legislative Programme;
- the creation of a body of drafting (and legislation-making) know-how;
- the training of non-drafters on areas within the Office's expertise;
- the development of the Office as one of the repositories of knowledge about previous bills.

53. The 'technical' element of legislative drafting is primarily a matter for OLC. Good practice in this respect involves:

- employing good drafting techniques for producing modern and accessible law;
- being guided by strong principles of good drafting (or 'good law');
- the implementation of a comprehensive and ongoing development programme for OLC and others with an interest in legislation;
- the ability to share knowledge with other drafting offices; and
- to contribute to the wider body of learning and debate on drafting matters.

54. OLC is also employing best practice in the sense that:

- it understands, and seeks to apply, the 'good law' principles that have been promoted by the Cabinet Office (see https://www.gov.uk/good-law);
- it is particularly aware of the drafting issues which are specific to Wales, and seek to address them in its work;
- where possible, bills are drafted with the long term aim of establishing a statute book for Wales (which in itself falls within one of the principles of 'good law');
- OLC receives and uses drafting techniques guidance provided by OPC, but is also developing its own drafting techniques based on its own specific needs, and its own views of best drafting practice (see Annex 2);
- OLC is instigating an internal development programme in anticipation of 3 less experienced lawyers joining the Office shortly; and
- OLC is engaging with the drafting community at large, in particular with the other UK drafting offices in the form of secondments, meetings, seminars,

and forums (since its inception OLC has also participated in each of the biennial conferences of the Commonwealth Association of Legislative Drafters).

PART 4

"Statute book" and accessibility

Accessibility

55. In seeking to make legislation understandable, as well as considering the accessibility of the language (considered above), the drafter must consider the coherence of the bill as a whole and ensure that the material is organised well:
    - provisions should be arranged in a logical order;
    - general provision should be followed by specific provisions and exceptions;
    - provisions that relate to the same subject should be grouped together;
    - provisions should be arranged in temporal sequence;
    - provisions that are significant should become before provisions of lesser importance;
    - sections should be limited in the number of sub-sections they contain;
    - divisions into parts and the use of headings and sub-headings break up a long document and aids comprehension; and
    - sections should be numbered.

Consolidation

56. A significant issue impacting greatly on the accessibility of Welsh legislation is the condition of the statute book as a whole. Improving access to legislation and developing a Welsh Statute Book is a longstanding concern. In the words of the Committee itself:

    > *"According to several submissions we received, it is sometimes difficult to establish what the law is that applies in Wales. Laws for Wales have been made by the UK Parliament and the National Assembly, and laws made each have been amended by the other, with statutory instruments sometimes amending primary legislation to complicate the picture further. It is important that law should be accessible to practitioners and citizens. We recommend that a mechanism be sought to ensure the expeditious publication of up-to-date law applying in Wales, and that a programme of consolidation of law should be undertaken. The Law Commission would have an important role in this process."*

    This is a UK wide problem that has a specific Welsh dimension. The number of statutes currently in force in the United Kingdom is vast, approximately 4,000 Acts as well as thousands of pieces of subordinate legislation. Resource considerations and the need to implement policy quickly can also lead to choices being taken to amend existing laws rather than consolidating: amending what is there rather than starting afresh. This means that as the Statute Book is continuously changed according to the policy priority of the day, it lacks a sensible order and provisions are scattered across Acts with little cohesion.

Little emphasis is given to consolidation and historically there has been very little of it in the United Kingdom.

57. Devolution, in particular to Wales, has potential to make the law yet more inaccessible. There is, it could be said, currently inherent complexity to the law applicable to Wales. There are a number of reasons for this.

- The first is that as well as needing to be compliant with overarching provisions such as EU law and Human Rights, legislation in a devolved area must often be read in conjunction with legislation in areas that are not.
- The second is that within the competence of the National Assembly for Wales, the vast majority of the existing legislation that applies to Wales actually applies to England and Wales. Most provisions apply equally to England and Wales and only some are separate. New and old Wales-only provisions can only be decoupled with concerted effort. On the other side of the coin, where such decoupling has occurred through Westminster Bills applying to England only, this has often left complex old UK or England and Wales text in place only for Wales.
- The third reason is the historic mechanism of conferring executive powers on the old Assembly, in part through transfer of functions orders and in part (post devolution) through Westminster Bills. This requires the reader to understand that the text on the face of the legislation does not reflect legal reality. References in Acts to powers conferred on the 'Secretary of State' are often in reality held by the Secretary of State in England while in Wales the power was held at first by the National Assembly for Wales and now by the Welsh Ministers. Similarly, following the coming into force the Government of Wales Act 2006, a number of powers conferred upon the National Assembly on the face of statutes enacted post 1999 are now held by the Welsh Ministers.

58. The Committee will be aware the Counsel General made a commitment early in this Assembly to restate provisions in Assembly Bill where appropriate in order to minimise the practice of amending existing legislation that applies to England and Wales or the United Kingdom as a whole. This (generally speaking) reduces complexity as it means the legislative provisions apply to Wales only. The effect of this also is to ensure that provisions that would have been made in English only (as the existing legislation would be in English only) are also made in Welsh. This has been achieved with few exceptions during this Assembly, and in the case of those exceptions there was little practical alternative (as they involved relatively small Welsh Acts making a relatively small number of amendments for a narrow purpose to large England and Wales Acts).

59. Of the Acts and Bills that have been developed to date in this Assembly only two of them, the Further and Higher Education (Governance and Information) (Wales) Act 2014 and the very short NHS Finance (Wales) Act 2014 are made up (for good reason) solely of amendments to existing Acts of Parliament that apply to Wales and England. In all other cases freestanding Welsh laws have been developed in accordance with the principles the Counsel General outlined to the Assembly two years ago, often restating provisions of existing law as well as reforming the law.

Examples of this practice include:

- the Schools Standards and Organisation (Wales) Act 2013;
- the Local Government (Democracy) (Wales) Act 2013;
- the Human Transplantation (Wales) Act 2013;
- the Social Service and Well-being (Wales) Act 2014;
- the Education (Wales) Act 2014; and
- the Mobile Homes (Wales) Act 2013.

60. This is a relatively obvious thing to do where policy proposals envisage a wholesale redesign of a system (for example, the Social Services and Well-being (Wales) Act 2014), but it is less obvious where the most straightforward and easiest thing to do is amend existing law.

61. As an example, from the perspective of the drafter, it would have been more straightforward had the Human Transplantation (Wales) Act 2013 amended a lengthy section of the Human Tissue Act 2004 (which applied to England, Wales and Northern Ireland) so as to provide for a deemed consent system in Wales. It was decided however, that in order to improve accessibility, the Assembly Bill should carve out the consent system provided in the 2004 Act, suitably amended so that it related only to transplantation and incorporated the necessary amendments to reflect the policy. It also enabled the substantive provisions to be produced bilingually, something which would not have been the case had we amended the 2004 Act. It should be noted however, that restating these provisions in the Assembly Act brought its own complexities, arising from the fact that the organ donation system is a UK wide one and from the fact that the Human Tissue Act 2004 (which sets out the legal framework for consent for the use of body parts) actually applies for 15 different organ use purposes, transplantation being only one of them. It was also complicated because certain provisions, for example in relation to coroners, were not devolved. Certain amendments to the 2004 Act were also unavoidable due to the fact that the existing system is overseen by the Human Tissue Authority, which is a UK body. Provisions related to guidance to be issued by that body, therefore, had to be incorporated into the 2004 Act.

62. The Mobile Homes (Wales) Act 2013, which was eventually 85 pages long, is notable as it consolidated 4 Acts of Parliament ranging back to the 1960s and separated all provisions in relation to residential mobile homes from those which had previously applied to England and Wales. The (Westminster) Mobile Homes Act 2013, which was also a Member Bill, on the other hand amended the earlier legislation and by contrast has left the law considerably less accessible than is the case in Wales.

63. The Welsh Government welcomes that the Committee consultation is also looking at the way in which a bill is structured as a possible measure of good practice in the drafting of bills and would expect to be involved in taking this work forward.

64. Although not outwardly evident, progress has been made through other initiatives designed to assist accessibility. Since 2012 officials from OLC have been working with the National Archive specifically on updating Welsh provisions on legislation.gov.uk (which is now available bilingually and is due to publish all primary legislation in its updates – i.e. amended – by 2015). In addition work is underway, in conjunction with Westlaw, to develop an online encyclopaedia of Welsh laws, which should be launched (as a work in progress) later this year. Discussions have also taken place with the Law Commission and we are hopeful that an announcement can be made shortly in relation to a Law Commission project considering the costs and benefits of consolidating laws and how best to achieve this by forming a more cohesive 'Welsh statute book'.

The impact of the Assembly's conferred powers model of legislative competence on the drafting of Bills

65. The "model" of legislative competence has little or no impact on the drafting of bills. However, the breadth of legislative competence, in other words the extent of the subject devolved, does indeed have an impact on the development and drafting of legislation. This is because there are occasions where not all aspects of the subject matter of a policy proposal are within legislative competence.

66. There is no doubt that the Welsh devolution settlement is a complex one and for those developing legislation the settlement can be confusing as it is not always clear where the boundaries lie. The problems lie with the fact that the extent of the subject areas devolved are narrow and subject to often complex exceptions, while also being constrained by existing functions of a Minister of the Crown. This all adds to the task of developing legislation in Wales.

Documentation that accompanies bills

67. The content and quality of Explanatory Memorandums vary significantly both within Wales and across the wider UK. Length, style and content can and should vary depending on context and the matters covered by the legislation but the key purpose of the Explanatory Memoranda is to explain and support the bill under consideration.

68. Explanatory Memorandums have an important role and provide an opportunity to set out in brief the context, the policy options considered, the reasons for their rejection or adoption, the consultation approaches taken and the direction of travel supported by the bill. The inclusion of the Regulatory Impact Assessment provisions within Explanatory Memorandums allows the financial impacts and consequences to be considered alongside the policy context and, increases the transparency of the legislative approach taken.

69. Explanatory Memorandums are equally important in areas where a bill is amending existing legislation. Primary legislation which amends existing legislation can be impenetrable to the uninitiated lay reader so the Explanatory Memoranda has an important role in helping the lay person to understand the purpose and effect of the legislation.

70. The same can be said for the Regulatory Impact Assessments and Explanatory Notes. The suite of documents which support the bill aids its understanding and have an important role in terms of potential future challenge to the bill. It is imperative that the policy purpose is clear within these documents and that this is within the purpose(s) for which the Assembly may legislate. It is also imperative that all supporting documents issued with the bill are precise and accurate as the Court will often refer to these documents – as it did, for example, in the reference of the Local Government Byelaws (Wales) Bill to the Supreme Court.

71. It is acknowledged that more could be done to assist the users of legislation by improving Explanatory Notes. This is both in terms of the textual content of the notes and the way in which the content of the notes can be read electronically, for example on the legislation.gov.uk website. Work has been undertaken recently by The National Archives and the Parliamentary Counsel Office in Whitehall, looking at this particular issue. As part of that process, the Welsh Government has received the results of research undertaken into the benefits of Explanatory Notes and how they can be improved. The Welsh Government has commenced its own project to consider what improvements can be made within a Welsh context.

ANNEX

Part 1

(none)

Part 2

Note 1:

In so far as the issue of which procedure should apply to subordinate legislation made under Acts of the Assembly is concerned, there are certain factors that may, to a greater or lesser extent depending on the context, tend to suggest the application of the 'draft affirmative' procedure (or require particular justification if a procedure other than 'draft affirmative' procedure is applied). The factors referred to are:

a) powers that enable provision to be made that may substantially affect provisions of Acts of Parliament, Assembly Measures or Acts of the Assembly (e.g. E.g. Henry VIII powers <u>if</u> wider than necessary for purely consequential amendments as a result of the Act or Measure);
b) powers, the main purpose of which is, to enable the Welsh Ministers, the First Minister or the Counsel General to confer further significant powers on themselves;
c) powers to apply in Wales provisions of, for example, Acts of Parliament that in England, Scotland or Northern Ireland are contained in the Act itself (whether with or without modifications);
d) powers to impose or increase taxation or other significant financial burdens on the public;
e) provision involving substantial government expenditure;
f) powers to create unusual criminal provisions or unusual civil penalties;
g) powers to confer unusual powers of entry, examination or inspection, or provide for collection of information under powers of compulsion;
h) powers that impose onerous duties on the public (e.g. a requirement to lodge sums by way of security, or very short time limits to comply with an obligation).
i) powers involving considerations of special importance not falling under the heads above (e.g. where only the purpose is fixed by the enabling Act and the principal substance of the legislative scheme will be set out in subordinate legislation made in exercise of the power).

Factors that may reasonably tend to suggest the application of the 'negative' procedure include, in particular:

a) where the subject matter of the subordinate legislation is relatively minor detail in an overall legislative scheme or is technical;
b) where it may be appropriate to update the subject matter of the subordinate legislation on a regular basis;
c) where it may be appropriate to legislate swiftly (e.g. to avoid infraction proceedings or for the protection of human or animal health or of the environment where in some cases subordinate legislation made for these purposes is not subject to any procedure due to the recognised need to legislate urgently);

d) where the discretion of the Welsh Government over the content of the subordinate legislation is limited (e.g. legislation that gives effect to some provisions of EU law); or
e) where it where it would be appropriate to combine provision to be made under the power with provision that can be made under another power where the latter may be subject to negative procedure.

Part 3

Note 1:

Plain language principles:

- Drafting should be as simple as possible. It should also be precise so that the document has its intended effect. The instrument must be workable but at the same time drafted in language and in a style that ensure that it can be readily understood by its readers. Clarity of drafting should encourage clarity and simplicity of policy.
- Sentences should be short and well structured.
- Sentences should not contain excessive embedded and relative clauses.
- The active rather than the passive voice should be used.
- Archaic language and expression should be avoided.
- Gender specific language should not be used, a practice that has been followed in Wales since the creation of the National Assembly and this being advocated by the (first) Legislation Committee (other UK jurisdictions shortly followed suit).
- The drafting should be consistent. Words should be used in the same sense. If the sense is changed, this should be made clear.
- Overuse of capitals should be avoided.
- Proposition should be expressed in positive rather than negative terms.
- Similar proposition should be expressed in similar language.
- Repetition and unnecessary words should be avoided.
- Excessive cross-references and qualifications should be avoided.
- Expressions in common or everyday use should be used wherever possible.
- Jargon should be avoided; however technical terms will be necessary in legislation that deals with technical subject matter.
- Paragraphs and sub-paragraphs can break up blocks of text but multiple paragraphs and sub-paragraphs, while having the appearance of clarity, can often involve several ideas or concepts and be difficult to understand.

Part 4

(none)

Swyddfa y Cwnsleriaid Deddfwriaethol

Office of the Legislative Counsel

Llywodraeth Cymru
Welsh Government

LEGISLATIVE DRAFTING GUIDELINES

JANUARY 2012

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PART 1

INTRODUCTION

1 The purpose of this guidance

(1) This document sets out the main principles and techniques that the Welsh Government applies to its legislative drafting. It is principally intended to be a guide for members of the Office of the Legislative Counsel who draft Assembly Bills proposed by the Welsh Government, other officials in the Welsh Government who draft Welsh statutory instruments, legislative translators and legislative text editors. It may also be of use to Welsh Government officials drafting subordinate legislation not made by statutory instrument and anyone drafting non-Government Assembly Bills.

(2) The document will be revised from time to time and the latest version will be made available on the Office of the Legislative Counsel pages of the Welsh Government website [insert link].

(3) If you have any suggestions for changes or additions to the principles and techniques set out in this document, please send them to:

Dylan Hughes, First Legislative Counsel – Dylan.Hughes@Cymru.gsi.gov.uk

2 The context for this guidance

(1) Legislation made in Wales is usually made bilingually in Welsh and English. Where legislation is made bilingually, both texts are to be treated for all purposes as being of equal standing[1]. This demands care on the part of the Welsh legislative drafter to ensure that both texts say the same thing and in a way that respects the syntax and idiom of each language.

(2) The Welsh approach to legislative drafting also needs to take account of how the Assembly and the public respond to the drafting of Assembly Acts and subordinate legislation made by the Welsh Government. This guidance takes into account a number of recommendations made in response to feedback, in particular from Assembly Legislation Committees and the Constitutional Affairs Committee of the third Assembly (2007-2011).

3 Acknowledgements

A substantial part of this document is based on the drafting guidance of the UK Office of the Parliamentary Counsel and their contribution to it is gratefully acknowledged. In addition a significant contribution to the text was made by the Legislative

[1] Section 156(1), Government of Wales Act 2006.

Translation Unit of the Welsh Government. Inspiration has also been drawn from other sources, including the conferences and publications of the Commonwealth Association of Legislative Counsel and the manuals of other law drafting offices in common law jurisdictions around the world.

4 Applying the guidance in this document

The principles and techniques in this document must be applied flexibly. The drafting challenges that arise vary according to the particular context and there are often a number of solutions to a particular drafting issue. For these reasons, legislative drafting cannot be carried out by following simple rules rigidly; the task requires the drafter to think creatively and exercise judgement about whether a particular drafting technique achieves the best result in each case. The best result is legislation that gives effect to the policy in the clearest way possible.

PART 2

CLARITY

Clarity, effectiveness, and practicality

5 Clarity: the overarching objective

(1) The overarching objective for Welsh Government legislative drafters is clarity. Legislation must be effective, but it cannot be effective unless it is sufficiently clear.

(2) An effective draft is certain in its effect, accurate and achieves the policy objectives behind the legislation. Being clear is about making it as easy as possible for readers to understand what is being said. Even if a draft is clear enough to be effective, it may still be possible to make it easier to understand. The drafter's search for clarity should go beyond the minimum required to be effective.

6 Clear for whom?

(1) The drafter should be guided by the interests of the reader, bearing in mind that there will usually be a wide range of different kinds of reader. The readers include Assembly Members, lobby groups and members of the general public who take interest in draft legislation under scrutiny and ultimately those using the legislation when enacted or made. The end users include professional advisers and the courts and it is vital that the drafting produces the right result if tested in court. But individuals and bodies affected by the legislation are also end users, and their interests in accessing the law need to be taken into account.

(2) The requirements of readers may be different depending on who they are. What one set of readers finds easy may be difficult for another and competing interests need to be balanced and given due weight in the drafting.

7 Clarity: simplicity v precision

(1) Clarity requires both simplicity and precision and the demands of each call for compromise between them. What is simple will often be precise and what is precise will often be simple, but one does not follow from the other. Too much emphasis on simplicity can lead to imprecision and doubt about the effect of the law. While a law drafted in "blind pursuit of precision will inevitably lead to complexity; and complexity is a definite step along the way to obscurity"[2].

---

[2] G.C.Thornton highlights the compromise between simplicity and precision in *Legislative Drafting* (4th edition) p. 52.

(2) Drafters need to recognise the tension between simplicity and precision and use their experience and judgement to strike the right balance. It is incumbent on senior drafters to assist junior drafters in developing the necessary skills and judgement. Striking the right balance is not easy.

8 Clear bi-lingual text

It is usually the case (although not always) that the English language text of legislation is produced before the Welsh language text. This means that the initial Welsh text will be produced by the government's legislative translators before being checked for legal equivalence with the final text in English. It is important that the Welsh text should **not** unnaturally follow the syntax of the English, and neither should the English unnaturally follow the Welsh syntax. The texts have equal standing in law and the focus in checking legal equivalence between them should be on whether the same legal effect is achieved. Every effort should be made to ensure that this is done through natural and modern language in both versions.

9 Practical limitations on achieving the clearest result

(1) Some things that affect the clarity of legislation are not within the ultimate control of the drafter. But in all cases the drafter has a role in being an advocate within government for approaches to legislative projects that better promote clear law.

(2) If an Act or statutory instrument has been amended on a number of previous occasions, a new proposal for amendment should cause those involved to think seriously about updating the law into a consolidated text to improve its accessibility to the public. Or if the proposal is to amend an Act of Parliament or a statutory instrument made in English only this will mean that the substantive law will remain in the English language only – remaking the law would mean producing a text in Welsh too, improving access to the law through the Welsh language.

(3) There may well be valid reasons why Ministers or departments do not wish to consolidate provisions at the same time as taking forward a legislative reform: for example, it may require resources that are not easily available, or in the case of a Bill, settled but potentially controversial provisions could be opened up to debate and amendment. The final decision on how to proceed in a case like this is for Ministers collectively, not the drafter; but it is the role of the drafter to ensure that these matters are brought to the attention of decision makers. If drafters are concerned that these issues are not being considered or if approaches are suggested which are liable to impair access to legislation, the issues should be raised through the management chain of the Legal Services Department and, if necessary, with the Counsel General. The drafter's client is the Welsh Government as a whole, rather than individual departments or Ministers, and the policy interest in clear law must be properly taken into account along with the other policy and handling considerations.

(4) An important practical consideration for drafters is the time available for drafting. Drafts are often produced under tight time constraints and depend on policy input

which may need to take a wide range of interests into account. This may impact on drafting at late stages in the preparation of a Bill or a set of regulations. Work on improving clarity takes time, and sometimes this will not be available.

(5) In summary, the aim of the drafter is to make a draft as easy to understand as it is possible to make it in the time available, within the parameters set by Ministers and the Counsel General.

10 Clarity: drafting techniques

The following parts of the guidance describe the techniques within the control of the drafter which promote clarity.

PART 3

STRUCTURE AND ORGANISATION

11 Telling the story

(1) The reader of a piece of legislation does not know what the message is until it is delivered. This contrasts with the position of a party to a commercial agreement, who presumably knows, at least in general terms, what the agreement says. So it is especially important to take the reader through the story that needs to be told in the legislation in a logical way.

(2) Different readers of legislation may be interested in different aspects of the story: for example, Ministers might be interested in how the legislation fits with a general policy, but professional advisers will be more interested in the details of the law. This may influence how the story is told.

12 Organisation and headings

(1) The clarity of a text is greatly affected by the way it is organised. The reader can be helped by the way in which legislation is divided into Parts, Chapters etc and the words chosen for their headings; and also by the words chosen for section, article and regulation headings. Text is easier to understand if the topic is specified at the beginning. Parts, chapters and headings help the reader to identify topics.

(2) It helps if the headings of sections, articles and regulations give as full an indication of the contents as possible, consistent with keeping the heading reasonably short (many drafters try to make sure that their headings do not go into a second line). But a section heading may not need to repeat the work done by a Chapter or Part heading.

(3) Headings have a relationship with each other, not just with the section. In thinking about structure and organisation of the material it is helpful to imagine the section (or article or regulation), Chapter and Part headings as set out in the table of contents. As the draft develops drafters should re-read the table of contents regularly to make sure it still hangs together.

(4) All sections, articles and regulations should have headings. If there is no obvious way of summarising the contents of a new section, article or regulation, this may be an indication that it needs to be kept together with the subdivisions of the previous section, article or regulation (see paragraph 20 below).

13 Order of material

(1) It helps the reader if the material in the legislation is set out in a logical order, so that later propositions build upon earlier ones.

(2) The following techniques may assist this—

(a) arranging provisions in a time sequence. For example – first provisions dealing with the application for a licence, then the issue of the licence, then the conditions of the licence, then renewal and finally revocation;

(b) grouping together provisions with a common subject-matter;

(c) grouping together related concepts;

(d) expressing similar ideas in provisions with similar structures;

(e) putting general and important provisions first.

14 Schedules

(1) It will often be helpful to divide material into main provisions (sections, articles or regulations) and schedules where the detail is in danger of obscuring the main story.

(2) Examples of where a schedule may be useful include—

(a) technical provision that is unlikely to be of interest to many readers;

(b) lengthy material that is at something of a tangent to the main story;

(c) repeals or revocations;

(d) long series of minor textual amendments;

(e) large tables and very long lists;

(f) the text of treaties.

15 Forward references

(1) Reference at any point to material which needs to be understood at that point but which does not appear until later is generally not helpful. This may well be an indication that the material would be better re-ordered.

(2) But a signpost to later (or indeed earlier) material which is relevant but which does not necessarily need to be understood now may well be helpful. It can be included in brackets (eg "see section X").

16 Overview provisions

(1) A section at the beginning of a Bill, or of a Part or Chapter, explaining what is to follow may help the reader to navigate round a larger piece of legislation where the table of contents is too long to give a clear picture.

(2) An example is section 2 of the Income Tax Act 2007, which says that the Act contains 17 Parts, and then sets out briefly what is covered by each Part.

(3) That Act also has a wider overview provision in section 1, which puts the Act into context with other Acts making provision about income tax.

(4) An overview provision may be helpful in shorter pieces of legislation; for example, if the substantive provisions are on an obscure topic or potentially difficult for all or part of the likely readership.

(5) For further provision about the drafting of overview provisions see chapter 6 of Part 6 on drafting techniques.

17 Structure of sections, articles and regulations: connection between subsections

(1) A subsection (or paragraph in an article or regulation) may usually be read in the light of a previous subsection in the same section (or article or regulation). It is usually unnecessary to repeat material which has been established earlier.

EXAMPLE

(1) A person may apply to the council for a permit to play music.

(2) An application under subsection (1) must contain the prescribed information.

(3) On receiving an application made by a person under subsection (1), the council may issue a permit to the person.

(4) A permit issued under subsection (3) must be in the prescribed form.

(5) A permit issued under subsection (3) authorises the holder to play music as indicated in the permit.

(1) Caiff person wneud cais i'r cyngor am drwydded i chwarae cerddoriaeth.

(2) Rhaid i gais o dan is-adran (1) gynnwys yr wybodaeth a ragnodir.

(3) Os bydd y cyngor yn cael cais gan berson o dan is-adran (1), caiff y cyngor ddyroddi trwydded i'r person.

(4) Rhaid i drwydded a ddyroddir o dan is-adran (3) fod ar y ffurf a ragnodir.

(5) Mae trwyddedd a ddyroddir o dan is-adran (3) yn awdurdodi'r deiliad i chwarae cerddoriaeth fel y mae'r drwydded yn ei dangos.

This could be recast in the following way–

(1) A person may apply to the council for a permit to play music.

(2) The application must contain the prescribed information.

(3) The council may issue a permit to the applicant.

(4) *The permit must be in the prescribed form.*

(5) *The permit authorises the holder to play music as indicated in the permit.*

(1) *Caiff person wneud cais i'r cyngor am drwydded i chwarae cerdddoriaeth.*

(2) *Rhaid i'r cais gynnwys yr wybodaeth a ragnodir.*

(3) *Caiff y cyngor ddyroddi trwydded i'r ceisydd.*

(4) *Rhaid i'r drwydded fod ar y ffurf a ragnodir.*

(5) *Mae'r drwydded yn awdurdodi'r deiliad i chwarae cerddoriaeth fel y mae'r drwydded yn ei dangos.*

(2) It is helpful if the opening sub-division of a provision gives the reader some idea of what the provision is about, especially if it introduces a new topic. For example, if a section produces a particular legal effect if conditions are met, it may be more helpful to state the effect before listing the conditions.

18 Structure of sections, articles and regulations: second sentences

(1) Normally each sentence in a section, article or regulation is a separate numbered provision. But there is no rule against having more than one sentence in a numbered provision. The logical connection between sub-divisions is likely to be closer in some cases than others. A second sentence enables the drafter to distinguish two levels of connection between subsections in the same section; or to deal with cases where putting a second thought in a separate provision would place undue emphasis on it.

EXAMPLE (section 108, Housing Grants, Construction and Regeneration Act 1996)

(1) *A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.*

For this purpose "dispute" includes any difference.

(2) *The contract shall include provision in writing so as to—*

(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;

(b) provide a timetable [etc].

(2) In this example, there are only two main propositions - the right to refer disputes to adjudication and what the contract must say about referrals. The point about the meaning of "dispute" is just an afterthought to the first, and it might be unhelpful to treat it as equal in weight to the other two.

19 Sub-headings

Sometimes information may be more accessible to the reader if it is set out under a series of sub-headings (even within the same subsection). An example is section 836(3) of the Income Tax Act 2007:

"836 Jointly held property

[(1), (2)]

(3) But this treatment does not apply in relation to any income within any of the following exceptions.

Exception A

Income to which neither of the individuals is beneficially entitled.

Exception B

Income in relation to which a declaration by the individuals under section 837 has effect (unequal beneficial interests).

Exception C

Income to which Part 9 of ITTOIA 2005 applies (partnerships).

Exception D

Income arising from a UK property business which consists of, or so far as it includes, the commercial letting of furnished holiday accommodation (within the meaning of Chapter 6 of Part 3 of ITTOIA 2005).

Exception E

Income consisting of a distribution arising from property consisting of –

(a) shares in or securities of a close company to which one of the individuals is beneficially entitled to the exclusion of the other, or

(b) such shares or securities to which the individuals are beneficially entitled in equal or unequal shares.

"Shares" and "securities" have the same meaning as in section 254 of ICTA.

Exception F

Income to which one of the individuals is beneficially entitled so far as it is treated as a result of any other provision of the Income Tax Acts as-

(a) the income of the other individual, or

(b) the income of a third party."

20 Section, article and regulation length

(1) Drafters should try to avoid sections, articles or regulations containing more than ten subsections or paragraphs.

(2) However, this is again a matter of judgement: if there is a self-contained story to tell, it may be more convenient for the reader to have it all in one section which is a bit longer, rather than in two or more shorter sections.

(3) It may also help if the division into sections follows the division of thought. If, for example, you have to make separate provision for three different cases, but one case requires more provision than the other two, it might still be easiest to have only one section for each case, even if that means that one of the sections is longer than you would otherwise wish.

PART 4

LANGUAGE

CHAPTER 1

PLAIN LANGUAGE

21 Plain Language

(1) Legislation should be in modern standard Welsh and English, reflecting ordinary general usage.

(2) Drafters should use plain language, so far as possible.

(3) This means that the drafter should—

(a) use simple and familiar words rather than complex expressions and unusual words;

(b) avoid using foreign words;

(c) avoid using archaic words;

(d) avoid using jargon, especially governmental shorthand expressions and unexplained acronyms;

(e) avoid including too many different ideas in each sentence or "sense bite" (see paragraph 22).

(4) Sometimes it is not possible or sensible to express complex concepts in language that is easy for any person to understand. Technical expressions may be appropriate where such terms are well understood by the main audience of the legislation.

(5) Technical expressions may also be better if any attempt to render their meaning in everyday language would lead to long-winded provisions that are difficult to understand or uncertain in effect.

(6) But the use of technical language must be fully justified.

(7) Drafters, translators and text editors need to work together to ensure that plain language is used in both the Welsh language and English language texts.

CHAPTER 2

SENTENCES

22 Sentence structure: short "sense bites"

(1) Drafters should avoid long blocks of unbroken text, which is the hallmark of traditional forms of legal writing and commonly the subject of caricature and criticism.

(2) In order to understand the message being conveyed in a sentence, the reader needs to know the structure of the whole sentence. Very long sentences often include a number of ideas; the reader must hold all of these ideas in his or her mind until the end of the sentence before the message can be understood. Sentences become difficult to understand if they contain a number of elements in addition to the subject and the verb; the more additional elements there are, the more difficult it is to understand the sentence.

(3) This insight commonly leads to the exhortation for drafters to write "short sentences", but a better recommendation is to write in short "sense-bites"[3]. The rigid application of short sentence only policy, such as a word limit, would not be appropriate. An example of a situation where it would not be sensible to have a fixed limit on the length of a sentences would be a proposition that an office holder is to have a number of different powers in a particular context; a list of those powers (appropriately sub-divided by paragraphs) with appropriate introductory words may be better that a series of sentences opening with the same words – which would could be irritating. Information should be presented to the reader in short bites: each of those short bites may be contained in a separate phrase or paragraph which grammatically amount together to a single (longer) sentence.

(4) A single sentence with subordinate clauses is often harder to understand than a series of sentences expressing the same substance. So a single sentence should ideally contain one idea only, or be split into sense bites each containing one idea only. For example, qualifications or conditions can be split off, into separate subsections of paragraphs or even separate sections, articles or regulations as appropriate.

23 Sentence structure: unnecessary words

(1) Unwieldy sentences may be shortened by removing unnecessary words. The following paragraphs contain suggestions for drafters.

(2) Avoid turning verbs into nouns. These forms result in longer sentences.

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[3] This is the recommendation of Butt and Castle in *Modern Legal Drafting* (2nd edition) p.181.

EXAMPLES

"a local authority must consider"

"rhaid i awdurdod lleol ystyried"

Not

"a local authority must give consideration".

"rhaid i awdurdod lleol roi ystyriaeth"

"an eligible student may apply for a grant"

"caiff myfyriwr cymwys geisio am grant"

Not

"an eligible student may make an application for a grant".

"caiff myfyriwr cymwys wneud cais am grant".

This is also generally more consistent with the natural sentence structure of the language when drafting in Welsh e.g. "defnyddio'r Gymraeg" as opposed to "y defnydd o'r iaith Gymraeg".

(3) Avoid unnecessary cross-references. Think carefully about the need for expressions like "subject to paragraph (x)".

(4) Avoid lists of alternatives: consider a generic term, possibly with a definition.

(5) Avoid the unnecessary use of "such…as" and "y fath … â" or "y cyfryw …â".

EXAMPLE

"provide any information required by the Welsh Ministers"

"darparu unrhyw wybodaeth sy'n ofynnol gan Weinidogion Cymru"

Not

"provide such information as is required by the Welsh Ministers".

"darparu'r fath wybodaeth (y cyfryw wybodaeth) ag sy'n ofynnol gan Weinidogion Cymru"

(6) Avoid the unnecessary use of "there is" and "there are" or "yna".

EXAMPLE

"if any information is available"

"os oes unrhyw wybodaeth ar gael"

Not

"if there is any information available".

"os oes yna wybodaeth ar gael"

(7) Avoid superfluous or archaic words like "hereby", "herein", "hereafter" (see paragraph 30 (words and phrases)).

24 Sentence structure: arrangement of sentence components

(1) Overly long or complex sentences can be broken up into the component parts in order to identify the best way of re-arranging the ideas they contain. This can be done by taking the following steps:

(a) find the subject and the main verb;

(b) identify the other elements of the sentence and their relationship to the subject and verb;

(c) consider whether the additional elements are conditions, qualifications, exceptions, elaborations, reasons or results;

(d) consider whether the additional elements refer more directly to other additional elements than the subject and main verb.

(e) identify the elements that are essential to the basic idea being conveyed by the sentence;

(f) redraft the provisions by keeping the essential elements together in one sentence or sense bite and place the non-essential elements in separate shorter sentences or sense bites.[4]

25 Sentence structure: multiple sentence clauses and location of clauses

(1) Sentences that are difficult to understand often have too many clauses or subordinate clauses, or they have groups of words in positions that inhibit comprehension or create ambiguity.

(2) The classic sentence structure in English is subject-verb-object and in Welsh it is verb-subject-object. If possible avoid inserting words between the subject and the main verb in English and between the subject and the object in Welsh.

EXAMPLE

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[4] This set of recommendations is drawn from a paper presented to the 2007 Conference of the Commonwealth Association of Legislative Counsel by Dr Duncan Berry. For some practical examples of how to address these questions see the paper *Reducing the Complexity of Legislative Sentences* in the January 2009 edition of *the Loophole* published by the Commonwealth Association of Legislative Counsel http://www.opc.gov.au/calc/loophole.htm .

The Welsh Ministers may issue a licence to the applicant if the required conditions are met.

Caiff Gweinidogion Cymru ddyroddi trwydded i'r ceisydd os bodlonir yr amodau gofynnol.

Not

The Welsh Ministers may, if the required conditions are met, issue a licence to the applicant.

Caiff Gweinidogion Cymru, os bodlonir yr amodau gofynnol, ddyroddi trwydded i'r ceisydd.

(3) Drafters should consider the following questions when drafting sentences in English with multiple clauses:

- (a) Is there too much information before the subject of the sentence? (Left branching sentences, in which two or more conditions precede the statement of the legal rule, are more difficult to understand)
- (b) Is there too much information between the subject and the verb?
- (c) Is there too much information between the verb and the object or complement?
- (d) Is there too much information at the end of the sentence?
- (e) Is there too much information between a relative pronoun and its antecedent?

(4) Drafters should consider the following questions when drafting sentences in Welsh with multiple clauses:

- (a) Is there too much information before the main verb? (Left branching sentences, in which two or more conditions precede the statement of the legal rule, are more difficult to understand)
- (b) Is there too much information between the verb and the subject?
- (c) Is there too much information between the subject and the object?
- (d) Is there too much information at the end of the sentence?

(5) It is not suggested that information cannot be inserted at these points in a sentence; but drafters should be wary of placing too much information at these points.

26 Sentence structure: conditional sentences

(1) The position of conditions in a sentence can affect the clarity of the sentence. The following guidelines may assist the drafter in making sentences clear.

(2) If there is only one condition precedent, it is usually better to state it first.

EXAMPLE

If a person has attained the age of 18, he or she is entitled to receive the benefit.

Os yw person wedi cyrraedd 18 oed, mae ganddo hawl i gael y budd-dal.

(3) A single condition subsequent is usually better placed after the main clause.

EXAMPLE

A secure tenant is entitled to a rent rebate, except during any period in which he or she is subject to an anti-social behaviour order.

Mae gan denant diogel hawl i gael ad-daliad rhent, ac eithrio yn ystod unrhyw gyfnod pryd y mae'n ddarostyngedig i orchymyn ymddygiad gwrth-gymdeithasol.

(4) If there are several conditions or exceptions, it is usually better to state the main proposition first and list the conditions or exceptions afterwards.

EXAMPLE –

"A person is entitled to the grant if the person-

(a) is ordinarily resident in Wales,

(b) is attending an educational institution full-time, and

(c) has attained the age of 18."

"Mae gan berson hawl i'r grant os yw'r person-

(a) yn preswylio fel arfer yng Nghymru,

(b) yn mynychu sefydliad addysgiadol yn llawn amser, ac

(c) yn 18 oed neu'n hŷn.

Not

"If a person is ordinarily resident in Wales, is attending an education institution full-time, and has attained the age of 18, that person is entitled to a grant."

> *"Os yw person yn preswylio fel arfer yng Nghymru, yn mynychu sefydliad addysgiadol yn llawn amser, ac yn 18 oed neu'n hŷn, mae gan y person hwnnw hawl i grant."*

27 Sentence structure: compressed sentences

(1) Drafters should not be too economical with words if a few more words would make their drafts clearer.

(2) Problems will occur for readers if defined terms are overused.

(3) Another kind of undesirable compression occurs when drafters try to cover too many cases by a single sentence or formula.

(4) Drafting by reference to other legislation is yet another example of compressed drafting and the technique should be avoided. It is generally undesirable to draft in a way that causes the reader to refer to other legislation in order for a provision to be understood.

(5) But in some cases it may be better to draft by reference to other legislation if the alternative is excessive repetition of provisions on the statute-book, particularly if provisions are lengthy or complex.

28 Sentences: prefer the active to the passive voice

(1) It is usually clearer to use the active voice than the passive voice.

EXAMPLE

The Welsh Ministers must give a notice

Rhaid i Weinidogion Cymru roi hysbysiad

is more quickly grasped than –

A notice must be given by the Welsh Ministers.

Rhaid i hysbysiad gael ei roi gan Weinidogion Cymru.

(2) But the passive may be appropriate if the agent is unimportant, universal or unknown.

EXAMPLE

If a notice is given to the Authority ….
Os rhoddir hysbysiad i'r Awdurdod…

might be appropriate if it did not matter who gave the notice.

(3) The passive may also be useful as a technique for gender-neutral drafting. (see paragraph 48)

(4) In Welsh, the passive may be preferred for stylistic reasons: for instance, to avoid the use of less common active verbal forms.

EXAMPLE

Os llofnodwyd yr adroddiad ganddynt yn ystod y cyfnod perthnasol

might be more readily understood than –

(5) Os llofnodasant yr adroddiad yn ystod y cyfnod perthnasol

29 Sentences: prefer the positive to the negative

(1) The positive is often easier to understand than the negative version of the same thing.

(2) But this depends on the nature of the proposition and on the overall effect of what is said: it is not a universal rule. A prohibition may well be best expressed in the negative.

EXAMPLE

Speak after the tone
Siaradwch ar ôl y tôn

is easier to understand than –

Do not speak until you hear the tone
Peidiwch â siarad nes i chi glywed y tôn

EXAMPLE

Do not walk on the grass
Peidiwch â cherdded ar y gwair

is probably easier to grasp at once than –

Walk only on the pathways
Cerddwch ar y llwybrau yn unig

(3) Certain positive constructions in English may be expressed by a negative construction in Welsh.

EXAMPLE

The authority may only grant permission after it has consulted with the public (positive construction)

may be drafted in Welsh as-

Ni chaiff yr awdurdod ond roi caniatâd ar ôl iddo ymgynghori â'r cyhoedd (negative construction)

(4) Negatives are often better avoided when expressing a quantity.

EXAMPLE

not less than 25%

nid llai na 25%

would often be more clearly expressed as-

at least 25%
o leiaf 25%

or

25% or more.
25% neu fwy.

(5) It is best to avoid double negatives: but note that it may not always be possible.

EXAMPLE

The Welsh Ministers have not certified that no application was made
Nid yw Gweinidogion Cymru wedi ardystio na wnaed cais

does not mean the same as –

The Welsh Ministers have certified that an application was made.
Mae Gweinidogion Cymru wedi ardystio bod cais wedi ei wneud.

(6) Apparent double negatives may also be used in certain constructions in Welsh, even if they are avoided in the corresponding construction in English.

EXAMPLES
No person may make an application
Will need to be translated as -

Ni chaiff neb wneud cais

Only an applicant may apply for costs

Will need to be translated as -

Ni chaiff ond ceisydd hawlio costau

CHAPTER 3

WORDS AND PHRASES

30 Words and phrases

Above and below /uchod ac isod

Drafters should not use references to "regulation X above" or "regulation Y below", or to "rheoliad X uchod" or "rheoliad Y isod", unless it is necessary in the context to distinguish the provisions of the instrument from the provisions of another instrument, Act or Measure.

Any /unrhyw

Drafters should not use "any" when the indefinite article "a" will do. "Any" and "unrhyw" should only be used where "any and every" is meant. "Any" and "unrhyw" can also be ambiguous—

For example-

The Welsh Ministers must consult any organisation appearing to them to be representative of the agricultural producers in Wales.

Rhaid i Weindogion Cymru ymgynghori ag unrhyw sefydliad y mae'n ymddangos iddynt eu bod yn cynrychioli cynhyrchwyr amaethyddol yng Nghymru.

This is ambiguous because it is not clear whether "any" or "unrhyw" means all such organisations, or any one of them.

***But* / ond**

There is no rule against putting "But" or "Ond" at the beginning of a sentence, and it can on occasion be helpful. But it should not be overused. Unnecessary or over-emphatic words distract the reader.

An initial "but" or "ond" is unnecessary if it is in any event obvious that the second statement qualifies the first. For example, a proposition to the effect that "Nothing in this section applies" / "Nid oes dim yn yr adran hon yn gymwys" or "Subsection (x) does not apply" / "Nid yw is-adran (x) yn gymwys" does not need an initial "but" or "ond".

Comprise

"Comprise" should not be used where "include" or "contain" is meant.

For example-

The Act comprises of a number of regulation making provisions.

would better drafted as-

The Act includes/contains a number of regulation making provisions.

The primary meaning of “comprise” is “consist of”, “to be made up of”.

For example -

This section comprises regulation making provisions.

The passive use of “comprise” is synonymous.

For example-

This section is comprised of regulation making provisions.

However, “comprise of” in the active voice is non-standard usage.

For example-

This section comprises of regulation making provisions.

would be better drafted as-

This section consists of regulation making provisions.

Hereby, hitherto, hereinafter, hereinbefore etc

“Hereby” and the other “here-” words should not be used because they are archaic and usually unnecessary. The use of “hereby” might serve some useful purpose if there is a need to refer to a provision, but that purpose is likely to be better met by more specific words (e.g. “the board is abolished by this regulation”).

In particular /yn benodol

The expressions “in particular” and “yn benodol” are commonly used in legislation to indicate that a subsequent list of things is not exhaustive:

For example-

This power includes<u>, in particular</u>,-

(a)…

(b)…

Mae’r pŵer hwn yn cynnwys<u>, yn benodol</u>, -

(a)…

(b)…

Or the expressions may be used to indicate that that a single example is not the only thing meant:

For example-

For the purpose of furthering the objectives in section X, the Welsh Ministers may, in particular, do Y.

At ddibenion hyrwyddo'r amcanion yn adran X, caiff Gweinidogion Cymru wneud Y yn benodol.

There have been instances during the third Assembly of this use of "in particular" and "yn benodol" not being understood by Assembly Members scrutinising legislation before the Assembly or by some consultees. It is recommended that drafters deploy alternative ways of indicating that a list is not intended to be exhaustive or that one thing specified is not intended to be the only thing.

For example-

The power includes, but is not limited to,-

(a)…

(b)…

.

Mae'r pŵer yn cynnwys, ond nid yw'n gyfyngedig i'r canlynol,-

(a)…

(b)…

For the purpose of furthering the objectives, the Welsh Ministers may, among other things, do X.

At ddibenion hyrwyddo'r amcanion, caiff Gweinidogion Cymru wneud X ymhlith pethau eraill.

Only/nid…ond, dim ond…,… yn unig

The word "only" and the corresponding Welsh phrases are easily misplaced, so drafters must take care. The sentences in the following example demonstrate the problem. Note that the Welsh examples sometimes allow for the use of emphatic constructions. Also note the ambiguity in (c), which could have the same meaning as (a) or (d), and the ambiguity in (g), which could have the same meaning as (e) or (i).

(a) Only the local authority may give the eligible student the grant.

(a) Ni chaiff ond yr awdurdod lleol roi'r grant i'r myfyriwr cymwys / Dim ond yr awdurdod lleol a gaiff roi'r grant i'r myfyriwr cymwys / Yr awdurdod lleol yn unig a gaiff roi'r grant i'r myfyriwr cymwys.

(b) The only local authority may give the eligible student the grant.

(b) Yr unig awdurdod lleol a gaiff roi'r grant i'r myfyriwr cymwys.

(c) The local authority only may give the eligible student the grant.

(c) Yr awdurdod lleol yn unig a gaiff roi'r grant i'r myfyriwr cymwys.

(d) The local authority may only give the eligible student the grant.

(d) Ni chaiff yr awdurdod lleol ond rhoi'r grant i'r myfyriwr cymwys./ Dim ond rhoi'r grant i'r myfyriwr cymwys y caiff yr awdurdod lleol.

(e) The local authority may give only the eligible student the grant.

(e) Ni chaiff yr awdurdod lleol roi'r grant ond i'r myfyriwr cymwys. / I'r myfyriwr cymwys yn unig y caiff yr awdurdod lleol roi'r grant. / Dim ond i'r myfyriwr cymwys y caiff yr awdurdod lleol roi'r grant.

(f) The local authority may give the only eligible student the grant.

(f) Caiff yr awdurdod lleol roi'r grant i'r unig fyfyriwr cymwys.

(g) The local authority may give the eligible student only the grant.

(g) Ni chaiff yr awdurdod lleol roi'r grant ond i'r myfyriwr cymwys. / Ni chaiff yr awdurdod lleol roi ond y grant i'r myfyriwr cymwys./ Y grant yn unig y caiff yr awdurdod lleol ei roi i'r myfyriwr cymwys. / Dim ond y grant y caiff yr awdurdod lleol ei roi i'r myfyriwr cymwys.

(h) The local authority may give the eligible student the only grant.

(h) Caiff yr awdurdod lleol roi'r unig grant i'r myfyriwr cymwys.

(i) The local authority may give the eligible student the grant only.

(i) Ni chaiff yr awdurdod lleol roi ond y grant i'r myfyriwr cymwys. / Y grant yn yn unig y caiff yr awdurdod lleol ei roi i'r myfyriwr cymwys. / Dim ond y grant y caiff yr awdurdod lleol ei roi i'r myfyriwr cymwys.

Or /neu/ynteu

"Or" is not always disjunctive in character. In Welsh, "or" is expressed in one of two ways. When "or" is not disjunctive "neu" is generally used. But when "or" is disjunctive in nature, the written form "ynteu" (usually expressed as "ta" in speech) is used.

A power to impose conditions on grants or loans would normally be read as allowing conditions relating to one or both.

EXAMPLE

The regulator may require the employer to—

(a) produce any relevant document, or

(b) provide any relevant information.

Caiff y rheoleiddiwr ei gwneud yn ofynnol i'r cyflogwr—

(a) dangos unrhyw ddogfen berthnasol, neu

(b) darparu unrhyw wybodaeth berthnasol.

In that example, it seems very unlikely that the powers are intended to be mutually exclusive. But in other cases it may be less clear, as perhaps the following example illustrates.

EXAMPLE

The regulator may require the employer to—

(a) pay a fine, or

(b) take action of a description specified by the regulator.

Caiff y rheoleiddiwr ei gwneud yn ofynnol i'r cyflogwr—

(a) talu dirwy, neu

(b) cymryd camau o ddisgrifiad a bennir gan y rheoleiddiwr.

The Welsh version using 'ynteu' would make it clearer that (a) and (b) are mutually exclusive.

Caiff y rheoleiddiwr ei gwneud yn ofynnol i'r cyflogwr—

(a) talu dirwy, ynteu

(b) cymryd camau o ddisgrifiad a bennir gan y rheoleiddiwr.

So a degree of caution is in order. It may be possible to make the intention clear by the introductory words spelling out that both of two alternatives are a permissible option; for example, in the case of a penal provision allowing "the imposition of a fine or imprisonment for a period of up to 2 years or both"/ "gosod dirwy neu cyfnod o garchar o hyd at ddwy flynedd, neu'r ddau".

Provided that…

The use of the lawyer's proviso to introduce conditions, limitations or exceptions should be avoided. "Provided that…" is an archaic formulation that has been criticised by a number of writers who advocate the use of plain language in legal drafting[5].

The appearance of these words in a sentence is sometimes a sign that the sentence is too long.

The words "provided that" are ambiguous. The phrase might be used to introduce conditions, limitations, exceptions or simply a new proposition that does not qualify or limit the preceding material.

If the intention is to introduce a limitation or qualification drafters should consider simple words like 'if', 'but', 'when' or 'however' instead.

New provision that is not a true limitation or qualification does not need an introduction.

Same

"Same" or "of the same" should not be used as a substitute for "it" or "them". It can often be dropped altogether; for example "*The notice must be in writing and the local authority must deposit two copies **of the same** in each public library in its area*"

[5] E.g. P. Butt. & R. Castle, *Modern Legal Drafting* (2nd edition).

Save

"Save" should not be used if "but" or "except" is meant.

Shall

"Shall" can be used in English to denote the future, to denote obligation or in a declaratory manner. Welsh Government drafting policy is to minimise the use of the legislative "shall" so as to avoid this ambiguity. There is no equivalent single term in Welsh covering all of the senses in which "shall" is used in English, so the same issue does not arise in the Welsh text. The future in Welsh is expressed either by using the present/future inflected form of the verb or by a periphrastic construction consisting of the future forms of the verb 'bod' and the relevant verb-noun. Obligation is expressed by use of the various nouns, adjectives and prepositions (e.g. rhaid, gofynnol, i). Declaratory statements are generally expressed by using the third person imperative form of the verb (e.g. bydded).

There are various alternatives to "shall" which can be used, depending on context—

- "must"/ "rhaid" in the context of obligations (although "is to be" and "it is the duty of" may also be appropriate alternatives in certain contexts);
- "there is to be" / "bydded" in the context of the establishment of new statutory bodies etc.;
- use of the present tense in provisions about application, effect, extent or commencement; in Welsh the simple present may be differentiated from the continuous present;
- "is amended as follows" / "wedi ei ddiwygio fel a ganlyn" in provisions introducing a series of amendments;
- "is repealed" / "wedi ei ddiddymu" in the context of free-standing repeals;
- "is to be" / "i'w" in the context of provisions relating to statutory instruments (and, if appropriate, "may not" "ni chaiff" as an alternative to "shall not").

A reason for not departing from "shall" might be that it would appear in text to be inserted near to existing provisions that use "shall" in the same sense.

Subject to / yn ddarostyngedig i

To say that "This section is subject to section x" / "Mae'r adran hon yn ddarostyngedig i adran x" is not always helpful. It may be better to be more precise about the relationship between the propositions (eg "This section does not apply to... (see section x)" / "Nid yw'r adran hon yn gymwys i …(gweler adran x)".

It may also be possible to use another expression: for example, "but see section X" / "ond gweler adran X". Or it may be possible to state briefly the case to which a different rule applies by saying, for example, "except" "ac eithrio" or "unless" "oni bai" (as in "Unless the person concerned is under 30" / "Oni bai bod y person dan sylw yn iau na 30 oed").

The relationship between the provisions may be particularly hard to follow if "subject to" / "yn ddarostyngedig i" is at the beginning of the sentence. It may be better to start with the main proposition and then indicate that there is a qualification (perhaps in a second sentence).

Alternatively, it may be possible to dispense with "subject to" / "yn ddarostyngedig i" altogether, especially if the qualifying proposition is close to the proposition it qualifies— in which case the reader may be expected to grasp the relationship between the two without extra help.

"Subject to what follows" and "subject as follows" / "yn ddarostyngedig i'r hyn a ganlyn" are potentially very ambiguous and should be avoided unless it is abundantly obvious from the context exactly which of the following provisions are being referred to. Where there is any doubt, specify exactly which provisions you mean (or express the relationship in some other way).

Global cross-references such as "Subject to the provisions of the Corporation Tax Acts" / "Yn ddarostyngedig i ddarpariaethau yn Neddfau'r Dreth Gorfforaethau" are sometimes unavoidable but may not be entirely meaningful to non-expert readers. If the reference cannot be avoided, try to include a list of where the relevant other provision is made.

Such / y fath, …o'r fath, y cyfryw…

"Such" should not be used if "the", "a" or "that" will do. "Y fath …", "…o'r fath", "y cyfryw" should similarly be avoided in Welsh if the use of the definite article or demonstrative adjectives suffices.

If "such" is being used to refer back to something care must be taken over how much is to be picked up by the previous proposition.

For example, if a draft says "such" period", does this pick up the period of 12 months mentioned earlier, or that period plus one or more of the qualifications built into the earlier provision that make the period shorter or longer in particular circumstances?

Thereby, thereafter, thereto, therefrom, etc

"There-" words seem old fashioned to modern readers and they should be avoided. As with "here-" words, there may be some purpose in using them, in the case of "there-" words for references back. A reference back that is necessary is usually better achieved with more specific words.

"of this Act", "of this section", "of this Schedule" etc / "o'r Ddeddf hon", "o'r adran hon", "o'r Atodlen hon")

This relates to the use of "this Act", "of this section" and "of this Schedule" etc and the corresponding Welsh expressions in connection with references to sections, subsections and paragraphs of a Schedule etc.

As a general rule, use of these expressions should be avoided.

But they may serve a useful purpose:

(a) in contexts where "above" or "below" might otherwise be used (see above): there may be reasons of symmetry or emphasis that mean that, for example, "of this Act" is to be preferred to "above" or "below";

(b) where there is a reference in a Schedule to "this Part" or "Part 2" and both the Schedule and the Act containing it are divided into Parts; it may be desirable to add "of this Act" or "of this Schedule" to make clear which Part of what is being referred to;

(c) where there is a reference to a Chapter of the Part in which the reference occurs and another Part of the Act is also divided into Chapters; it may be desirable to add "of this Part" to the reference in the interests of clarity.

The same principles apply to the use of the corresponding Welsh expressions.

Where / pan fo

Sometimes "where" is clearly preferable to "if", and sometimes "if" is clearly preferable to "where", but sometimes either could be used. The same is true of the corresponding Welsh expressions "pan fo" and "os".

"Where" ("pan fo") is useful for stating a case (or a set of circumstances" in which a later proposition applies.

"If" ("os") is useful for stating a contingency.

But the two overlap, as a case may also be a contingency: in those circumstances "if" ("os") may often be more instantly comprehensible.

EXAMPLE

Instead of-

Where a person is served with a notice,[then something follows],

Pan fo hysbysiad yn cael ei gyflwyno i berson, [yna mae rhywbeth yn dilyn],

you could say-

If a person is served with a notice, [then something follows]

Os cyflwynir hybysiad i rywun, [yna mae rhywbeth yn dilyn].

Will / bydd

"Will" / "bydd" has sometimes been used where makers of subordinate legislation are imposing obligations on themselves. It is preferable to impose obligations in legislation in objective terms, imposing the obligation rather than stating an intention.

EXAMPLE

Applications received by the Welsh Ministers must be acknowledged within seven day"

Rhaid cydnabod ceisiadau a ddaw i ddwylo Gweinidogion Cymru cyn pen saith niwrnod

Not

Applications received by the Welsh Ministers will be acknowledged within seven days

Bydd ceisiadau a ddaw i ddwylo Gweinidogion Cymru yn cael eu cydnabod cyn pen saith niwrnod

31 Neologisms

(1) Neologisms should be avoided in Welsh and English. On certain rare occasions, however, the use of neologisms in Welsh may be necessary: although Welsh has been used as a language of law for many centuries, legislation and many of the technical fields with which it is concerned are relatively new domains for the Welsh language.

(2) This is sometimes manifested in the appropriation of a word already in existence but which has fallen out of favour in modern Welsh and lending it a new meaning. The word 'mangre' (with the appropriate mutation in context to 'fangre') is used in section 41 of the Children and Families (Wales) Measure 2010 to convey the meaning of 'premises'.

(3) The word 'premises' was a longstanding problem for legislation in Welsh until the word 'mangre' (a place or location) was appropriated for the drafting of statutory

instruments some years ago and given a specific meaning. Similarly, in section 37 of the Welsh Language Measure 2011, the word 'neilltuedig' (already in existence with the meaning 'set apart' or 'reserved') was appropriated for the English 'qualifying' as in 'qualifying person' and 'qualifying service delivery standard'. The word normally used for 'qualifying' is 'cymwys', but the decision was taken to appropriate another word because 'cymwys' also means 'applicable' and 'penodol gymwys' was already in use in the Measure for 'specifically applicable' and 'cymwysadwy' in use for 'potentially applicable'.

(4) In coining new terms, best terminological practice should be observed. Drafters and translators should follow the Guidelines for the Standardization of Terminology published jointly by the Welsh Government Translation Service and the Welsh Language Board.

32 Regional variations in Welsh words

(1) The Welsh and English used in legislation needs to be understandable to speakers in all parts of Wales and so the use of dialect and colloquialisms is generally to be avoided. However, there are rare instances in Welsh where there is not an acceptable word in use throughout the whole of Wales and in those cases regional alternatives are used in Welsh legislative drafting; for example, Rheoliadau Gwrychoedd neu Berthi Uchel (Ffioedd) (Cymru) 2004 (The High Hedges (Fees) (Wales) Regulations 2004) where both 'gwrychoedd' and 'perthi' are used for 'hedges' .

(2) No alternatives have appeared in Assembly Measures, although the issue has arisen. There are two Welsh words for milk: 'llaeth' and 'llefrith'. In section 1(1)(b) of the Red Meat (Wales) Measure 2010 only 'llaeth' is used, the reasoning being that although there are two words in use, one is dominant and would be understood in all parts of Wales. In this case it was not thought worth disrupting the flow of text, which inevitably follows when mentioning alternative words. This demonstrates need for the flexible application of drafting techniques to produce the best result.

CHAPTER 4

SINGULAR AND PLURAL

33 Bodies corporate: plural or singular

(1) In English, local authorities and other bodies corporate may be treated as plural or singular nouns; in Welsh, a single noun is always treated as a single noun and a plural as a plural.

(2) In general a local authority or other body corporate should be treated in English as a singular noun.

(3) But when textually amending legislation that uses the plural in English, it may be necessary to follow suit in order to avoid confusion.

CHAPTER 5

NUMBERS AND DATES

34 Cardinal Numbers

(1) Figures should normally be used for all numbers above ten;

(2) Figures should also normally be used for numbers up to and including ten that relate to sums of money, times or periods of time, ages, dates, units of measurement or in quasi-mathematical contexts;

(3) In other contexts, numbers up to and including ten should either be spelt out or be expressed as figures depending on what seems more natural or appropriate in the contexts concerned;

(4) A number that begins a sentence should normally be spelt out;

(5) Mixing words and figures referring, in a single context, to things of the same kind should be avoided.

(6) In Welsh texts the following points of house-style have been adopted:

(a) the traditional vigesimal rather than the decimal system is to be used;

(b) from 11 onwards, the pattern ’11 o ddiwrnodau’ rather than ’11 diwrnod’ is to be followed

(c) figures will cause mutation as if they were words e.g. ‘2 bwynt’, ‘6 phwynt’, ‘8 bwynt’.

(d) 7 and 8 cause soft mutation (except for words beginning with ‘d’ or ‘m’).

(e) ‘blwydd’ ‘blynedd’ and ‘diwrnod’ are mutated nasally after every cardinal number except 2, 3 and 4 using the ‘deng’, ‘deuddeng’, and ‘pymtheng’ forms.

(f) the ‘deng’, ‘deuddeng’, and ‘pymtheng’ forms are to be used with words beginning with a vowel e.g. ‘pymtheng awdurdod’ or ‘m-’ e.g. ‘deng mis’.

35 Ordinal numbers

(1) Ordinal numbers above 10th should not be spelt out;

(2) The question of whether numbers below 11 should or should not be spelt out should be decided in the light of what seems more natural or appropriate in the contexts concerned.

36 Dates

(1) Numbers should be used.

(2) The English endings -st, -rd and -th and the Welsh endings –ydd, -fed, -ed, -ain etc in conjunction with figures for dates should not be used in the body of legislation.

37 Percentages

“%” should be used rather than “per cent” / “y cant”.

PART 5

GENDER NEUTRAL DRAFTING

General

38 What is gender-neutral drafting?

(1) The Presiding Officer's Determination on Proper form for Public Bills for Acts of the Assembly states that the text of a Bill "must not use gender specific language unless the meaning of the provision cannot be expressed in any other way (e.g. the provision is one that relates only to persons of a particular gender)"[6]. The use of gender specific language is also one of the grounds upon which the Constitutional and Legislative Affairs Committee of the National Assembly for Wales may report to the Assembly on a statutory instrument under standing order 21.2[7].

(2) Gender neutral drafting means that, where there are suitable alternatives available, the constructions drafters use should not imply that only men do certain things, such as hold office. Generally, gender-specific language should only be used for references to persons of one gender or the other (for example, in provisions that deal with women taking maternity leave).

(3) This presents a challenge to drafters in making drafts as clear as possible. The paragraphs that follow explore a number of techniques that may be used to draft in a gender-neutral way without over-complicating the text.

(4) The techniques will not be suitable in all contexts. The drafter should choose a technique that works best is each context that presents itself.

Gender- specific pronouns

39 Gender-specific pronouns

(1) The old drafting practice in English only of using gender-specific pronouns relied in part on section 6 of the Interpretation Act 1978, by which a gender-specific pronoun (usually the male pronoun) is used to refer to a person who may be either male or female. This involved using "he" instead of "he or she" or "he, she or it", and so on with "him" and "his".

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[6] http://www.assemblywales.org/bus-home/bus-legislation/bus-legislation-guidance.htm

[7] http://www.assemblywales.org/bus-home/bus-assembly-guidance.htm

(2) In order to draft gender-neutrally in English this practice should not be overused. The following sections set out a number of methods that can be used to help to eliminate gender-specific pronouns. Different considerations apply to drafting in Welsh.

(3) In Welsh, masculine pronouns are used to refer to masculine nouns and feminine pronouns are used to refer to feminine nouns – the sex of the person referred to is immaterial[8]. This means that there is no need in Welsh to avoid the gender-specific pronouns in the same way as in English.

(4) The Interpretation Act assumes that all UK legislation will be drafted in the English language, and takes no account of Welsh or other languages. As a result, section 6 does not work for Welsh.

(5) Welsh, in common with many other languages such as French, Spanish and Russian, has a grammatical gender system which means that all nouns in the singular are either masculine or feminine. This is not an indication of sex, but a traditional label that grammarians use.

(6) The introduction to the Welsh Academy English-Welsh Dictionary states that "it would be just as logical to classify nouns as red nouns and green nouns, or as round nouns and square nouns". Conversely, English has no grammatical gender, and its pronouns refer only to the sex of the person referred to.

(7) While there is usually a correlation in Welsh between sex and grammatical gender with regard to nouns denoting persons (e.g. job titles, relations, roles etc.[9]) this is not universally the case. '*Plentyn*' (child) is masculine, and so the masculine pronoun '*ef*' and the possessive '*ei*' followed by a soft mutation (him and his) are used to refer to the word, even if the child in question is a girl.

(8) Both the feminine and masculine pronoun may be used in Welsh if a pair of nouns, one masculine and one feminine, is used, but using pairs of pronouns (like *ef/hi, ganddo ef/ganddi hi)* should be avoided as far as is possible.[10]

(9) In Welsh, the pronoun should always follow the grammatical gender of the noun even if the English draft uses *his/her* (a construction that should also be avoided in English – see below).

EXAMPLE—

[8] *The Welsh Academy English-Welsh Dictionary (1995), p xii.*

[9] For example, '*mam*' (mother) is feminine and '*tad*' (father) is masculine

[10] For example, for the English word "teacher", there are two words in Welsh – '*athro*' for a male teacher, and '*athrawes*' for a female teacher. If both '*athro*' and '*athrawes*' are used, both the masculine and feminine pronouns need to be used. The masculine possessive pronoun '*ei*' causes a soft mutation and the feminine possessive pronoun '*ei*' causes an aspirate mutation, so consequential changes will occur throughout the text.

*If a parent sends **his or her** child to the school > Os bydd rhiant yn anfon **ei** blentyn i'r ysgol*

40 Accumulating pronouns

(1) The practice of using "he or she" instead of "he" is quite common in current Welsh Government drafting practice in English. Arguably, it is not truly gender-neutral and should be avoided unless there is no better way of achieving gender-neutral drafting.

(2) Overuse of the "he or she" method leads to inelegant sentences and is distracting. The effect is exacerbated when a non-gender specific pronoun is also needed to cover the eventuality of the person referred to being a body rather than an individual (i.e. "he, she or it").

41 Repeat the noun

(1) Substituting a noun for the pronoun is the most usual and effective technique for avoiding gender-specific pronouns in English. In Welsh, in the formal register, it is not always essential or desirable to use any pronoun in corresponding constructions.

EXAMPLE—

A person ceases to be the chair or the deputy chair if the person…

Mae person yn peidio â bod yn gadeirydd neu'n ddirprwy gadeirydd os yw'n…

Instead of

*A person ceases to be the chair or the deputy chair if **he or she**…*

Mae person yn peidio â bod yn gadeirydd neu'n ddirprwy gadeirydd os yw ef yn…

A member of the Tribunal may resign the office of member.

Instead of

*A member of the Tribunal may resign **his or her** office.*

(No translation is provided as the grammatical gender system in Welsh means that no issues arise in relation to gender-neutrality: see paragraph 39 (3))

(2) Substituting a noun in this fashion often enhances clarity of the English draft, since the reader does not have to go back and work out what the antecedent of a pronoun is.

(3) The drawback of repeating the subject is that, in some instances, it can lead to inelegant provisions. The technique should be used with caution where the noun needs to be repeated several times, as it may become too cumbersome.

42 Use a neutral word or phrase such as "person", "any person", "every person" or "no person"

(1) It may be appropriate to substitute a neutral word or phrase in English, such as "person" for the pronoun.

EXAMPLE—

After a person's term as a member ends, the person may carry out the duties of a member in respect of a matter that was referred to the Commission.

Instead of

*After a member's term ends, **he or she** may carry out the duties of a member in respect of a matter that was referred to the Commission.*

(No translation is provided as the grammatical gender system in Welsh means that no issues arise in relation to gender-neutrality: see paragraph 39(9))

(2) In this example it would be inappropriate to repeat the noun "member" in each instance because the provision deals with the situation where the person is no longer a member (because the person's term as member has ended).

43 Use a label

(1) The adverse effects of repeating a noun can sometimes be mitigated by using a letter as a label for a noun that would otherwise appear repeatedly:

EXAMPLE—

If a person ("C") makes a claim under this section, C is entitled...

Os yw person ("C") yn gwneud cais o dan yr adran hon, mae gan C hawl i…

(2) Constantly repeating titles, for instance "the Chief Inspector of Education and Training in Wales" can also be avoided by using a shorter label e.g. "the Chief Inspector" and adding a definition:

EXAMPLE—

In [this Matter][these regulations], "the Chief Inspector" means the Chief Inspector of Education and Training in Wales.

Yn y [Mater hwn][rheoliadau hyn], ystyr "y Prif Arolygydd" yw Prif Arolygydd Addysg a Hyfforddiant yng Nghymru.

(3) Note that using a letter as a label for a noun in order to avoid using the pronoun will not have the same effect in Welsh as in English. Although it is possible to use a letter as a label in Welsh (see the example in subsection (1)), letters of the alphabet are treated as feminine nouns (rather than being gender-neutral as in English). However, the fact that the letter is treated as grammatically feminine in Welsh does not imply that the person it represents is a woman.

44 Eliminate references back

Whilst repeating the noun can often be cumbersome when there are a number of references back, sometimes a reference back is unnecessary and the same result can be achieved by changing the structure of the sentence or using a synonym or alternative phrase.

EXAMPLE—

The claimant should as far as possible be put in the position that would have prevailed if the breach had not occurred.

Instead of

The claimant should as far as possible be put in the position ***he*** *would have been in had the breach not occurred.*

(No translation is provided as the grammatical gender system in Welsh means that no issues arise in relation to gender-neutrality: see paragraph 39(9))

45 Omit pronouns

Sometimes a pronoun can be omitted completely, even if that means rewriting the sentence. This is often a compact and clear way of achieving gender-neutral drafting.

EXAMPLE—

If satisfied that all the conditions are fulfilled, the Inspector may…

Instead of

If ***he or she*** *is satisfied that all the conditions are fulfilled, the Inspector may…*

A member of the Tribunal may resign office…

Instead of

*A member of the Tribunal may resign **his or her** office…*

A fisheries officer may issue and register a licence after determining that the applicant has met the licence requirements.

Instead of

*A fisheries officer may issue a licence and **he or she** may register the licence if **he or she** considers that the applicant has met the licence requirements.*

(No translation is provided for the above examples as the grammatical gender system in Welsh means that no issues arise in relation to gender-neutrality: see paragraph 39(9))

46 Replace the pronoun with "the", "a", "that" or "those"

An article such as "the" or "a", or a determiner such as "that" or "those", can sometimes be used to replace the pronoun.

EXAMPLE—

In accordance with the terms of employment….

Instead of

*In accordance with **his or her** terms of employment…*

The Minister may not appoint a relative to the position of Deputy Minister.

Instead of

*The Minister may not appoint any of **his or her** relatives to the position of Deputy Minister.*

An applicant must include with the application…

Instead of

*An applicant must include with **his or her** application…*

The Commissioner shall advise the complainant in the report under subsection 2.

Instead of

The Commissioner shall advise the complainant in ***his or her*** *report under subsection 2.*

(In this case, subsection (2) says that the Commissioner issues the report, so it is not necessary to refer to "his" report).

(No translation is provided for the above examples as the grammatical gender system in Welsh means that no issues arise in relation to gender-neutrality: see section 39(9))

47 The "whose" solution

Occasionally, it will be possible to use the gender-free "whose" to resolve a drafting problem and drop the pronoun.

EXAMPLE—

This section confers no immediate authority on the auditor, whose powers remain dormant until the occurrence of the contingency.

Instead of

This section confers no immediate authority on the auditor. ***His*** *powers remain dormant until the occurrence of the contingency.*

(No translation is provided as the grammatical gender system in Welsh means that no issues arise in relation to gender-neutrality: see paragraph 39(9))

48 Use the passive rather than the active voice

(1) Agentless passive constructions in English may avoid the need for the use of gender-specific pronouns. But those passive constructions may be less clear than their active counterparts and may give rise to ambiguities[11] (see paragraph 28).

[11] In the passive construction given in this example, for instance, it is not clear that it is the Secretary of State's failure to lay the order which must be explained.

EXAMPLE—

The Secretary of State must submit a memorandum explaining why the order has not been laid…

Instead of

*The Secretary of State must submit a memorandum explaining why **he** has not laid the order…*

(2) Personal pronouns are not always used in the same way in Welsh and the conversion of active to passive is a solution specific to a problem arising in English.

(3) In standard literary Welsh, the pronoun is omitted in any case in a neutral (non-emphatic or non-contrastative) statement, e.g. '*ysgrifennodd lythyr*' – '[he/she] wrote a letter'. Auxiliary pronouns are used only for emphasis or contrast: '*ysgrifennodd ef lythyr*' or '*ysgrifennodd hi lythyr*' emphasises that ***he*** or ***she*** wrote the letter rather than someone else. For this reason, converting the active to the passive, while useful for English, makes no difference to gender-neutrality in Welsh – '*ysgrifennwyd llythyr*' ('a letter was written') is no more gender-neutral than '*ysgrifennodd lythyr* – ('[he/she] wrote a letter').

49 Use the plural rather than the singular

(1) While the use of the singular is usually preferred, the plural can be used to avoid a gender-specific pronoun in difficult cases so long as its use does not create ambiguity.

EXAMPLE—

Occupiers must notify the Authority of any changes in their address.

Instead of

*An occupier must notify the Authority of any change in **his** address.*

Members of the Tribunal may resign their offices…

Instead of

*A member of the Tribunal may resign **his or her** office…*

Borrowers who are not prompt in making payments under their mortgage risk losing their homes.

Instead of

*A borrower who is not prompt in making payments under **his** mortgage risks losing his home.*

(2) This is one technique that can be helpful in Welsh as well as in English.

(3) Using the word '*athro'* (male teacher) as an example; whilst there is no 'neutral' noun that will cover both the male ('*athro')* and female (*'athrawes'*) singular in Welsh, the plural of the masculine form '*athro'* ('*athrawon'*) is generally accepted to refer to male teachers, male and female teachers, or even female teachers, despite the fact that there is a feminine plural ('*athrawesau')*.

(4) When dealing with gender-specific nouns like '*athro/athrawes*', using the plural (teachers) in the English draft can be helpful, and should be considered where that does not lead to ambiguity.

50 Use a participle rather than a verb

EXAMPLE—

A person must record the name of the manufacturer when acquiring any medicinal product.

Instead of

*A person must record the name of the manufacturer when **he or she** acquires any medicinal product.*

(No translation is provided as the grammatical gender system in Welsh means that no issues arise in relation to gender-neutrality: see paragraph 39(9))

51 Use a subordinate clause that operates as an adjective – the 'who' solution

The word "who" is a gender-free pronoun that can be useful in avoiding the need for a reference back either containing a gender-specific pronoun or a repeated noun.

EXAMPLE—

A person who concludes that exercising a power would assist it to comply with those duties must seek to exercise that power.

Instead of

*If a person concludes that the exercise of a power would assist it to comply with those duties **he or she** must seek to exercise that power.*

A testator who makes a bequest intending that the beneficiary's own property be disposed in a particular way must make this condition express.

Instead of

*If a testator makes a bequest with the intention that the beneficiary dispose of **his** own property in a particular way, **he** must make this condition express.*

A person who has obtained a licence may keep a dangerous animal.

Instead of

*If a person obtains a licence, **he** may keep a dangerous animal.*

A mortgagee who exercises a power to sell mortgaged property may not…

Instead of

*Where a mortgagee exercises a power to sell mortgaged property **he** may not….*

(No translation is provided as the grammatical gender system in Welsh means that no issues arise in relation to gender-neutrality: see section 39(9))

52 Use a verb instead of a noun + pronoun

EXAMPLE—

If satisfied that an application meets the relevant criteria, the Secretary of State must consent to it.

Instead of

*If satisfied that an application meets the relevant criteria, the Secretary of state must give **his** consent to it.*

The Commissioner may consent…

Instead of

*The Commissioner may give **his** consent….*

(No translation is provided as the grammatical gender system in Welsh means that no issues arise in relation to gender-neutrality: see paragraph 39(9))

53 Mention the offence not the offender

EXAMPLE—

It is an offence to fail to comply with this regulation.

Instead of

*A person commits an offence if **he or she** fails to comply with this regulation.*

(No translation is provided as the grammatical gender system in Welsh means that no issues arise in relation to gender-neutrality: see paragraph 16(3))

54 Using plural pronouns for singular nouns

(1) Using "they" (and its other grammatical forms: "them", themselves" and "their") as a gender-neutral pronoun to refer to a singular noun is possible, but this usage in English is controversial.

EXAMPLE—

If a person contravenes this regulation, they commit an offence.

Instead of

*If a person contravenes this regulation, **he or she** commits an offence.*

(2) There are literary precedents for such usage where there is an implied element of plurality (e.g. "anyone" or "a person"), but such usage is probably best avoided.

(3) This solution may make it more difficult in future to rely on the number of a pronoun to identify clearly what it is referring to. It may be better in this instance to repeat the noun:

EXAMPLE—

If a person contravenes this regulation, that person commits an offence.

(4) In Welsh, the corresponding plural pronoun 'hwy' can only refer to plural nouns. This means that even if the English text reads 'if a chairman decides to retire **they** must inform the Assembly', the Welsh will need to use the singular masculine pronoun to concord with '*cadeirydd'* (chairman).

55 Dealing with the self-referential "himself"

(1) The self-referential word "himself" occurs from time to time, and can be dealt with in a variety of ways.

(2) In some contexts, "personally" is an acceptable alternative for "himself".

EXAMPLE—

Liability will arise even though the owner is not personally guilty of a wrongful act.

Instead of

Liability will arise even though the owner is guilty of no wrongful act ***himself****.*

(3) Where "himself" is the object of a verb, it may be necessary to use a different form.

EXAMPLE—

Where there has been a breach the innocent party may be entitled to terminate the contract and be released from further performance of obligations under the contract.

Instead of

Where there has been a breach the innocent party may be entitled to terminate the contract and release ***himself*** *from further performance of* ***his*** *obligations.*

(No translation is provided as the grammatical gender system in Welsh means that no issues arise in relation to gender-neutrality: see paragraph 39(9))

Gender-specific nouns

56 Gender-specific nouns in English

(1) Some difficult questions arise about which nouns should be regarded as gender-specific and which should be regarded as gender-neutral.

(2) In English, generally, words ending in "-man" need to be avoided to secure gender-neutral drafting (unless a particular individual of a certain sex is intended).

(3) An alternative form of words should be used instead of words like "chairman", "deputy chairman", "workman", policeman" etc. For "chairman" and "deputy

chairman", the Climate Change Act 2008 uses "chair and "deputy chair", but other possible alternatives include "president", "convenor", "leading member", and "principal member". The precise wording may depend on the context of the enactment.

(4) Drafters will need to form a view on what constitutes acceptable gender-neutral alternatives, as the use of "-person" (instead of "-man") as a suffix can also be controversial in some instances.

(5) English words that don't end in "-man", but have alternative feminine forms, e.g. "testator", "actor", "manager" can be regarded as gender-neutral despite the existence of alternative female forms (e.g. "testatrix", "actress" and "manageress").

(6) The ending "-ess" should be avoided wherever possible as it is often pejorative, or perceived as such (for example, use "actor" not "actress; "author" not "authoress").

57 Gender-specific nouns in Welsh

(1) Similar to English, some nouns in Welsh take a form that appears to assume that a man rather than a woman will hold a particular office.

(2) Whilst some of the most problematic nouns in English often have the suffix '-man', in Welsh the most problematic end in '*-wr*' (from the word '*gŵr*', meaning 'man'), e.g. '*cyfarwyddwr*' (director), or are compounds of '*dyn*' (man), e.g. '*dyn tân*' (fireman).

(3) In Welsh, many of the nouns referring to jobs, roles, positions etc. have masculine and feminine forms (e.g. '*athro*' and '*athrawes*' for 'teacher'). The noun suffixes (or head noun in compounds) denote which form denotes which sex.

(4) Although many job titles have masculine and feminine forms, job titles are not usually sex-specific, with the exception of '*athro*' (male teacher) and '*athrawes*' (female teacher), as the 'masculine' form can be used for both male and female in most cases. As mentioned above, in the case of '*athro/athrawes*', using the plural can be useful.

58 Welsh nouns ending in '-wr' (man) and '-wraig' (woman)

(1) Where a noun in Welsh is formed by adding a suffix to a noun or verb stem, the grammatical gender of the noun is governed by the grammatical gender of the suffix. The most common personal suffixes are '*-wr*' and '*-ydd*' (although there are others, such as '*-yn*', '*-adur*' and '*-or*'). The ones just quoted are masculine, but it is possible to form corresponding suffixes which have a feminine grammatical gender, being '*-wraig*', '*-yddes*', '*-en*', '*-dures*' and '*-ores*'.

(2) Nouns ending in '*-wr*' in particular raise questions of gender-neutrality because they often have a corresponding female form ending in '*-wraig*' and may therefore be

constructed as referring to males only. A list of some examples is contained in the following table.

arbenigwr	arbenigwraig	specialist
cyfarwyddwr	cyfarwyddwraig	director (directrix, directress)
cyfreithiwr	cyfreithwraig	lawyer
cynorthwywr	cynorthwywraig	assistant
gweinyddwr	gweinyddwraig	administrator (administratrix)
gweithiwr	gweithwraig	worker
gofalwr	gofalwraig	carer
hyfforddwr	hyfforddwraig	trainer
myfyriwr	myfyrwraig	student
newyddiadurwr	newyddiadurwraig	journalist, reporter
rheolwr	rheolwraig	manager (manageress)

(3) This is where the confusion may arise. Although the feminine suffixes mentioned above are invariably used to create nouns which refer specifically to the female sex, it does not follow that the masculine forms refer specifically to those of the male sex. Rather, it is often a case of the masculine forms being the basic forms, and the feminine forms being variations on them.

59 Welsh nouns with '-ydd' suffixes

(1) Even though nouns ending in *'-ydd'* are masculine in grammatical gender and a corresponding feminine form may be created by adding *'–es'* , they are generally perceived to be more gender neutral[12].

(2) This supposition seems to have arisen because while '*gŵr*' corresponds to 'man', 'married man' or 'adult male' (whereas '*gwraig*' corresponds to 'woman', 'married woman', 'adult female'), the suffixes *'-ydd'* and *'-yddes'* have no related status as

[12] See Equal Opportunities Commission, *Advertising Jobs in Welsh*, p. 2.

independent words, and are therefore considered more neutral. A list of some of the more common forms of '*-ydd*' nouns are set out in the following table.

cydlynydd	co-ordinator
cyfieithydd	translator
cyfrifydd	accountant
cynhyrchydd	producer
derbynnydd	receptionist; receiver
dylunydd	designer
gohebydd	correspondent; reporter
golygydd	editor
goruchwylydd	supervisor
llyfrgellydd	librarian
peiriannydd	engineer
rhaglennydd	programmer
seicolegydd	psychologist
trefnydd	organizer
ymchwilydd	researcher
ymgynghorydd	consultant

(3) Although there is no such thing as a Welsh gender-free noun, the Equal Opportunities Commission has in the past objected to the use of job titles rendered in Welsh with the masculine suffix '*-wr*' without the corresponding feminine '*-wraig*' form, suggesting instead the supposedly more neutral '*-ydd*'. This seems to follow the attempt to search for alternatives for '-man' endings in English, but a rule that works for one language can't necessarily be transposed to another.

(4) There are difficulties surrounding any attempt to prescribe the suffix '*-ydd*' rather than '*-wr*' for nouns which are job titles on grounds that '*-wr*' is 'more male' than '*-ydd*'.

(5) '*-wr* and '*-ydd*' and their related feminine and plural forms are so closely related that they can form morphologically mixed pairs or sets. For example, the singular '*ymwelydd*' (visitor) and '*peiriannydd*' (engineer) give us the plural forms '*ymwelwyr*' and '*peirianwyr*', and there are many more similar examples.

(6) There are also examples where one finds both *'-wr'* and *'-ydd'* forms added to the same root word, but where the words are not interchangeable, since they have slightly different meanings.

EXAMPLE—

'*ysgrifenn**ydd**'* means 'secretary', but '*ysgrifenn**wr**'* means 'writer';

'*cynghor**ydd**'* means 'councillor', but '*cynghor**wr**'* means 'counsellor;

'*rheol**wr**'* or '*rheol**wraig**'* means 'manager', but '*rheol**ydd**'* means 'control, regulator', i.e. a device which regulates things.

This emphasises the point that it is not always possible to search for feasible, supposedly gender-neutral alternatives, to *'-wr'* endings in Welsh.

(7) Nouns ending in *'-ydd'* may also have corresponding female forms.

EXAMPLE—

By adding *'-*es':

Cadeirydd	(chairman)
Cadeiryddes	(chairwoman)
Trysorydd	(treasurer (male))
Trysoryddes	(treasurer (female))

(8) The female form may be irregular, using the suffix *'-wraig'*:

EXAMPLE—

Darlithydd	(lecturer (male))
Darlithwraig	(lecturer (female))
Cyfieithydd	(translator (male))
Cyfieithwraig	(translator (female))

(9) The female *'-es'* suffix may also be attached to a number of other male noun suffixes to make female alternatives.

EXAMPLE—

	masculine	feminine
-adur	*cofiadur* (recorder)	*cofiadures*
-mon	*plismon* (policeman)	*plismones*
-or	*actor* (actor)	*actores*
-ych	*eurych* (goldsmith)	*euryches*

60 Welsh nouns: use of pairs

(1) As should now be clear, Welsh nouns often come in gender-specific pairs.

(2) Whilst it would appear possible to use pairs of both feminine and masculine nouns to answer the gender-neutral question, this causes problems in itself.

(3) A noun's gender in Welsh has other grammatical repercussions apart from classifying it as a "he" or a "she". Most importantly, it causes mutations to other words in the sentence.

(4) Mutations vary according to the gender of the noun (rather than the sex of the person alluded to). In Welsh, you would say '*mae John yn nyrs dda'* (John is a good nurse), where the adjective '*da'* (good) is mutated to '*dda'* following the feminine noun '*nyrs'*. It makes no difference that the nurse in question is male.

(5) Using pairs of feminine and masculine nouns would mean that pairs of male and female pronouns (*ef/hi, ganddo ef/ganddi hi)* would be needed, as well as the corresponding mutation alternatives. This would result in unnatural, cumbersome drafting, and should be avoided.

(6) Another problem with the use of pairs is that it isn't always possible to do so in a consistent and unambiguous manner because there are sometimes variations in meaning between morphologically related forms.

(7) For instance '*ysgrifennydd'* means 'secretary', is masculine in gender and is used of males and females in official roles with societies or Government departments. The corresponding feminine form '*ysgrifenyddes'* on the other hand is used only of females, and means an office assistant.

(8) Because '*ysgrifenyddes'* is so obviously gender-specific, it is preferable to use other titles such as 'personal assistant' in English so that a more gender-neutral term can be used in Welsh, such as '*cynorthwyydd personol'.*

(9) Even where there are no such precise meanings to the variations in form, the feminine forms often carry connotations of inferiority. For example, '*rheolwr'* means 'manager' and may be used for both males and females. The feminine variant

'*rheolwraig'* (corresponding to 'manageress'), on the other hand, refers exclusively to females and is perceived by some speakers as suggesting lower status.[13]

(10) This is true of many *'-yddes'* endings, and the development of using *'-wraig/-yddes'* endings in an effort to be gender neutral has been criticised by some as seeming to demote particular professions. The perceived pejorative and sexist connotations of some feminine endings in Welsh bear a similarity to some feminine endings which are criticised in English, such as "authoress", "poetess", "usherette" etc.

(11) The use of word pairs like '*athro/athrawes'* in Welsh should be avoided if possible. Plural forms can be used where appropriate if that assists (so long as they do not create ambiguity).

(12) Alternatively, if it is possible to choose another word that does not raise such obvious gender connotations, then that should be substituted. For example, '*pennaeth'* (head) can be used instead of *'prifathro/prifathrawes'* (head teacher).

(13) As in the Learning and Skills (Wales) Measure 2009, this can be expanded if dealing specifically with a head teacher of a school or principal of an institution: '*pennaeth ysgol'* (head teacher of a school) '*pennaeth sefydliad'* (principal of a higher education institution).

61 Welsh nouns: neologisms

(1) Linguistic techniques that may work in English cannot be transferred wholesale into Welsh. The answer, it seems, is that rather than devise new supposedly egalitarian female '*-wraig'* endings, or supposedly neutral '*-ydd'* endings, for job titles in Welsh, the message needs to be reinforced that both '*-wr'* and '*-ydd'* endings (and indeed any other job title with a masculine grammatical gender) may apply equally to both men and women. Grammatical gender is not tied to the sex of the person.

(2) The general policy is to use terms which are well-established rather than to coin new terms to meet the needs of gender-neutrality.

(3) As a rule, following the line given in the Welsh Academy English-Welsh dictionary, the suffix '*-ydd'* should not be used unless it occurs naturally, and strained constructions such as *cyfarwyddwr/wraig* should also be avoided. Not every case is black and white though, and there may be more than one possibility in Welsh.

(4) There are occasions when there may be no well-established Welsh term corresponding to an English one, an existing Welsh term may be poorly attested, or a noun ending in '*-ydd*' may be as well established as its '*-wr*' counterpart. In such circumstances an existing term can be set aside in favour of a better one, or a completely new term may be created. In such situations, nouns ending in '*-ydd'* should be favoured over nouns ending in '*-wr'*.

[13] D. Prys, "Gender and Sex in Welsh Nouns", *Planet* 121, p. 90.

EXAMPLE—

The term 'adopter', '*mabwysiadwr'* exists, but is poorly attested historically. The opportunity was therefore taken to use the term '*mabwysiadydd'.*

62 Nouns with only one form for both sexes

There are a number of job-titles in Welsh which have only one form for both sexes. These nouns are usually (but not always) masculine in grammatical gender, but may refer to males or females. Generally, they do not raise any gender-neutrality issues, and no new words need be coined.

EXAMPLE—

Mecanic (*m*)	mechanic
Meddyg[14] (*m*)	doctor
Nyrs (*f*)	nurse
Bydwraig (*f*)	midwife
Pennaeth(*m)*	head
Pensaer (*m*)	architect
Porthor (*m*)	porter
Saer (*m*)	carpenter
Swyddog (*m*)	officer
Tiwtor (*m*)	tutor
Warden (*m*)	warden

Exceptions and difficulties

[14] The female form 'meddyges' exists, but tends to refer to a female healer or herbalist rather than a doctor of medicine.

63 Amending existing Acts

(1) A difficulty occurs when amending Acts or subordinate legislation which is drafted in a way that is not gender neutral.

(2) Although it may be possible to use gender-neutral techniques to frame textual amendments to provisions that were originally framed in gender-specific terms, there are clearly going to be cases in which that will not be possible. Sometimes it would be necessary to rewrite a provision from scratch in order to make a very minor amendment in gender-neutral terms, and that could create handling problems, as well as obscuring the real purpose of the amendment.

(3) Careful consideration is needed where amendments are made to instruments that were not drafted in gender-neutral terms. If, for example, the instrument being amended uses “chairman”, the drafter will need to amend the original instrument so that all references to “chairman” are replaced by a gender-neutral alternative). But if it is not practical to make wholesale changes of this kind, drafters should not use “chair” in the amendment and leave “chairman” in the principal instrument without doing something to clarify the position for the reader of the consolidated amended text; for example, by inserting a provision to make clear that the references to “chair” and “chairman” are to be interpreted as meaning the same thing.

64 Gender-specific enactments

There will be some instances where gender-specific drafting will remain appropriate (e.g. in enactments about marriage or divorce).[15]

65 The Monarch

Drafters should continue to refer in gender-specific terms to the monarch according to the gender of the current monarch.

66 First Minister, Counsel General, Secretary of State and other office holders

References to the First Minister, Counsel General, Secretary of State and other office holders should not follow the gender of the current office holder.

[15] Although difficult questions may arise where provisions about marriage have been applied to civil partnerships.

PART 6

DRAFTING TECHNIQUES

CHAPTER 1

PARAGRAPHING

67 Introduction

(1) An obvious way of making a sentence more digestible is to separate the text out into numbered paragraphs. But drafters should be careful not to overdo paragraphing. Just because text can be turned into paragraphs doesn't mean it has to be. In some cases it may be better to have continuous text, and not to separate out the items at all.

(2) This chapter gives technical guidance about paragraphs[16].

68 Two sets of paragraphs

(1) Do not put two or more sets of paragraphs in the same sentence (eg in the same subsection).

EXAMPLE (to avoid)—

If the Welsh ministers consider that –

(a) the authority is not likely to achieve the target, or

(b) the authority is not likely to achieve the target in a reasonable time,

the Welsh minister may after consulting the authority.

(c) revise the target, or

(d) require the authority to explain.

(2) Instead, split the proposition into two so that there is one series in each paragraph.

69 "Sandwiches"

(1) The following structure is a sandwich—

[16] Generally on paragraphs, see G.C. Thornton, *Legislative Drafting* (see chapter 7.1), pp.61-65, 95- 97 and D. Greenberg, *Craies on Legislation* (see chapter 7.1) paras 8.2.11 and 13. Some of the material contained in this chapter reflects material to be found in some of those passages.

(2) EXAMPLE—

If an inspector reasonably believes that -

(a) premises falling within this Part are unfit for human occupation,

(b) they are nevertheless occupied, and

(c) the life or health of the occupants is at risk,

the inspector may serve a notice under this section.

(3) This structure can impede understanding, especially if the main proposition is relegated to the end (as in the example above). It is often possible to move the proposition in the full-out words at the end so that it appears in the opening words, and usually the result is easier to understand. Instead of the text above, you could say this—

An inspector may serve a notice under this section if the inspector reasonably believes that—

(a) premises falling within this Part are unfit for human occupation,

(b) they are nevertheless occupied, and

(c) the life or health of the occupants is at risk.

70 Conjunctions

(1) Ensure that it is clear whether the paragraphs are intended to operate cumulatively or instead as alternatives.

(2) There should not be a mixture of conjunctions, i.e. different conjunctions at the ends of different paragraphs in the same provision.

Cumulative or alternative paragraphs

(3) Where a provision is paragraphed, the intention may be that the paragraphs are to operate cumulatively, or instead it may be that they are to operate as alternatives. In either case, it is up to the drafter to ensure that the intention is readily apparent to the reader.

(4) So far as “or” is concerned, the drafter is confronted with the linguistic problem that “or” can have both an inclusive sense (i.e. a reference to A or B means A or B or both) and an exclusive one (i.e. a reference to A or B means A or B but not both) (the position in Welsh is different - see the entry for “or/neu/ynteu” in section 30).

Dickerson[17] suggests that: "Observation of legal usage suggests that in most cases "or" is used in the inclusive rather than the exclusive sense". This construction may be bolstered, or alternatively excluded, by the context.

EXAMPLE

Where an animal is taken into possession, a magistrates' court may order-

(a) that specified treatment be administered to the animal, or

(b) that the animal be sold or destroyed.

It seems unlikely the court should have to choose between (a) and (b). So the "or" at the end of (a) should probably be read in an inclusive sense.

On the other hand, in (b), it would make no sense for the court to order both sale and destruction, so "or" should no doubt be read in an exclusive sense.

(5) It may be tempting to omit "or" from provisions in order to avoid any suggestion of exclusivity and perhaps to make it clear from the opening words what is intended. But where it is obvious from the context that the provisions would be read in an inclusive sense, it may be better from the point of view of clarity or consistency across the statute book to follow normal English and use "or".

(6) Sometimes it will be desirable to spell out that both of two alternatives are a permissible option. For example, a provision allowing the imposition merely of a "fine or a term of imprisonment" might be construed in favour of a defendant so as to exclude the imposition of both. So if both may be wanted, it is probably best to say so.

(7) Similar issues can arise with "and". If, in the example above, the court were given power to order that treatment be given to the animal *and* that it be sold or destroyed, would it have to do both? Again, though, the context will probably supply the answer.

Use of single conjunction

(8) Often it will be sufficient to put the appropriate conjunction at the end of the penultimate paragraph and rely on the implication (in the absence of a contrary indication) that each of the preceding paragraphs is separated by the same conjunction.

[17] F. Reed Dickerson *Fundamentals of Legal Drafting* (see chapter 7.1) p.77.

(9) However, if the "and" or "or" appears only at the end of the penultimate paragraph, the reader has to wait until then to know whether the paragraphs are cumulative or alternative. This is may be unhelpful with a long list of paragraphs.

(10) It is of course possible to say "and" or "or" at the end of each paragraph. That can however be cumbersome.

No conjunction

(11) It is also possible to avoid a single conjunction by making it clear in the opening words whether the paragraphs are cumulative or alternative.

EXAMPLE

A person who applies for a licence must send with the application a copy of [all] [at least one] of the following documents—-

(a) the person's birth certificate;

(b) the person's passport;

(c) the person's driving licence.

(12) This can be heavy-handed in simple propositions, when "and" or "or" may be better.

(13) For specific heads of *vires*, the conjunction is often omitted. It is also common practice not to expand the opening words so as to refer to "any or all of the following", but instead to rely on the context to supply the right answer.

EXAMPLE

The Welsh Ministers may by order make provision about—

(a) the form of an application;

(b) the procedure for making an application;

(c) the fee to be paid by an applicant.

In this example, it seems sufficiently clear that the Welsh Ministers may make provision about any or all of the things mentioned.

71 Punctuation

(1) In the case of a simple list of paragraphs linked by a conjunction, commas or semi-colons may be used.

(2) If the paragraphs are followed by full-out text that is effectively a continuation of the proposition contained in the text preceding the paragraphs, commas should be used, not semi-colons (see the example of a "sandwich" above).

(3) Semi-colons may be more appropriate than commas where there is no conjunction (i.e. where the paragraphs are in effect a list setting out matters that have no particular affinity with each other - see the examples above).

72 Repeals and amendments

(1) If you are repealing a paragraph which ends with a conjunction, it needs to be clear whether or not you are repealing the conjunction.

(2) In cases where the conjunction's fate would not otherwise be sufficiently clear, clarify the position by adding words such as "(together with the "and" following it)" or "(but not the "or" following it)".

73 Unnumbered paragraphs (lists)

Paragraphs need not have numbers or letters. A list of things may be sometimes usefully displayed as paragraphs without numbers or letters, especially if the list is not too long and the entries are relatively short. This may also be a good idea if the list is likely to be amended frequently.

EXAMPLE

In this section "award for bravery" means -

the Victoria Cross,

the George Cross,

the Albert Medal,

the Edward Medal, [etc.][18]

[18] Income Tax (Earnings and Pensions) Act 2003, section 638(2).

CHAPTER 2

DEFINITIONS

74 Kinds of definition

(1) Definitions are broadly of four kinds—

(a) Definitions of major concepts without which the reader cannot understand what follows.

EXAMPLE

In the Animal Welfare Act 2006, what is meant by "animal" (section 1) and "protected animal" (section 2).

(b) Definitions adopted for the sake of drafting convenience.

EXAMPLE

In this Act, "the 2002 Act" means the Enterprise Act 2002.

Definitions of this kind should be kept to a minimum. They are likely to be less convenient to the reader than to the drafter.

(c) Definitions of words or expressions which will be understood in general terms, but where a degree of certainty or clarification is needed.

EXAMPLES

In this Act, "child" means a person under the age of 18.

In this Act, "enactment" includes an enactment comprised in subordinate legislation.

(d) Definitions making, for convenience, a minor adjustment of what a word or phrase would otherwise mean.

EXAMPLE

In this Act, "employment" includes self-employment.

This kind of definition should also be used sparingly.

75 Where to put definitions - Bills

(1) Where the defined term is used only once, the definition should appear in the same provision (eg the same section).

(2) Where the defined term is used more than once—

(a) a definition of the first and second kind referred to above should normally be defined up front, as the reader will not understand what is being said. So it should appear either in the first place where the defined term appears or, if more convenient, in an introductory definitions provision.

(b) a definition of the third kind referred to above can usually be left to the end;

(c) a definition of the fourth kind referred to above can also usually be left to the end, unless there is a danger of the reader being seriously misled.

(d) Definitions which are given up front should be indexed so that the reader can see in one place whether the term is defined or not. This does not apply if the defined term is used only once.

(3) A traditional interpretation section therefore includes—

(a) index entries for definitions that have already been given (eg "In this Part, x has the meaning given in section 1"), and

(b) minor definitions of the third and fourth kinds referred to above.

(4) Avoid prospective definition: "In this section and the next section, x means y". The reader of the next section may not see the definition. If necessary, repeat the definition.

76 Where to put definitions – statutory instruments

(1) The long standing practice for statutory instruments is for the general interpretation provision to appear near the beginning of the instrument rather than the end as in the case of Acts.

(2) It seems that the difference in approach between primary and secondary legislation in the UK has arisen principally because of Parliamentary procedure in the consideration of amendments to bills. Opinion differs as to the relative merits of general interpretations provisions appearing at the start or at the end. Some consider it a distraction to the main story to have every kind of definition no matter how trivial listed at the start. Others argue that this is a more efficient way for readers to locate definitions[19]. Whatever the relative merits of the different approaches most users of UK legislation will be familiar with the usual location of general interpretation provisions in primary and secondary legislation, so the practice should continue of placing the general interpretation provisions at the start of statutory instruments.

(3) Although all defined terms appear in a list near the start, drafters may still find that as a matter of drafting it is easiest to introduce and define a concept in a substantive article or regulation. Regulation Y might introduce and define the concept and if that concept is used elsewhere in the regulations the interpretation provision would say "X has the meaning given in regulation Y" / "mae i X yr ystyr a roddir iddo yn rheoliad Y". Also where a definition is long or complex the interpretation provision could again cross refer to a later provision e.g. "X has the meaning given in regulation Y" "mae i X yr ystyr a roddir iddo yn rheoliad Y".

[19] Thornton*, Legislative Drafting ,* 4th edition at page 192.

(4) Where a defined term is used only once, the definition should appear in the same provision (e.g. the same regulation).

77 Choice of label

(1) Avoid labels which are misleading (and, conversely, do not give defined terms a meaning the reader would not expect).

EXAMPLE (to avoid)

In this Act, references to fingerprints include footprints.

(2) A defined term should ideally in itself give the reader some clue as to what it means.

EXAMPLE

"PACE" or "the 1984 Act" would be a better label for the Police and Criminal Evidence Act 1984 than "the principal Act".

(3) Equally, colourless terms such as "the relevant person" should where possible be replaced with something more helpful.

(4) Using the same label to denote different things in the same piece of legislation may confuse.

78 Operative provision in definitions

It is considered bad practice to include operative material in a definition. For example, it may be permissible to say that "regulations" means regulations made by the Welsh Ministers, but it would be going too far to include the Assembly procedure in the definition.

79 Definitions involving cross-references

(1) If legislation is to use a term which has already been defined in the way desired in other legislation, it may be useful to borrow the definition from that other legislation.

(2) There are at least two ways of doing this—

EXAMPLES—

In this Act, "health care" has the same meaning as in the Health Act 2006 (see section 98).

In this Act, "health care" has the meaning given by section 98 of the Health Act 2006.

(3) The first approach may be the only possible one where the meaning of the word or phrase in the earlier Act is not given in a single place but has to be constructed from

a number of different provisions. This approach may also be better if the definition has been elaborated on by case law which you want to attract.

(4) In other cases, the second formulation may be better as more concise. But consider then whether it would not be even better just to copy the definition out.

(5) If the Welsh text of legislation cross-refers to a definition found in an English-only legislative text, the way to do this is to refer to the English definition in the Welsh text.

EXAMPLE—

Yn y Ddeddf hon, mae i "gofal iechyd" yr un ystyr â "health care" yn Neddf Iechyd 2006 (gweler adran 98).

80 Lists of definitions

(1) In some cases it may make sense to list definitions in conceptual order (e.g. where each definition builds on the previous one).

(2) In most cases, though, definitions should be listed alphabetically. The English definitions are ordered according to the English alphabet and the Welsh definitions according to the Welsh alphabet. In the Welsh definitions, the definite article ("y" or "yr") is ignored but prepositions are counted. Definitions beginning with numbers (e.g. in English "the 2002 Act" means the Enterprise Act 2002") should appear first in numerical order. The corresponding Welsh definition would be 'ystyr "Deddf 2002" yw Deddf Menter 2002' and should therefore listed under 'd'.

(3) In a list of definitions, each entry should end with a semi-colon. There should be no conjunction.

(4) The defined term in the English version of the text should also include the Welsh defined term in italics like this—

"local authority" ("*awdurdod lleol*") means…..

(5) Similarly, the defined term in the Welsh version should have the English alongside in italics. The reason for doing this is to facilitate comparison of text between the language versions. The definitions are likely to appear in a different order in each language.

(6) This should not be done for single definitions or lists of definitions that are not ordered alphabetically.

81 Other technical points

(1) "Unless the context otherwise requires" / "oni bai bod y cyd-destun yn mynnu fel arall" is not particularly helpful. Do not use it at all if there is no case where the

context does otherwise require - and in such a case, it may be better to say what is meant in that context.

(2) Some writers deplore the use of a definition to use a term which is used only in another definition, unless that is the only way to make the other definition manageable.

(3) It should be clear to which portion of the resulting legislation the definition will apply: so use "in this Act" / "yn y Ddeddf hon" , "in this section" / "yn yr adran hon" and so on unless there is no possible doubt.

(4) In most cases it is not obvious that "for the purposes of this Act, x means y" / "at ddibenion y Ddeddf hon, ystyr x yw y" has any particular advantage over "In this Act, x means y" / "Yn y Ddeddf hon, ystyr x yw y".

82 Indexes

Many Acts now contain an index of defined expressions. These can be helpful if the Act contains a large number of them.

CHAPTER 3

CROSS-REFERENCES

83 Use of cross-references

(1) Cross-references can prove particularly hard work for the reader, so it is helpful to minimise their use. This can sometimes be done by re-ordering the material.

(2) Generally, it is helpful to refer to a substantive rule or proposition, rather than the statutory provision containing it (in which readers are unlikely to be interested).

EXAMPLE

Suppose subsection (1) says—

(1) A company must pass a resolution before [doing something].

(1) Rhaid i gwmni basio penderfyniad cyn [gwneud rhywbeth].

An exception is wanted for small companies.

The provision could say—

(2) Subsection (1) does not apply in the case of a small company.

(2) Nid yw is-adran (1) yn gymwys yn achos cwmni bach.

But rather than telling readers about “subsection (1)”, it might be more helpful to say—

(2) No resolution is required in the case of a small company.

(2) Nid oes angen penderfyniad yn achos cwmni bach.

(3) If a cross-reference is absolutely necessary, it may be possible to make it more user-friendly by adding words describing the effect of the provision referred to.

84 Parenthetical descriptions

(1) It will generally be helpful to provide a parenthetical description of a provision referred to. But the drafter will need to consider the usefulness of the descriptive words against the disadvantage of interrupting the flow of text. There is usually less need to give a parenthetical description of a cross-reference to a provision of the same Bill.

(2) The parenthetical description is a description, not a quotation. It will often be the heading of the section or Schedule referred to, but it does not have to be. For

example, the heading may have been devised in the context of other headings in the Act in question, but may not be particularly helpful taken in isolation.

(3) It should be made clear whether the parenthetical description relates to a particular subsection or other portion of text, or whether it relates to the section generally. In the latter case, it may be helpful to use a formulation along the following lines:

EXAMPLE

In section 1 (description of section 1), in subsection (1)...

Yn adran 1 (dsigrifiad o adran 1), yn is-adran (1)…

instead of

In section 1(1) (description of section 1).....

Yn adran 1(1) (dsigrifiad o adran 1)…

85 Cross references

(1) If something is expressed as being "subject to" / "yn ddarostyngedig i" something else, the relationship between them may not be immediately easy to grasp. In particular, this may be true if "subject to"/ "yn ddarostyngedig i" occurs at the beginning of the sentence. Another arrangement would often be better, for example adding a proposition at the end, such as "but this is subject to section X" / "ond mae hyn yn ddarostyngedig i adran X".

(2) It may also be possible to use another expression: for example, "but see section X" "ond gweler adran X" may be sufficient, or it may be possible to state briefly the case to which a different rule applies by saying (for example) "except" "ac eithrio" or "unless" "oni bai" " (as in *"Unless the person concerned is under 30" "Oni bai bod y person dan sylw o dan 30 oed".*).

(3) Global cross-references such as "Subject to the provisions of the Corporation Tax Acts" "Yn ddarostyngedig i ddarpariaethau Deddfau'r Dreth Gorfforaethau" (s.7(2) ICTA 1988) are meaningless to all but the most expert reader. In such cases, if the reference cannot be avoided, try to include a list of where the relevant other provision is made.

CHAPTER 4

WORDS INTRODUCING SCHEDULES

86 Need for introductory words

(1) This chapter is about the wording used to introduce a Schedule which consists of freestanding legislative propositions (for example, a Schedule of amendments to other Acts).

(2) This chapter is therefore not concerned with—

- cases where the Schedule is a continuation of a legislative proposition in the body of the Bill, such as a list or table (an obvious example is a repeals Schedule, which is just a list of enactments referred to in the section giving effect to the repeals); or
- cases where the Schedule is not part of a legislative proposition at all and is merely there for information (e.g. an index or the text of a treaty).

(3) Where a piece of legislation contains a free-standing Schedule, it is the invariable practice to introduce it in one of the sections, articles of regulations of the document (either the section to which it most closely relates or, if it does not relate to any other section, in a new one).

(4) The function of the words introducing a free-standing Schedule is to provide a signpost to the existence of the Schedule and an indication of its contents.

87 Possible formulations

(1) A commonly-used formula to introduce a Schedule is to say something along the following lines—

Schedule 3 ([brief description of Schedule contents]) has effect.

Mae Atodlen 3 (disgrifiad cryno o gynnwys yr Atodlenni) yn cael effaith.

(2) This formula certainly fulfils the functions referred to above. It is not though strictly necessary to say that the Schedule “has effect” “cael effaith”. It has effect whether the provision says so or not.

(3) There are other ways of introducing a Schedule which equally perform the functions referred to above.

EXAMPLES

Schedule 1 makes further provision about the Senior President of Tribunals....

Mae Atodlen 1 yn gwneud darpariaeth bellach am Uwch Lywydd y Tribiwnlysoedd.

Schedule 1 contains amendments of Schedule 16 to the 1999 Act (the London free travel scheme)

Mae Atodlen 1 yn cynnwys diwygiadau I Atodlen 16 i Ddeddf 1999 (cynllun teithio am ddim yn Llundain)

Schedule 5 amends the Environmental Protection Act 1990 to provide for the making of waste reduction schemes.

Mae Atodlen 5 yn diwygio Deddf Diogelu'r Amgylchedd 1990 i ddarparu am wneud cynlluniau lleihau gwastraff.

(4) Another recently used technique, which very clearly expresses the function of inducing words as a signpost, is to adopt a "see" formula.

EXAMPLE

For provision about alterations in the Assembly electoral regions and in the allocation of seats to those regions see Schedule 1 (section 2(5) of the Government of Wales Act 2006)

Am ddarpariaeth am newidiadau yn rhanbarthau etholiadol y Cynulliad a dyraniad seddau i'r rhanbarthau hynny gweler Atodlen 1 (adran 2(5) o Ddeddf Llywodraeth Cymru 2006).

(5) All of these techniques, and other forms of words which fulfil the functions mentioned above, are acceptable.

(6) It is important to ensure that the description of the Schedule is accurate and covers everything in the Schedule.

CHAPTER 5

ALTERNATIVE STRUCTURES TO CONVEY THE MESSAGE

88 Tables

A table is often a neat and clear way of setting out a number of cases with the rule that applies to each of them: see, for example, section 9 of the Learner Travel (Wales) Measure 2008:

"9 Learner travel arrangements not to favour certain types of education or training

(1) This section applies if arrangements under section 3, 4, or 6 are made in respect of learners of a description set out in an entry in column 1 of the following table.

(2) Arrangements must also be made in accordance with those sections in respect of the learners of the description set out in the corresponding entry in column 2 of the table.

(3) The arrangements referred to in subsection (2) must be no less favourable than the arrangements referred to in subsection (1).

TABLE

Column 1	***Column 2***
Children of compulsory school age receiving education or training at maintained schools.	*Children of the same age receiving education or training at other relevant places.*
Learners over compulsory school age receiving full-time education or training at maintained schools.	*Learners of the same age receiving full-time education or training at other relevant places.*
Learners with learning difficulties receiving education or training at maintained schools.	*Learners of the same age with learning difficulties receiving education or training at other relevant places.*
Learners who have a disability receiving education or training at maintained schools.	*Learners of the same age who have a disability receiving education or training at other relevant places.*
Children looked after by a local authority receiving education or training at maintained schools.	*Children of the same age who are looked after by a local authority receiving education or training at other relevant places.*

9 Trefniadau teithio i ddysgwyr a'r rheini'n drefniadau nad ydynt i ffafrio mathau penodol o addysg neu hyfforddiant

(1) Mae'r adran hon yn gymwys os gwneir trefniadau o dan adran 3, adran 4 neu adran 6 mewn cysylltiad â dysgwyr o fath a ddisgrifir mewn cofnod yng ngholofn 1 y tabl a ganlyn.

(2) Rhaid gwneud trefniadau hefyd yn unol â'r adrannau hynny mewn cysylltiad â'r dysgwyr o fath a ddisgrifir yn y cofnod cyfatebol yng ngholofn 2 y tabl.

(3) Rhaid i'r trefniadau y cyfeirir atynt yn is-adran (2) beidio â bod yn llai ffafriol na'r trefniadau y cyfeirir atynt yn is-adran (1).

TABL

Colofn 1	***Colofn 2***
Plant o oedran ysgol gorfodol sy'n cael addysg neu hyfforddiant mewn ysgolion a gynhelir.	*Plant yr un oed sy'n cael addysg neu hyfforddiant mewn mannau perthnasol eraill.*
Dysgwyr sydd dros yr oedran ysgol gorfodol ac sy'n cael addysg lawnamser neu hyfforddiant llawnamser mewn ysgolion a gynhelir.	*Dysgwyr yr un oed sy'n cael addysg lawnamser neu hyfforddiant llawnamser mewn mannau perthnasol eraill.*
Dysgwyr a chanddynt anawsterau dysgu sy'n cael addysg neu hyfforddiant mewn ysgolion a gynhelir.	*Dysgwyr yr un oed a chanddynt anawsterau dysgu sy'n cael addysg neu hyfforddiant mewn mannau perthnasol eraill.*
Dysgwyr a chanddynt anabledd sy'n cael addysg neu hyfforddiant mewn ysgolion a gynhelir.	*Dysgwyr yr un oed a chanddynt anabledd sy'n cael addysg neu hyfforddiant mewn mannau perthnasol eraill.*
Plant sy'n derbyn gofal gan awdurdod lleol ac sy'n cael addysg neu hyfforddiant mewn ysgolion a gynhelir.	*Plant yr un oed sy'n derbyn gofal gan awdurdod lleol ac sy'n cael addysg neu hyfforddiant mewn mannau perthnasol eraill. "*

89 Formulae

(1) These are perfectly acceptable when used appropriately. A formula may be the neatest way to express a relationship between various quantities; spelling the same thing out in words may be the worst way of expressing it.

EXAMPLE

An example of a formula is in section 998(3) of the Income Tax Act 2007 (meaning of "grossing up")-

"(3) The grossed up amount may also be expressed as-

$$GA = NA + \left(NA \times \frac{R}{100 - R}\right)$$

where

GA is the grossed up amount,

NA is the net amount, and

R is the percentage rate of tax by reference to which the net amount is to be grossed up."

"(3) Gellir hefyd fynegi'r swm wedi ei grosio fel a ganlyn-

$$GA = NA + \left(NA \times \frac{R}{100 - R}\right)$$

ystyr

GA yw'r swm wedi ei grosio,

NA yw'r swm net, ac

R yw graddfa canran y dreth drwy gyfeirio at y swm net sydd i'w grosio."

(2) However, a sequence of written instructions may sometimes be more accessible than a formula: see, for example, the "method statement" in section 90 of the Income Tax Act 2007. And if the proposition is very simple (for example, the sum of two

quantities) using a formula may make it look more complicated than saying the same thing in words.

(3) Sometimes which is more accessible will depend on the reader: an accountant or an actuary dealing with actual figures may find a formula more useful, while a reader who needs only a description of what is happening may find words more useful. The expected readership may influence which approach is adopted.

90 Method statements

A "method statement" may be the neatest way to set out the various steps in a process. An example is s.91 of the Income Tax Act 2007:

"91 How relief works

This section explains how the deductions are to be made.

The amount of the relievable loss to be deducted at any step is limited in accordance with section 25(4) and (5).

Step 1

Deduct the relievable loss from the profits of the trade of the final tax year.

Step 2

Deduct any part of the relievable loss not deducted at Step 1 from the profits of the trade of the previous tax year.

Step 3

Deduct any part of the reliable loss not deducted at Step 1 or 2 from the profits of the trade of the tax year before the previous one.

Step 4

Deduct any part of the relievable loss not deducted at Step 1, 2 or 3 from the profits of the trade of the tax year before that one.

Other claims

If the relievable loss has not been deducted in full at Steps 1 to 4, the person may use the part not so deducted in giving effect to any other relief under this Chapter (depending on the terms of the relief)."

CHAPTER 6

OVERVIEW PROVISIONS

91 Introductory

(1) An "overview" is, typically, a brief summary of the content of an Act, Part, Chapter, group of sections (or articles or regulations) or Schedule. It may also contain signposts to other relevant provisions. Its purpose is to assist the reader in navigating legislative material.

(2) An overview will generally have no operative effect of its own. It may be contrasted with a purpose clause intended to affect the interpretation of other provision.

(3) Overviews have been widely used in Tax Law Rewrite legislation. Their use in other legislation becoming a more common.[20]

92 Overviews of whole Acts, Orders or Regulations

(1) Section 1 of the Corporation Tax Act 2009 is an example of an overview for a whole Act. It may be asked what an overview like this adds to the list of contents. There are perhaps three main arguments in its favour.

(a) In a large Act the arrangement by itself can run to many pages (for example, 63 pages in the Corporation Tax Act 2009). This can make it difficult for a reader to get a clear idea of the overall contents of the Act. An overview can offer the reader a snapshot of the Act more briefly (just over a page of text in the Corporation Tax Act 2009).

(b) The list of contents can do no more than create a list of the headings to Parts, Chapters, cross-headings and clause titles. An overview can go further, by drawing out the principal themes behind a group of Parts and the relationship between those Parts.[21]

(c) An overview can if necessary explain how the new legislation fits into the legislative landscape (for instance, by including signposts to other relevant provision).

(2) An overview of an entire piece of legislation is most likely to be of use in very large Acts, orders or regulations where the reader is unable to gain an easy grasp of the scope of the legislation from the arrangement or, in the case of an Act, the long title. But there is no reason in principle why such sections cannot be used in an Act, Order or set of Regulations of any size if the drafter considers that it would be helpful. But an overview that merely repeats the arrangement, or the explanatory note in the

[20] For example, the Banking Act 2009, the Local Government Bye-laws (Wales) Bill currently before the Assembly and the proposed Food Hygiene Rating (Wales) Bill currently out to consultation.

[21] For example, section 1(6) of the Corporation Tax Act 2009 tells readers that Parts 15 to 18 all contain special rules for particular cases, a point that may not be readily apparent from the listing of Parts in the arrangement.

case of a Welsh statutory instrument, in a different format is unlikely to be of any great assistance.

93 Overviews of Parts, Chapters and Schedules

(1) In Tax Law Rewrite Acts, overviews are also commonly used in relation to Parts and Chapters. A typical overview of a Part that is divided into Chapters contains a brief description of those Chapters. If other provision outside the Part is relevant to the operation of the Part, the overview may also contain a signpost to that other provision in order to alert the reader of its relevance.[22]

(2) It is for the drafter to determine how useful an overview is likely to be. If the Part or Chapter is short and contains only a few clauses then an overview is unlikely to be of much assistance: the clause headings will suffice. However, an overview may still be of assistance - even for a very short Chapter - if it alerts the reader to the existence of other relevant legislation before the operative provisions of the Chapter.[23]

(3) To use an overview for one Part does not mean that all other Parts of the Act have to have one.[24] There is no point in having an overview where there is no benefit to the reader.

(4) An overview may be useful for a long Schedule.[25]

94 Sections containing overviews

(1) Often an "overview" will have a section to itself[26]. However, sometimes it may be convenient to include interpretative provision, or a provision as to the application of a Part or Chapter, alongside the overview.[27]

(2) But be careful not to mislead readers. If a combination of operative and inoperative material is desired, "overview" may not be the most helpful section heading ("introduction", for example, might be better).

95 Operative and inoperative effect

(1) The fact that an overview may not be intended by the drafter to have any operative effect does not mean to say that a court would take no account of it in construing the legislation to which the overview relates. So it needs to be drafted with care to

[22] For example, section 35 of the Corporation Tax Act 2010. Subsections (1) and (2) contain descriptions of the Chapters; and subsections (3) and (4) highlight other relevant provision.

[23] For example, section 976 of the Corporation Tax Act 2009.

[24] For example, in the Finance Act 2004, Part 4 has an overview but no other Part does.

[25] See para. 3 of Schedule 19 to the Finance Act 2011, where the Schedule runs to over 50 pages.

[26] For example, section 33 of the Income Tax Act 2007; section 98 of the Corporation Tax Act 2010.

[27] For example, section 615 of the Income Tax Act 2007.

ensure that it is an accurate summary of those provisions and could not have an unintended consequence.

(2) Some overviews go beyond merely outlining the contents of a set of provisions and instead describe or explain how the provisions operate[28]. This kind of descriptive or explanatory material may on occasion be useful. But particular care is required, as it carries a greater risk of unintended consequences than a more standard type of overview containing a mere outline of subject-matter.

96 Amending overviews

(1) If a provision amends an enactment that is in a Chapter or Part of an Act that includes an overview, then consideration should be given as to whether the overview should be amended to ensure that it continues to be an accurate description of the Chapter or Part.

[28] For example, section 1(2) to (5) of the Banking Act 2009.

PART 7

REPEALS AND AMENDMENTS

CHAPTER 1

TEXUAL AMENDMENTS

General issues

97 Differences between English and Welsh

(1) The amendments required to produce a particular legal effect may be quite different in English and in Welsh.

(2) For instance, the differences between sentence structure in English and in Welsh (see Part 4, Chapter 2) may mean that an amendment needs to be inserted in a different location in each language. An adjective normally precedes a noun in English but follows a noun in Welsh: “new scheme” but “cynllun newydd”. So if the English text is amended to insert an adjective before a noun, the corresponding amendment to the Welsh text will insert the adjective after the noun.

EXAMPLE

“If the Welsh Ministers publish a [new] scheme, they must lay a copy of that scheme before the Assembly.”

“Os yw Gweinidogion Cymru yn cyhoeddi cynllun [newydd], rhaid iddynt osod copi o’r cynllun hwnnw gerbron y Cynulliad.”

(3) An amendment to the Welsh text may also give rise to a need for further changes to that text. For example, if a masculine noun is substituted for a feminine noun, any pronouns referring to that noun will also need to be altered (see paragraph 39(3)).

(4) In producing amendments, the focus should be on whether the same legal effect is achieved in the two languages, rather than on whether the two sets of amendments are the same.

Operative words

98 Insertions and substitutions

(1) The following forms are widely used, and both are acceptable—

imperative form: after x insert y / for x substitute y / ar ôl x mewnosoder y

declaratory form: after x there is inserted y / for x there is substituted y / ar ôl x mae y wedi ei mewnosod/fewnosod

(2) In each case the effect of the amendment is clear.

(3) Where a single section makes provision for a series of amendments (as opposed to a single amendment) to an Act, or to a section, the first subsection is often in a declaratory form, while the remaining propositions are in the imperative:

(1) The [Act] is amended as follows...

(2) In section 1, after subsection (1) insert....

(1) Mae'r [Ddeddf] wedi ei diwygio fel a ganlyn…

(2) Yn is-adran 1, ar ôl is-adran (1) mewnosoder…

(4) Although the effect is clear, there is something to be said for using the same form in both the opening proposition and the amendments.

99 Repeals and revocations

(1) The following formulations, or variations of them, are often used to make textual amendments to an Act by the repeal of one or more provisions or words within the Act—

omit x / x is omitted

hepgorer x / mae x wedi ei hepgor

x ceases to have effect

mae x yn peidio â chael effaith

x is repealed

mae x wedi ei (d)diddymu

(2) Here the imperative form is possible only with "omit" / "hepgor". And in the case of provisions of secondary legislation the appropriate term is "revoked" / "dirymu" not "repealed" / "diddymu".

(3) For repeals of less than a whole Act, all of these are acceptable, regardless of the unit of text being repealed. Clearly only "is repealed" / "wedi ei (d)diddymu" or "ceases to have effect" / "yn peidio â chael effaith" would be used for a whole Act. It might then make for consistency to use "is repealed" / "wedi ei (d)diddymu or "ceases to have effect" / "yn peidio â chael effaith "(rather than "omit" / "hepgorer") for smaller units of text.

(4) To use "is repealed" / "wedi ei (d)diddymu" would also be consistent with "repeal Schedules" / "Atodlenni diddymu" and with the fact that provisions introducing repeal Schedules use the words "are repealed" / "wedi eu (d)diddymu".

(5) As between "is repealed" / "wedi ei (d)diddymu" and "ceases to have effect" / "yn peidio â chael effaith", "is repealed" follows the language of sections 15 to 17 of the Interpretation Act 1978. The advantages of this should probably not be overstated: in *Commissioner of Police of the Metropolis v Simeon* [1982] 2 All ER 813 it was held that the fact that a repeal was effected by providing that the repealed provisions

"shall cease to have effect" was not sufficient to indicate a "contrary intention" within section 16(1) of the Interpretation Act 1978.

(6) However, it may be helpful to use the word "repeal" / "diddymu" rather than to require the reader to work out that what has been done is in substance a repeal. The "repeal" form is also the shorter of the two.

Describing where the amendment is to go

100 Replacing, or adding to, words in the first place where they occur

The following (amongst others) are possible—

after "x", in the first place it occurs, insert "y"

ar ôl "x", yn y lle cyntaf lle y mae'n digwydd, mewnosoder "y"

after "x", where first occurring [or appearing], insert "y",

ar ôl "x", lle y mae'n digwydd [neu'n ymddangos] gyntaf, mewnosoder "y"

101 Replacing, or adding to, words in all places where they appear

(1) The following (amongst others) are possible—

after "x", in each place, insert "y"

ar ôl "x", ym mhob lle, mewnosoder "y"

after "x", wherever it occurs/appears, insert "y"

ar ôl "x", lle bynnag y bo'n digwydd/ymddangos, mewnosoder "y"

for "x" (twice) substitute "y"

yn lle "x" (ddwywaith) rhodder "y".

(2) In principle, a single amendment could be used to change a term used throughout a piece of legislation. In practice, there are probably relatively few cases where this approach will be appropriate. Obviously, a global amendment should only be used if the drafter is certain that it achieves the right result in each place. And it may be difficult to adopt this approach if the legislation being amended includes legislation in the Welsh language, as the global amendment will need to make provision for a range of consequential changes to mutations, pronouns, and so on.

(3) It is relatively common practice to put brackets around the words identifying where in the provision the amendment is to be made—

after “x” (in each place) insert “y”

ar ôl “x” (ym mhob lle) mewnosoder “y”

after “x” (in the first place it occurs) insert “y”

ar ôl “x” (yn y lle cyntaf lle y mae’n digwydd) mewnosoder “y”.

(4) Presumably, the wording in question will only be used where it would not otherwise be clear whether one amendment, or more than one, is intended. So, strictly speaking, brackets ought not to be used (on the basis that brackets are generally reserved for material that is included to assist the reader but does not have substantive legal effect). However, drafters may find that, in some cases, the use of brackets makes the provision easier to read.

102 Inserting at the beginning of a provision

The usual form is to say—

at the beginning insert x/there is inserted x

ar y dechrau mewnosoder x/ mae x wedi ei fewnosod/mewnosod

rather than to say that x is inserted “before” particular words.

103 Inserting text at the end of a provision

(1) The usual form is to say—

“at the end”

“ar y diwedd”.

(2) Sometimes drafters say “add”/ “ychwanegu” instead of “insert” / “mewnsod” for text which is to appear at the end of an existing provision. But it is not wrong to use “insert” / “mewnosod” in this context and it may be simpler to use the same word whether the new text is to appear in the middle or at the end of the existing provision.

104 Parts of a subsection

(1) In the case of a subsection which includes paragraphs, the words before the paragraphs may be identified as “the opening words” / “y geiriau agoriadol” or “the words before paragraph (a)” / “y geiriau o flaen paragraff(a)”.

(2) The words after the paragraphs (sometimes referred to by drafters as “full-out” words / “geiriau cloi”) may be identified as “the closing words” or “the words after paragraph ( )” / “y geiriau ôl paragraff ( )”. Of course, it is not always necessary to

specify exactly where in a subsection the words in question appear (for example, if the words appear only once).

105 Lists

Where an amendment is made to insert an entry into a list, such as a list of definitions or statutory bodies, it is sometimes framed as an amendment to insert the text "at the appropriate place" / "yn y lle priodol" (instead of "after" / "ar ôl" something). This is appropriate where, for example, a list runs in alphabetical order.

106 Location of a new section

(1) It is usual to specify that a new section is to be located "after" / "ar ôl "another one.

(2) However, "before" / "o flaen" can be useful where the new section is to be inserted at the beginning of a Part, Chapter or group of sections (where a reference to "after" / "ar ôl " the preceding section would tend to suggest that the intention was that the new section should appear at the end of the preceding Part etc).

107 Unnumbered provisions

To add a subsection or sub-paragraph to a section or paragraph which is not already subdivided, the recommended form is—

to say first that

In [section] [paragraph] 1 the existing provision becomes [subsection] [sub-paragraph] (1)

Yn [adran] [paragraff] 1 daw'r ddarpariaeth bresennol yn [is-adran] [is-baragraff] 1

then to insert the new material as subsection or sub-paragraph (2).

108 How much text to substitute

(1) The starting point when drafting a substitution is that the minimum amount of text should be replaced. In most cases, this will make it easier for the reader of the Bill to identify the substantive change that is being made. It also avoids suggesting that changes are being made to text which is not in fact changing.

(2) However, in some cases it will be helpful to the reader of the Bill, or the reader of the Act being amended, to substitute more text than is strictly necessary. For example—

• where a number of related changes are being made to a single provision,

• where the end result of a group of amendments would be to alter the whole basis

of an existing provision or to leave very little of the previous text,

• where the passage to be amended has previously been amended non-textually (so

that there may be some doubt about which words remain to be textually amended),

• where it is otherwise helpful to the reader to substitute a few extra words, and

• if doing so would enable the drafter to repeal an amending provision.

(3) The risks of substituting more text than is strictly necessary include—

• the risk of missing a cross-reference, non-textual modification or an old saving, and

• the risk that it will be more difficult for a reader to work out what substantive changes are being made.

(4) In some cases a parenthetical description may help instead.

109 Parenthetical description

(1) Generally, see the discussion of parenthetical descriptions in paragraph 84. In this section, only aspects relevant to textual amendments are discussed.

(2) It has become fairly standard practice to give a brief description of the section or Schedule that is being amended, to give the context of the amendment and perhaps its significance. The parenthetical description will often be the heading of the section or Schedule, but it does not have to be - it may be better, for readers of the Bill, to describe the section in a different way.

(3) There may be less utility in maintaining this practice in, say, Schedules of consequential amendments, where there is no important substantive effect to be described (and fewer readers to describe it to). For example, if the provision is simply changing the name of a body in all existing legislation, there may be little point in describing every provision where the change is made.

(4) It is also unlikely to be worthwhile to give the description of a section after which a new section is inserted, unless there is a very close connection between the two.

(5) To describe the section or Schedule which is being amended may help to explain the significance and context of the amendment, but is unlikely of itself to tell the reader exactly what the amendment does. To tell the whole story the drafter probably needs to describe the particular portion of text which is being amended, whether a subsection or a smaller subdivision. But it will not be practical, or necessary, to do that in every case.

(6) For an important substantive amendment, it may be worth taking the reader by the hand and explaining the entire context, so that the meaning of the textual amendment is then readily apparent. But it is difficult to sustain this on a consistent basis in legislation of any length. There is certainly no point in giving a description of a subsection unless it actually helps the reader to understand the amendment. And

there seems little point in descending to this level of detail in long Schedules of minor or consequential amendments.

(7) Explanatory notes may help instead.

110 Schedules of amendments

(1) This relates to the format to be used in Schedules where amendments to an Act are arranged under an italic cross-heading giving the name of the Act.

(2) The recommended style is—

"*Education Act 2005*

1. In the Education Act 2005, after section N..."

"Deddf Addysg 2005

1. Yn Neddf Addysg 2005, ar ôl adran N…"

(3) Note in particular the short title of the Act needs to be given in the text of the amendment as well as in the heading;

111 Amendment of section headings etc

(1) It is acceptable to amend the heading to a provision.

(2) In particular, it may be helpful to do so if the provision is falsified by a textual amendment.

(3) There is no need to amend a heading merely because the existing heading is not quite what you would have chosen for the amended text. Also, the fact that the amended heading has Assembly authority might lead the courts to attach more weight to it than they would have attached to the original heading.

(4) There are also examples of cases where a heading needs to be changed without there being a change to the text under the heading. One example is where a parallel set of provisions is added after existing provisions and there need to be headings that distinguish and connect the neighbouring sets of provisions.

112 Punctuation

(1) Where inserted or substituted words end with a full stop before the closing quotes, there should be no further full stop after the closing quotes.

Numbering conventions

113 Re-using numbers

(1) When substituting a complete sub-division of text (e.g. a subsection), the numbering of the old provision should generally not be used for the new provision unless (as will frequently be the case) the subject matter of the new provision corresponds to that of the old provision.

(2) When inserting a complete sub-division of text (e.g. a subsection) in a place where a corresponding sub-division has been repealed, the numbering of the repealed provision should generally not be used for the new provision.

(3) Occasionally the drafter may decide that there is good reason to depart from the above approaches (e.g. where a repealed provision was repealed many years ago).

114 Adding numbered provisions – use of the English or Welsh alphabet

(1) The practice for statutory instruments from the establishment of the National Assembly for Wales has been to use the Welsh alphabet for numbering units of text (paragraphs etc) in the Welsh language text and to use the English alphabet for the English text. This means that the equivalent unit of text from each language version is often different, so section 1(1)(d) in the English text would be section 1(1)(ch) in the Welsh text.

(2) This is fine where the user of the text is referring only to one language text, but there is potential for confusion or difficulty in contexts where both the English and Welsh language texts are being referred to, for example in a bilingual debate on the floor of the Assembly about the provisions where simultaneous translation is necessary, or indeed bi-lingual proceedings in a court or tribunal. It was decided in the third Assembly that Assembly Measures would use the English alphabet in the Welsh text for numbering purposes and the same practice is applied to Assembly Bills. This was done in order to remove a potential barrier to the use of Welsh in contexts like the floor of the Assembly or a court or tribunal where legislation in both English and Welsh is available [29].

(3) The practice from 1 April 2012 is that the numbering conventions of Assembly Bills should also be applied to Welsh statutory instruments. So the following recommendations on adding numbered provisions apply to the Welsh text as well as the English text.

115 Adding provisions at the beginning of a series

The following applies when inserting a provision at the beginning of an existing series of provisions (e.g. a subsection at the beginning of a section or a Schedule before the first Schedule).

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[29] The same solution has been adopted where the same issue has arisen in other bi-lingual jurisdictions, such as Hong Kong.

• New sections inserted before the first section of an Act are preceded by a letter, starting with "A".

• The same approach is taken in relation to all other divisions of text (other than lettered paragraphs).
Thus the Insolvency Act 2000 inserted a Schedule A1 before Schedule 1 to the Insolvency Act 1986, and the Enterprise Act 2002 inserted a new Schedule B1 after Schedule A1.

• A provision inserted before "A1" (or "ai") is "ZA1" or ("zai").

• In the case of lettered paragraphs, new paragraphs inserted before paragraph (a) are (za), (zb) etc.

• And paragraphs inserted before (za) are (zza), (zzb) etc.

116 Adding provisions at the end of a series

Where adding a provision at the end of an existing series of provisions of the same kind (e.g. a subsection at the end of a section or a Schedule at the end of the Schedules), the numbering should continue in sequence.

117 Inserting whole provisions between existing provisions

The following applies when inserting whole provisions between existing provisions.

- New provisions inserted between 1 and 2 are 1A, 1B, 1C etc.
- New provisions inserted between 1A and 1B are 1AA, 1AB, 1AC etc.
- New provisions inserted between 1 and 1A are 1ZA, 1ZB, 1ZC etc. (and not 1AA etc.)
- New provisions inserted between 1A and 1AA are 1AZA, 1AZB, 1AZC etc.

Do not generate a lower level identifier unless you have to.

- A new provision between 1AA and 1B is 1AB not 1AAA.
- But a new provision between 1AA and 1AB is 1AAA.

The above recommendations apply equally to sub-paragraphs with roman numerals and lettered paragraphs.

- New sub-paragraphs between sub-paragraphs (i) and (ii) are (ia), (ib), (ic) etc.
- New paragraphs between paragraphs (a) and (b) are (aa), (ab), (ac) etc.
- New paragraphs between paragraphs (a) and (aa) are (aza), (azb), (azc) etc.

118 Insertions resulting in a series of more than 26 new sections, articles or regulations

This relates to the rare occasions when the insertion of new sections, articles or regulations into a piece of legislation would result in a series of more than 26 new units.

- After Z use Z1, Z2, Z3 etc.

So in the Capital Allowances Act 2001 section 360Z is followed by sections 360Z1 to 360Z4.

119 Insertions resulting in series of more than 26 lettered paragraphs

This relates to the rare occasions when the insertion of new paragraphs into a section would result in a series of more than 26 lettered paragraphs.

- After paragraph (z) insert paragraphs (z1), (z2), (z3) etc.

CHAPTER 2

NON-TEXTUAL MODIFICATIONS

120 Non-textual modifications and textual amendments

(1) This chapter is about how to distinguish a non-textual modification from a textual amendment.

(2) By "non-textual modification" is meant a modification of an enactment that is not intended to result in a change to the text of the modified enactment when the enactment is next printed (in contrast to a textual amendment, which is).

(3) There have been occasions where it has not been clear to departments, or to those who produce and edit statutory text, whether something is a textual amendment or a non-textual modification. Sometimes non-textual modifications have even been printed as textual amendments.

(4) It is therefore important to be make it clear what is intended.

121 Need to avoid formulations used in textual amendments

(1) Sometimes non-textual modifications are drafted in essentially the same form as a textual amendment, the only difference being in the opening wording—

EXAMPLE (to avoid)

(1) Section 3 applies to fine defaulters as to offenders but with the following modifications—

(a) in subsection (1) for "offence" substitute "default"; and

(b) in subsection (2) for "6 months" substitute "3 months".

(1) Mae adran 3 yn gymwys i ddrwgdalwyr dirwyon fel y mae'n gymwys i droseddwyr ond gyda'r amrywiadau a ganlyn-

(a) yn is-adran (1) yn lle "tramgwydd" rhodder "drwgdaliad"; a

(b) yn is-adran (2) yn lle "6 mis" rhodder "3 mis".

(2) This might readily be mistaken for a textual amendment. The opening words give a clue that something other than a textual amendment is intended, but the rest is exactly the same as a textual amendment. It would be particularly easy to lose sight of the opening words if the list of substitutions and other changes were very long.

(3) It would be clearer, in the first place, if the subjunctive mood were used to indicate that there is no intention actually to substitute the text—

EXAMPLE

(1) Section 3 applies to fine defaulters as to offenders but as if—

(a) in subsection (1) for "offence" there were substituted "default", and

(b) in subsection (2) for "6 months" there were substituted "3 months".

(1) Mae adran 3 yn gymwys i ddrwgdalwyr dirwyon fel y mae'n gymwys i dramgwyddwyr ond fel petai-

(a) "drwgdaliad" yn cael ei roi yn lle "tramgwydd" yn is-adran (1), a

(b) " 3 mis" yn cael eu rhoi yn lle "6 mis" yn is-adran (2).

(4) Better yet, though, would be to avoid the reference to substitution altogether—

EXAMPLE

(1) Section 3 applies to fine defaulters as to offenders but as if—

(a) in subsection (1) the reference to an offence were to a default; and

(b) in subsection (2) the reference to 6 months were to 3 months.

(1) Mae adran 3 yn gymwys i ddrwgdalwyr fel y mae'n gymwys i dramgwyddwyr ond fel petai-

(a) y cyfeiraid yn is-adran (1) at dramgwydd yn gyfeiriad at ddrwgdaliad; a

(b) y cyfeiriad yn is-adran (2) at 6 mis yn gyfeiriad at 3 mis.

122 "Modification"

Incidentally, the use of the word "modification" ("amrywio") does not of itself exclude the possibility that what is intended is a textual amendment. The word is sometimes used (rightly) to describe a textual amendment — see for example section 517(6) of the Education Act 1996 and section 26(2) of the Criminal Justice and Court Services Act 2000.

CHAPTER 3

AMENDMENT OF UNCOMMENCED PROVISIONS ETC

123 Amendment of a provision not in force

(1) A piece of legislation should not ignore relevant enacted material merely because that material is not yet in force. It is prudent to keep uncommenced legislation in a state where it could be brought into force. So if the policy behind a piece of legislation require changes to a provision, or would require changes to it were it in force, the provision should normally be amended accordingly.

(2) There are sometimes questions about whether an amendment is to be commenced by the commencement powers in an amending Act or those in the amended Act.

(3) The starting point is that commencement of a provision of an Act depends upon the provision for commencement made in that Act. This includes a provision that amends an uncommenced provision in an earlier Act. Conversely, an Act's commencement provisions apply to the provisions of the Act and are not intended, at the time of enactment, to apply to all text that happens to be added by amendment by later Acts.

(4) In some cases the drafter can and should rely simply on the commencement provision in the amending Act. For example, if the policy is that the uncommenced provision in an earlier Act should come into force and operate for a while without the amendment made by the amending Act, the later commencement of the amendment can only depend on the provision in the amending Act.

(5) Or again, an amendment may consist of the insertion of free-standing provision that is capable of having effect without reference to neighbouring uncommenced provisions of the Act. Such added provision could be brought fully into force by or under the amending Act, without any reliance on the amended Act's commencement provisions.

(6) There may be cases where a drafter would want the text added by a Bill to be subject to the commencement provisions of the Act being amended. The drafter might, for example, want the Act's power to make transitional provision in connection with commencement to apply to provision as amended by the Bill. That is perhaps particularly likely where the amendment has no meaning on its own.

(7) In some cases it may be obvious that the amendment made by the Bill itself impliedly modifies the Act's commencement provisions so that they apply to the amended text as they would have applied to the unamended text. This approach seems most reasonable where the text added by the amendment cannot operate independently of the provision amended.

(8) But if in any given case it is not obvious that this is the intention of the amending Act, then specific provision will be needed to apply the commencement provisions of the amended Act.

124 Amendment of a provision subject to an uncommenced repeal

(1) Similarly, a Bill should not ignore relevant enacted material merely because it is subject to an uncommenced repeal. So a provision in an Act subject to an uncommenced repeal should be amended by a Bill if the policy of the Bill demands the change while the provision remains unrepealed.

(2) If a provision in an Act is subject to an amendment that operates by way of substitution - that is, a repeal plus the insertion of new text - the policy of the Bill may make it necessary to amend the provision in its original and in its substituted form. In such a case, a Bill should make it clear which version of the Act's provision is being amended.

(3) In the case of an amendment of provision subject to an uncommenced repeal, there may be a question about whether the repeal, when commenced, would apply to the provision as afterwards amended. An analysis similar to that applying to amendments of uncommenced provisions applies here: the repeal, when enacted, could only have been addressed to provisions that then existed. It could similarly be argued that a Bill's amendment of a provision impliedly modifies the uncommenced repeal of that provision, so that the repeal applies to the provision as modified.

(4) One possible solution is for the Bill to make transitory provision that has effect only until the repeal is commenced.

(5) The prudent course for a drafter operating on provision subject to an uncommenced repeal is to check the provisions that relate to the repeal and its commencement in the Act containing the uncommenced repeal.

(6) If provision is spent, it can be ignored rather than amended - and this would be true even if the provision is subject to an uncommenced repeal. But be sure that the provision is spent - the fact that the repeal has not been commenced might suggest a decision to keep the provision in force.

PART 8

OPERATIVE PROVISIONS

CHAPTER 1

PERIODS OF TIME

125 Introductory

(1) This Part considers some aspects of expressing periods of time. It assumes that in deciding how to describe a particular period the drafter's objectives are:

(a) to ensure that it is certain when the period begins and ends;

(b) to ensure that the reader has the greatest chance possible of telling from the words used when the period begins and ends, rather than having to refer to case law;

(c) to express the period as simply as possible.

126 Start of period: fractions of days

(1) An Act often needs to describe a period by reference to some event. An example is a period of 14 days during which an appeal may be made, where the "event" is the decision to which the appeal would relate.

(2) In this example, it might be supposed that the appeal period should run from the decision. But this would cause problems, because the decision will have been made part-way through a day, and if the appeal period is to be expressed in whole days (or weeks, months or years) it has to begin at the beginning of a day. The question is, which day? Instructions are not always clear on this point.

(3) It may well be wrong in policy terms for the period to start running from the beginning of the day after the day of the decision, because that would disallow an appeal made on the day of the decision.

(4) If the period starts with the beginning of the day of the decision, it will technically include the part of that day that precedes the decision (during which an appeal will of course be impossible). This may not in practice cause any problems. But if the appeal period is short (for example, 7 days), it may be worth considering whether as a matter of policy the number of days should be increased by one, to take account of the fact that the period starts to run on the day of the decision and not the next day.

(5) Appeal periods are of course not the only periods that give rise to this kind of question.

(6) It may not always produce the right result to begin a period at the beginning of the day on which a particular event occurs: each case needs to be considered on its own

merits. And it will be obvious when some periods should start (for example, a year beginning with 1 April), so fractions of a day are not always an issue.

127 "Beginning with", "from", "after" "gan ddechrau ar", "oddi ar", "ar ôl"

(1) A clear way of expressing a period of, for example, 14 days so that it starts at the beginning of a particular day is to describe the period as "14 days beginning with" / " 14 o ddiwrnodau gan ddechrau ar" the day in question.

(2) Alternative methods are to refer to a period of 14 days "from" / "oddi ar" or "after" / "ar ôl" a particular event.

(3) The proper construction of "14 days from [the event]" / "14 o ddiwrnodau oddi ar [y digwyddiad]" will depend on the context. As a general rule, this wording will be taken to exclude the day on which the event takes place. This is something of which the user of the Act may very well be unaware.

(4) "14 days after [the event]" / " 14 o ddiwrnodau ar ôl [y digwyddiad]" will also generally be taken to exclude the day of the event (*Dodds v Walker* [1981] 2 All ER 609) but this will also depend on the context.

(5) It is suggested that "14 days beginning with" / "14 o ddiwrnodau gan ddechrau ar" the day of an event (or any other day or date) is often the least ambiguous short way of ensuring that the period starts to run from the beginning of that day. The formula "X months beginning with the day on which" / " X mis gan ddechrau ar y diwrnod pan" an Act is passed has long been the preferred way of framing a period of months for which commencement is postponed.

(6) References to a period "ending with" / "sy'n gorffen ar" a particular day or date are equally unambiguous.

(7) A reference to a period "beginning on" / " gan ddechrau ar" or "ending on" / "gan orffen ar" a particular date or day would not give the same certainty, because it would leave open the question of the time at which (on the day in question) the period begins or ends.

(8) A reference to "14 days from" / " 14 o ddiwrnodau oddi ar" a point that is bound to occur at midnight (for instance, the end of a year) makes clear exactly when the 14 days are to begin and end: in such a case "from" / "oddi ar" is as unambiguous as "beginning with" / "gan ddechrau ar".

128 "The period of"

Acts have often referred to (for example) a 14 day period as "the period of 14 days" / "cyfnod o 14 o ddiwrnodau". In many cases the words "the period of" / "cyfnod o" do not add anything and could be omitted – the reference could simply be to "14 days" / "14 o ddiwrnodau". If a reference back is needed, it may be possible to refer to "those 14 days" / " y 14 o ddiwrnodau hynny" instead of to "that period" "y cyfnod hwnnw".

129 "Within" "o fewn", "before the end of" "cyn pen"

(1) Statute often requires something to be done "within" / "o fewn" a particular period or "before the end of" / "cyn pen" a particular period.

(2) A requirement to take an action "before the end of 3 weeks beginning with [a particular date]" / "cyn pen 3 wythnos gan ddechrau ar [ddyddiad penodol]" would apparently allow the action to be taken at any time up to the end of those 3 weeks, including at any time before the 3 weeks began. A requirement to take the action "within" / "o fewn" those 3 weeks would limit the time in which the action may be taken to those 3 weeks.

(3) In some cases, the effect of either wording will in practice be the same. An example would be where a copy of a document is required to be given within/before the end of 3 weeks beginning with the date when the document comes into existence. But in other cases, the different wordings may produce materially different results.

(4) A requirement to do something "by the end of" / "erbyn diwedd" a period would seem to amount to the same thing as a requirement to do it "before the end of" / "cyn pen" the period.

130 Units of time

(1) Periods of time are commonly expressed in days, weeks, months or years. Which unit of time to use will depend sometimes on the policy and sometimes on the drafter's decision.

(2) Obviously, the longer the period, the less helpful it will be to use short units of time. For example, it is suggested that all readers will know that 30 days is about a month, but that a period expressed as (for example) 150 days would be much less readily understandable.

(3) Months are a particular problem because of their varying length. (Schedule 1 to the Interpretation Act 1978 defines a "month" as a calendar month, but this appears to do no more than prevent it from being interpreted as a lunar month.) When a period of "one month" begins other than at the beginning of a month, when does it end?

(4) According to the rule in *Dodds v Walker* ([1981] 2 All ER 609), where an application had to be made "not more than 4 months after" the giving of a notice on 30 September 1978, the last date for making the application was 30 January 1979. The date of 30 January 1979 is arrived at by treating the 4-month period as:

- beginning at midnight between 30 September and 1 October 1978 (that is, excluding the rest of the day on which the notice was given), and
- expiring at the end of the day in January 1979 corresponding to the day in September 1978 at whose end the period began - that is, day 30. (If the period had been expressed to be "4 months beginning with" "4 mis gan ddechrau ar " the date when the notice was given, the last date for making the application would have been 29 January.)

(5) The rule in *Dodds v Walker* is known as “the corresponding date rule”. Under it, the length of a period of “1 month” varies according to when the period begins. For example, a period of “1 month” beginning at midnight on 4/5 April, which will end at midnight on 4/5 May, will be shorter than a period of “1 month” beginning at midnight on 4/5 May (because April is shorter than May).

(6) The corresponding date rule obviously cannot apply unmodified in all cases, because the months of the year do not all have the same number of days. *Dodds v Walker* confirmed that where (for example) a period of 1 month starts at the end of 30 January, it ends at the end of 28 February, or in a leap year 29 February.

(7) Because the corresponding date rule can be a trap for the user, in some cases it may be worth considering whether a period of (for example) 3 months would be better expressed as 12 weeks or 90 days. The periods expressed in these ways will not be identical, but whether this matters will depend on the context.

131 Non-working days

(1) Some Acts exclude certain days (for example, Saturdays, Sundays and bank holidays) from specified periods. Others make no distinction between holidays and working days. If a specified period is very short, it may be worth remembering that weekends and bank holidays will not be treated differently from other days unless express provision to this effect is included.

(2) If any non-working days are to be excluded from a period, consideration needs to be given to exactly which days these should be.

(3) Schedule 1 to the Banking and Financial Dealings Act 1971 lists some bank holidays, but not all. Bank holidays may be created by royal proclamation - the early May bank holiday is an example.

CHAPTER 2

POWERS TO MAKE SUBORDINATE LEGISLATION

132 Attracting section 1 of the Statutory Instruments Act 1946

(1) Section 1(1A) of the Statutory Instruments Act 1946 states—

> "Where by any Act power to make, confirm or approve orders, rules, regulations or other subordinate legislation is conferred on the Welsh Ministers and the power is expressed to be exercisable by statutory instrument, any document by which that power is exercised shall be known as a "statutory instrument" and the provisions of this Act shall apply to it accordingly."

(2) The reference in section 1(1A) to "the Welsh Ministers" includes the First Minister and the Counsel General by virtue of section 11A (8) of the 1946 Act.

(3) To attract section 1 of the 1946 Act it is sufficient to say –

Orders/regulations [made by the Welsh Ministers] under this section are to be made by statutory instrument.

Mae gorchmynion/rheoliadau [a wneir gan Weinidogion Cymru] o dan yr adran hon i'w gwneud drwy offeryn statudol.

(4) It may sometimes be neater to roll up the attraction of section 1 with the power itself.

> EXAMPLE
>
> *The Welsh Ministers may by order made by statutory instrument provide...*
>
> *Caiff Gweinidogion Cymru drwy orchymyn a wneir drwy offeryn statudol ddarparu...*

(5) This may be neater where there is a simple power and everything can be dealt with in a single subsection. This technique is often used, for example, for commencement powers ("on such day as the Welsh Ministers may by order made by statutory instrument appoint").

(6) If there are a number of powers to be exercised by statutory instrument, it may be best to have a single provision at the end, rather than saying the same thing several times over in different places. This is technical provision which is unlikely to be of interest to most readers.

133 Negative resolution procedure

(1) To be consistent with section 5 of the 1946 Act, the statutory instrument containing the order/regulations - rather than the order/regulations themselves - should be expressed to be subject to annulment.

EXAMPLE

A statutory instrument containing an order or regulations under this Act is subject to annulment in pursuance of a resolution of the National Assembly for Wales.

Mae offeryn statudol sy'n cynnwys gorchymyn neu reoliadau o dan y Ddeddf hon yn agored i gael ei ddirymu yn unol â phenderfyniad gan Gynulliad Cenedlaethol Cymru.

134 Affirmative resolution procedure

(1) To be consistent with the recommended approach for negative instruments (above) - and with the wording of section 6 of the 1946 Act - the required approval should relate to a draft of the statutory instrument containing the order/regulations, rather than a draft of the order/regulations themselves.

EXAMPLE

A statutory instrument containing an order or regulations under this Act may not be made unless a draft of the instrument has been laid before and approved by a resolution of the National Assembly for Wales.

Ni chaniateir i offeryn statudol sy'n cynnwys gorchymyn neu reoliadau o dan y Ddeddf hon gael ei wneud oni bai bod drafft o'r offeryn wedi ei gyflwyno gerbron Cynulliad Cenedlaethol Cymru ac wedi ei gymeradwyo ganddo drwy benderfyniad.

135 Combined instruments

(1) If the intention is expressly to authorise the making of instruments containing provisions subject to negative and affirmative procedure, it may be helpful to use the

formulation suggested above for affirmative procedure with the addition of "(whether alone or with other provision)".

EXAMPLE

A statutory instrument containing provision under section X (whether alone or with other provision) may not be made unless a draft of the instrument has been laid before and approved by a resolution of the National Assembly for Wales.

Ni chaniateir i offeryn statudol yn cynnwys darpariaeth o dan adran X (p'un ai ar ei phen ei hun ynteu ynghyd â darpariaeth arall) gael ei wneud oni bai bod drafft o'r offeryn wedi ei gyflwyno gerbron Cynulliad Cenedlaethol Cymru ac wedi ei gymeradwyo ganddo drwy benderfyniad.

136 Location of procedural provision

(1) In some Acts, each provision which confers a power to make subordinate legislation applies any necessary Parliamentary or Assembly procedure.

(2) But, where an Act confers a number of powers to make subordinate legislation, these matters are more often dealt with in general provisions situated at the back of the Act.

(3) A "hybrid" approach is adopted in some UK Acts. The provision conferring the power says that it is subject to the "negative resolution procedure" or the "affirmative resolution procedure". Then, at the end of the Act, there is a definition of "negative resolution procedure" or "affirmative resolution procedure" (or both).

EXAMPLE (from the Companies Act 2006)

Regulations under this section are subject to affirmative resolution procedure. (Section 54(3))

Regulations under this section are subject to negative resolution procedure. (Section 66(5))

Where regulations or orders under this Act are subject to "negative resolution procedure" the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament. (Section 1289)

> *Where regulations or orders under this Act are subject to "affirmative resolution procedure" the regulations or order must not be made unless a draft of the statutory instrument containing them has been laid before and approved by a resolution of each House of Parliament.* (Section 1290)

(4) During the Assembly scrutiny stages of a Bill, the appropriate procedure could be debated together with the contents of a power and it may, therefore, be convenient if the two are located together. But readers of the final Act may find multiple references to the Assembly procedure intrusive. Matters of procedure are technical matters, and once the Bill is enacted are only likely to be of interest to those making the subordinate legislation and those in the Assembly administering the procedures.

(5) On that basis, it may be best on the whole to deal with Assembly procedure at the back of the Bill. There may of course cases where it is appropriate to depart from this recommendation (for example, if the Bill contains only a small number of powers to make subordinate legislation).

PART 9

FINAL PROVISIONS IN A BILL

137 Running order

(1) The following running order should be used as a starting point when it comes to deciding the running order for the final provisions of a Bill—

General provisions about offences (bodies corporate, unincorporated associations)

Orders and regulations (including Assembly procedure)

Directions

Notices/service of documents

Interpretation

Index

Amendments, transitional provisions and savings, repeals

Crown application

Commencement

Short title

(2) Of course it may be necessary to depart from this in some circumstances.

(3) The assumptions that underlie the recommended running order are—

(a) matters of substance, such as offences by bodies corporate, should come before procedural matters;

(b) there is an affinity between provisions relating to subordinate legislation and those relating to other documents;

(c) similarly there is an affinity between provisions relating to the application of provisions of the Bill and those relating to extent;

(d) the essentially procedural nature of provisions dealing with financial matters means that they can appear relatively low in the running order;

(e) commencement should be dealt with as late as possible in the Bill and so should normally be dealt with immediately before the short title section;

(f) there is an expectation that the short title will appear in the last section.

(4) Where there is to be a single section introducing Schedules containing minor and consequential amendments, transitional provisions and savings, and repeals, the section should deal with those topics in that order.

(5) Although the running order above deals with extent, commencement and short title separately, a Bill may be so short that it would be better to deal with all three topics in a single section.

138 Cross-heading

If a single cross-heading is used to cover all the final provisions of a general nature, it should be "General" (rather than, for example, "Supplementary").

139 Extent and application

(1) Extent provisions in Acts of Parliament tell the reader to which jurisdiction of the UK a particular provision applies.

(2) Wales forms part of the unified jurisdiction of England and Wales. The provisions of an Assembly Act may only extend to the jurisdiction of England and Wales (although provisions will usually apply only in relation to Wales). As a result there is no need to include an extent provision in an Assembly Act telling the reader that it forms part of the law applicable to the England and Wales court system.

(3) However, the territorial application of provisions should be made clear in the Act.

Commencement

140 Commencement on Royal Assent

(1) The provisions that are to come into force on Royal Assent should be identified expressly.

(2) The form of words used to bring such provisions into force should normally be designed to attract section 4(a) of the Interpretation Act 1978.

EXAMPLE

Sections X and Y come into force on the day on which this Act receives Royal Assent.

Daw adrannau X ac Y i rym ar y diwrnod y caiff y Ddeddf hon ei Chydsyniad Brenhinol.

(3) Very exceptionally the desired policy may involve specifying a particular time of day at which immediate commencement is to occur.

141 Commencement at end of fixed period

The recommended standard form of words is—

[This Act] comes into force at the end of the period of [2 months] beginning with the day on which it receives Royal Assent.

Daw[‘r Ddeddf hon] i rym ar ddiwedd y cyfnod o [2 fis] sy’n dechrau ar y diwrnod y caiff ei Chydsyniad Brenhinol

142 Commencement by order

(1) In general it is clearer to say that provision is to come into force on a day appointed by order by a particular person, than to say that it comes into force “in accordance with” (“yn unol â”) provision made by order. In the latter case it may not be clear whether any further power — for example, a power to make transitional provision — is also being conferred. (If further power is wanted, it should be conferred expressly — see below).

(2) An “appointed day” (“diwrnod penodedig”) provision should take the form of a positive statement along the lines that provisions “are to come into force on a day appointed by X in an order” / “ i ddod i rym ar ddiwrnod y caiff X ei benodi drwy orchymyn” (rather than that they do not come into force until such day as X may by order appoint).

143 Commencement by order: supplementary provisions

(1) Where there is a power to commence, consideration should be given to dealing with everything relating to commencement in a separate set of provisions, rather than in a general section relating to other order-making powers under the Bill. It may not be clear how powers conferred generally in relation to orders under the Bill will work in relation to the specific case of commencement.

(2) So, for example, the separate provision would expressly provide as necessary for—

(a) different days to be appointed for different purposes;

(b) the making of transitional, transitory or saving provision in relation to

(c) commencement;

(d) the making of supplemental, incidental or consequential provision in relation to commencement.

(3) The power to commence would then need to be excluded from any general supplementary provision along these lines attaching to order-making powers under the Bill.

(4) Note that the last two bullets of paragraph (2) refer to “commencement” (“cychwyn”). It may be necessary to make transitional provision in connection with the commencement of provisions on a date fixed by the Bill (e.g. 2 months after Royal Assent) as well as in connection with the commencement of provision by order. In such a case there would seem to be a strong argument for having a single express

power to make transitional provision in connection with commencement, whether by order or on a fixed date.

(5) Note also—

(a) a "transitional" provision ("darpariaeth drosiannol") is a provision that manages the transition from one regime to another.

EXAMPLE

A provision that spells out how the Bill works in relation to events or matters that

span the end of the old regime and the start of the new regime.

(b) a "transitory" provision ("darpariaeth ddarfodol") is a provision that has a limited shelf-life such as a provision that will expire on a particular day.

EXAMPLE

A provision that references in the Dogs Act 1990 to dogs include cats until the

coming into force of the Cats Act 2010.

Depending upon the circumstances, a transitory provision may also be a

transitional provision but need not be so.

(c) a "saving" provision ("darpariaeth arbed") is a provision that saves the operation of an existing piece of legislation or rule of law. It can do this for a temporary period or for ever, and for transitional purposes or for other purposes. It might therefore be a transitional or transitory provision but need not be so.

(d) there is no obvious difference in meaning between "supplementary" ("atodol") and "supplemental" ("atodol"). The recommendation is that "supplementary" be preferred (as perhaps the more usual formulation).

144 Short title

For consistency, the following formulation is to be used—

"The short title of this Act is…"

"Enw byr y Ddeddf hon yw…"

ANNEX

FURTHER READING

Listed here are the works referred to in this Guidance together with a small selection of other useful material.

Published material

Asprey M., Plain Language for Lawyers (Federation Press, Sydney, 4th ed., 2010)

Butt P. & Castle R., Modern Legal Drafting - A Guide to Using Clearer Language (Cambridge

University Press, 2nd ed., 2006)

Dickerson F. Reed, Fundamentals of Legal Drafting (Aspen Publishers, 1965)

Equal Opportunities Commission, Advertising Jobs in Welsh (Equal Opportunities Commission, 2001)

Greenberg D., Craies on Legislation (Sweet and Maxwell, London, 9th ed., 2008)

McLeod I., Principles of Legislative and Regulatory Drafting (Hart, Oxford and

Portland Oregon, 2009)

Prys D., "Gender and Sex in Welsh Nouns", *Planet* 121.

Thornton G.C., Legislative Drafting (Butterworths, London, 4th revised ed 2006)

Salembier P., Legal and Legislative Drafting (Lexis Nexis Canada 2009)

Material from other drafting offices etc

Australia

Office of Parliamentary Counsel, Australian Government, Plain English Manual,

available at www.opc.gov.au/plain/docs.htm

Law Reform Commission of Victoria, Plain English and the Law, 1987, Appendix 1 —

"Guidelines for Drafting in Plain English: A Manual for Legislative Drafters"

Canada

Department of Justice, Legistics, available at

www.justice.gc.ca/eng/dept-min/pub/legis/index.html

European Union

See the guidance prepared by the Legal Revisers of the Commission Legal Service:

http://ec.europa.eu/dgs/legal_service/legal_reviser_en.htm

New Zealand

Parliamentary Counsel Office, NZ

http://www.pco.parliament.govt.nz/clear-drafting

United Kingdom

Tax Law Rewrite: The Way Forward: Annex 1 - Guidelines for the Rewrite

www.hmrc.gov.uk/rewrite/wayforward/menu.htm

Plain Language and Legislation (Office of the Scottish Parliamentary Counsel)

www.scotland.gov.uk/Publications/2006/02/17093804/0

Drafting Guidance of the Office of the Parliamentary Counsel (UK Government)

http://www.cabinetoffice.gov.uk/resource-library/drafting-guidance-office-parliamentary-counsel

Commonwealth Association of Legislative Counsel

See the Association Journal, *the Loophole*, and separate discussion papers on the Association's website:

http://www.opc.gov.au/calc/index.htm

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

Document is Restricted

Agenda Item 4

Constitutional and Legislative Affairs Committee
Statutory Instruments with Clear Reports
9 March 2015

CLA494 - The Firefighters' Pension Scheme (Wales) (Consequential Provisions) Regulations 2015

Procedure: Affirmative

The Firefighters' Pension Scheme (Wales) (Consequential Provisions) Regulations 2015 make consequential provision in relation to the new public service pension scheme for firefighters under the Public Service Pensions Act 2013 and Firefighters' Pension Scheme (Wales) Regulations 2015.

Constitutional and Legislative Affairs Committee Draft Report CLA4)-07-15

CLA493 - The Environmental Permitting (England and Wales) Regulations 2015

These Regulations transpose Article 14(5)-(9) of Directive 2012/27/EU on energy efficiency, which aims to promote efficiency in heating and cooling. Articles 14(5) –(9) specify that when certain large, new, industrial installations are planned or existing such installations are substantially refurbished, a Cost-Benefit Assessment ("CBA") must be undertaken examining the viability of operation in co-generation (Combined Heat and Power – "CHP") mode. Where the CBA finds that co-generation is viable, the installation must operate in that mode.

Procedure: Affirmative

Technical Scrutiny

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

1. These Regulations have not been made bilingually. Paragraph 4 of the Explanatory Memorandum states that it was not possible for the Regulations to be made bilingually as they are composite regulations applying to England and Wales. The Regulations are subject to approval by the National Assembly for Wales and the UK Parliament and therefore the Welsh Government says that it has not been possible to make them bilingually. It was decided to make these Regulations on a composite basis because of the existing England and Wales environmental permitting regime. It is notable that Scotland and Northern Ireland have drafted their regulations separately. [Standing Order 21.2(ix) – not made bilingually]

2. Unusually, these Regulations have been laid with a number of known errors in the regulations. Several errors were discovered in the draft statutory instrument as laid before Parliament on 17 December 2014. [Standing Order 21.2(vi) – defective drafting].

3. Paragraph 10 of the Explanatory Memorandum summarises the known errors. Taking into account the relatively short length of these

Regulations the number of errors are significant. Paragraph 10 of the Explanatory Memorandum states as follows:

"10. The errors that it is proposed will be corrected prior to the making of the statutory instrument are as follows:

a) In regulation 5(3), in the new sub-paragraph (1A) to be inserted in paragraph 1 of Schedule 8 to the principal Regulations (as defined in regulation 1(3) of the draft regulations), the reference to "paragraph 2 of Section 1.1" should be a reference to "paragraph 1A of Section 1.1". This is clearly an error as there is no paragraph 2 of Section 1.1 of Part 2 of Schedule 1 to the principal Regulations. This paragraph should refer to the new paragraph 1A as inserted by regulation 4(2), as referenced by regulation 5(2) of the draft regulations.

b) In regulation 6, which inserts the new Schedule 8A:

i. The title to regulation 6 reads "Energy Efficiency Directive", and the title to the new Schedule 8A reads "Energy Efficiency Directive: promotion of efficiency in heat and cooling". They are clearly in error as they do not accord with the title given to Schedule 8A in the operative provision inserted (by regulation 3 of these regulations) into regulation 35 of the principal regulations. It is proposed to correct these provisions so that Schedule 8A is consistently titled.

ii. in paragraph 1(1), in paragraph (b) of the definition of "installation", reference to "small waste incineration operation" should refer to "small waste incineration plant". This is clearly an error as the defined term in the principal Regulations is "small waste incineration plant" – see regulation 2(1) of the principal Regulations.

iii. in paragraph 1(2) (c) in the reference to the interpretation of installation, the words "within the meaning of Part 1 of Schedule 1" should be removed. This is clearly an error as in the previous paragraph 1(1), there is a definition of "installation" which is not the same as the definition of "installation" within the meaning of Part 1 of Schedule 1 to the principal Regulations due to the inclusion in the former of all small waste incineration plants (the latter includes only small waste incineration plants that are also Part B activities in Section 5.1 of Part 2 of Schedule 1 to the principal Regulations). Paragraph 1(2) (d) also requires this wider definition of "installation".

iv. In the title to the table in paragraph 11, the reference to "Radios" should read "Radius". This is clearly a typographical error."

4. The Joint Committee on Statutory Instruments raised further points and requested clarification from the Department for Environment, Food and Rural Affairs. These have since been resolved.

Merits Scrutiny

The following points are identified for reporting under Standing Order 21.3 in respect of this instrument.

5. These Regulations transpose Articles 14(5)-(9) of Directive 2012/27/EU on energy efficiency. The deadline for making these Regulations was 5 June 2014. These Regulations are over 9 months late and the Welsh Government is at risk of EU infraction proceedings. Paragraph 6 of the Explanatory Memorandum states that "delays to finalising the regulations following consultation have resulted in this deadline being missed." [Standing Order 21.3(iv) – inappropriately implements European Union legislation]

6. Despite the defects noted in paragraphs 2 and 3 above, and in paragraphs 9 and 10 of the Explanatory Memorandum, it was decided not to withdraw and re-lay these regulations due to the lack of Parliamentary time left before prorogation. Bearing in mind that these Regulations are being made significantly after the transposition deadline of June 2014 a further delay would not have been helpful. Additionally, because they are composite Regulations, the Welsh Government is unable to lay amended regulations with corrections because the same version must be laid for debate in the Assembly as laid in Parliament. Both the Welsh and UK Governments intend to make corrections after the respective debates. We find this to be wholly unsatisfactory as it is proposed to make Regulations that differ significantly from those approved. The Regulations should be made as approved. We accept that despite the defects, that would be preferable to further delay in implementing the EU law obligations. [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.]

Legal Advisers
Constitutional and Legislative Affairs Committee
March 2015

Draft Regulations laid before Parliament and the National Assembly for Wales under section 2(8) and (9)(d) of the Pollution Prevention and Control Act 1999, for approval by resolution of each House of Parliament and of the Assembly.

D R A F T   S T A T U T O R Y   I N S T R U M E N T S

2015 No.0000

ENVIRONMENTAL PROTECTION, ENGLAND AND WALES

The Environmental Permitting (England and Wales) (Amendment) Regulations 2015

Made - - - - ***

Coming into force in accordance with regulation 1(2)

The Secretary of State, in relation to England, and the Welsh Ministers, in relation to Wales, have in accordance with section 2(4) of the Pollution Prevention and Control Act 1999(**a**) consulted—

(a) the Environment Agency;

(b) the Natural Resources Body for Wales;

(c) such bodies or persons appearing to them to be representative of the interests of local government, industry, agriculture and small businesses as they consider appropriate; and

(d) such other bodies or persons as they consider appropriate.

A draft of this instrument has been approved by a resolution of each House of Parliament and by the National Assembly for Wales pursuant to section 2(8) and (9)(d) of that Act.

The Secretary of State in relation to England, and the Welsh Ministers in relation to Wales, make the following Regulations in exercise of section 2, and Schedule 1 to, that Act.

(**a**) 1999 c.24. There are amendments to Schedule 1, but none is relevant to these Regulations. Functions of the Secretary of State under or in relation to section 2, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales, by article 3 (subject to exceptions contained within that article that are not relevant to these Regulations) of the National Assembly for Wales (Transfer of Functions) Order 2005 (S.I. 2005/1958). Those functions were subsequently transferred to the Welsh Ministers by section 162 of, and paragraph 30 of Schedule 11 to, the Government of Wales Act 2006 (c.32). Section 2(4) was amended by the Natural Resources Body for Wales (Functions) Order 2013 (2013/755 W. 90), Schedule 2, Part 1, paragraphs 394, 395(1) and (3).

PART 1

General

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Environmental Permitting (England and Wales) (Amendment) Regulations 2015.

(2) These Regulations come into force on the day after the day on which they are made.

(3) In these Regulations, "the principal Regulations" means the Environmental Permitting (England and Wales) Regulations 2010(**a**)

PART 2

Amendment of the principal Regulations

Amendment of regulation 3 (interpretation: directives)

2. In regulation 3 of the principal Regulations, after the definition of "the End-of-Life Vehicles Directive", insert—

> ""the Energy Efficiency Directive" means Directive 2012/27/EU of the European Parliament and of the Council on energy efficiency(**b**);".

Amendment of regulation 35 (specific provisions applying to environmental permits)

3. In regulation 35(2) of the principal Regulations, after sub-paragraph (b) insert—

> "(ba) Schedule 8A (efficiency in heating and cooling energy: energy efficiency directive)".

Amendment of Part 2 of Schedule 1 (activities)

4.—(1) Part 2 of Schedule 1 to the principal Regulations is amended as follows.

(2) In Section 1.1 (combustion activities), after paragraph 1 of "interpretation and application of Part B" insert—

> "**1A.** For the purpose of Part B(a) of this section, where 2 or more appliances with an aggregate net rated thermal input exceeding 20 megawatts are operated on the same site by the same operator, those appliances must be treated as a single appliance with a net rated thermal input exceeding 20 megawatts".

Amendment of Schedule 8 (Part B installations and Part B mobile plant)

5.—(1) Schedule 8 to the principal Regulations is amended as follows.

(2) In paragraph 1(1), at the beginning insert "Subject to sub-paragraph (1A),".

(3) After paragraph 1(1) insert—

> "**1A.** Where installations are Part B installations solely because of the aggregation of the rated thermal input of 2 or more appliances in accordance with paragraph 2 of Section 1.1 of Part 2 of Schedule 1, only paragraph 4(1)(a) of this Schedule applies to those installations (in addition to the provisions in Schedule 8A)".

(**a**) S.I. 2010/675; relevant amendments were made by S.I. 2013/390, 2013/755 (W.90)
(**b**) OJ No L 315, 14.11.2010, p1

Insertion of Schedule 8A (Energy Efficiency Directive)

6. After Schedule 8 insert—

"SCHEDULE 8A

Regulation 35(2)(ba)

Energy Efficiency Directive: promotion of efficiency in heating and cooling

Interpretation

1.—(1) In this Schedule—

"cogeneration" means the simultaneous generation in one process of thermal energy and electrical or mechanical energy;

"connection distance" means—

(a) in the case of a hot water link, the thermal capacity in kilowatts of the source or demand, whichever is smaller, multiplied by 0.0038, or

(b) in the case of a steam heat link, the thermal capacity in kilowatts of the source or demand, whichever is smaller, multiplied by 0.0012,

expressed in kilometres;

"cost-benefit analysis" means a cost-benefit analysis in accordance with Part 2 of Annex IX of the Energy Efficiency Directive;

"economically justified demand" means demand that does not exceed the needs for heating or cooling and which would otherwise be satisfied at market conditions by energy generation processes other than cogeneration;

"high-efficiency cogeneration" means cogeneration meeting the criteria laid down in Annex II of the Energy Efficiency Directive;

"installation" means—

(a) a stationary technical unit where one or more activities listed in Part 2 of Schedule 1 are carried on; or

(b) a small waste incineration operation;

"relevant installation" means an installation carrying on—

(a) an activity described in Part A(1) of Section 1.1 of Part 2 of Schedule 1;

(b) an activity described in Part A(1) of Section 5.1 of Part 2 of Schedule 1;

(c) an activity described in paragraph (a) of Part B of Section 1.1 of Part 2 of Schedule 1; or

(d) a small waste incineration plant operation;

"substantially refurbished" means, subject to sub-paragraph (2)(e), a refurbishment the cost of which exceeds 50 % of the investment cost for a new comparable energy plant.

(2) For the purposes of this Schedule—

(a) the interpretation of "offshore platform" in paragraph 3 of Part A(1) of Section 1.1 of Part 2 of Schedule 1 shall also include any structure where the principal purpose of the use of the structure is the establishment of the existence of petroleum or the appraisal of its characteristics, quality or quantity or the extent of any reservoir in which it occurs;

(b) the interpretation of "petroleum" in paragraph 4 of Part A(1) of Section 1.1 of Part 2 of Schedule 1 shall also include coal or bituminous shales or other stratified deposits from which oil can be extracted by destructive distillation;

(c) a reference to an installation means an installation within the meaning of Part 1 of Schedule 1 which has a net rated thermal input exceeding 20 megawatts;

(d) where 2 or more small waste incineration plants falling within Schedule 13A with an aggregate net thermal input exceeding 20 megawatts are operated on the same site by the same operator, those small waste incineration plants must be treated as a single installation with a rated thermal input exceeding 20 megawatts; and

(e) refurbishment does not include the fitting of equipment to carry out the activity described in Part A(1) of Section 6.10 of Part 2 of Schedule 1.

Electricity generating installations

2. An application for the grant of an environmental permit under regulation 13(1) for a relevant installation which generates electricity must contain a cost-benefit analysis which assesses the cost and benefits of providing for the operation of the installation as a high-efficiency cogeneration installation.

3. The regulator must exercise its relevant functions to ensure that an application for a variation of an environmental permit under regulation 20(1) is made before the energy plant of a relevant installation which generates electricity is substantially refurbished.

4. The regulator must ensure that an application for a variation of an environmental permit required by paragraph 3 contains (in addition to the information required by paragraph 2(1)(b) of Schedule 5) a cost-benefit analysis which assesses the cost and benefits of converting the relevant installation to high-efficiency cogeneration.

5. The requirement for a cost benefit analysis in paragraph 2 or paragraph 4 do not apply to peak load and back-up electricity generating relevant installations for which the application for the grant or a variation of an environmental permit states that operation under 1,500 operating hours per year as a rolling average over a period of five years is planned.

6. In the case of a relevant installation to which paragraph 5 applies, the regulator must ensure that, if an environmental permit is granted or varied, it includes conditions ensuring that the operating hours for the installation remain within that constraint.

Installations generating waste heat

7. An application for the grant of an environmental permit under regulation 13(1) for an installation generating waste heat at a useful temperature level, other than a relevant installation falling within paragraph 2, must contain a cost-benefit analysis.

8. The regulator must exercise its relevant functions to ensure that an application for a variation of an environmental permit under regulation 20(1) is made before the energy plant of an installation generating waste heat at a useful temperature level, other than a relevant installation falling within paragraph 3, is substantially refurbished.

9. The regulator must ensure that an application for a variation of an environmental permit under paragraph 8 contains (in addition to the information required by paragraph 2(1)(b) of Schedule 5) a cost-benefit analysis.

10. The cost-benefit analysis required by paragraphs 7 and 9 must include an assessment of the cost and benefits of—

(a) utilising the waste heat to satisfy economically justified demand, including through cogeneration; and

(b) the connection of that installation to a district heating and cooling network.

11. Paragraphs 7 to 10 do not apply to an installation, except an installation which forms part of a district cooling network, with any of the following—

(a) available waste heat of 100 kilowatts or less;

(b) available waste heat—

(i) greater than 100 kilowatts as hot water or steam, where there is no hot water heat demand greater than 100 kilowatts within the search radius from the installation as set out in the table below and located within the connection distance from the centre of the installation; or

(ii) greater than 500 kilowatts as steam where there is no steam-based heat demand greater than 500 kilowatts and no hot water heat demand greater than 100 kilowatts within the search radius from the centre of the source installation as set out in the table below and located within the connection distance from the centre of the source installation;

(c) a heat demand of—

(i) 100 kilowatts or less for a hot water heat demand; or

(ii) 500 kilowatts or less for a steam-based heat demand;

(d) a hot water heat demand greater than 100 kilowatts, with no source of available waste heat greater than 100 kilowatts within the search radius from the centre of the demand installation as set out in the table below, located within the connection distance from the centre of the demand installation;

(e) a steam-based heat demand greater than 500 kilowatts, with no source of steam-based waste heat greater than 500 kilowatts within the search radius from the centre of the installation as set out in the table below, located within the connection distance from the centre of the demand installation.

Search Radios

Installation type	*Thermal capacity of heat source/demand*	*Search radius (kilometres), measured from the centre of the installation*
Hot water demand	>100 kilowatts and <3.9 megawatts	0.0038 x H, where H = thermal capacity in kilowatts
	≥3.9 megawatts	15
Steam demand	>500 kilowatts and <12.5 megawatts	0.0012 x H, where H = thermal capacity in kilowatts
	≥12.5 megawatts	15
Waste heat source (hot water or steam)	>100 kilowatts and <3.9 megawatts	0.0038 x H, where H = thermal capacity in kilowatts
	≥3.9 megawatts	15

Heating and cooling networks

12. An application for the grant of an environmental permit under regulation 13(1) for a relevant installation which forms part of a new district heating and cooling network or existing district heating or cooling network, must contain a cost-benefit analysis.

13. The regulator must exercise its relevant functions to ensure that an application for a variation of an environmental permit under regulation 20(1) is made before the energy plant of a relevant installation which forms part of a district heating and cooling network is substantially refurbished.

14. An application for the variation of an environmental permit required by paragraph 13 must contain (in addition to the information required by paragraph 2(1)(b) of Schedule 5) a cost-benefit analysis.

15. The cost-benefit analysis required by paragraphs 12 and 14 must include an assessment of the cost and benefits of utilising the waste heat from nearby installations.

Determination of applications

16. When considering an application for an environmental permit, or for a variation of an environmental permit, in accordance with this Schedule, the regulator must take into account—

(a) the outcome of the cost-benefit analysis carried out in accordance with this Schedule; and

(b) after 31st December 2015 the outcome of any comprehensive assessment carried out in accordance with Article 14(1) of the Energy Efficiency Directive.

17. Subject to paragraph 19, where a cost-benefit analysis carried out in accordance with paragraphs 2, 4 and 10 shows that benefits exceed costs, the regulator must ensure that any environmental permit that is granted or varied includes appropriate conditions that will ensure the operation of the installation in a manner shown by that analysis to be cost beneficial.

18. Subject to paragraph 19, where a cost-benefit analysis carried out in accordance with paragraph 15 shows that benefits exceed costs, the regulator must ensure that any environmental permit that is granted or varied contains appropriate conditions that will ensure the operation of the installation, in conjunction with the utilisation of the waste heat from nearby installations, in a manner shown by that analysis to be cost beneficial.

19. Where the cost-benefit analysis carried out in accordance with paragraphs 2,4,10 or 15 shows that benefits exceed costs, the requirement to impose appropriate conditions in accordance with paragraphs 17 and 18 do not apply if, in individual cases, the regulator decides that there are imperative reasons of law, ownership or finance for them not to apply.

20. The regulator must within two months of its decision under paragraph 19 submit a reasoned notification of that decision to the appropriate authority.

21. This Schedule does not apply to—

(a) installations that need to be located close to a geological storage site approved under Directive 2009/31/EC on the geological storage of carbon dioxide(**a**);

(b) any relevant installation within a nuclear site, within the meaning given in paragraph 1 of Part 2 of Schedule 23, and which is dedicated to the production of nuclear power;

(c) mobile plant.

22. Nothing in this Schedule affects the application of the Industrial Emissions Directive to installations".

PART 3

Transitional provisions

Interpretation of Part 3

7. In this Part—

(a) references to any provision of the principal Regulations are references to those provisions as amended by these Regulations;

(b) "Part B installation" has the meaning given in Part 1 of Schedule 1 to the principal Regulations;

(**a**) OJ No L 140, 5.6.2009, p. 114

(c) "regulated facility" has the meaning given in regulation 2 of the principal Regulations;

(d) "substantially refurbished" has the meaning given in paragraph 1(1) of Schedule 8A to the principal Regulations (as inserted by regulation 6).

Aggregation of rated thermal input – existing installations

8.—(1) This regulation applies to a Part B installation that is a regulated facility solely as a result of the aggregation of the net rated thermal input of 2 or more appliances in accordance with paragraph 1A of Section 1.1 of Part 2 of Schedule 1 (interpretation and application of Part B) to the principal Regulations.

(2) A Part B installation that was in operation immediately prior to the coming into force of these Regulations is taken to be an exempt facility for the purposes of regulation 8(2) of the principal Regulations.

(3) Paragraph (2) ceases to apply to a Part B installation (so that it is no longer taken to be an exempt facility) if, after the coming into force of these Regulations, the energy plant of the Part B installation is substantially refurbished.

Existing applications for the grant or variation of an environmental permit

9.—(1) Schedule 8A to the principal Regulations (as inserted by regulation 6) does not apply to an existing application.

(2) In this regulation, "existing application" mean a duly made application received by the regulator prior to the coming into force of these Regulations—

(a) for the grant of an environmental permit pursuant to regulation 13 of the principal Regulations; or

(b) for the variation of an environmental permit pursuant to regulation 20(1) of the principal Regulations.

Name
Parliamentary Under Secretary of State
Date — Department for Environment, Food and Rural Affairs

Name
Minister for Natural Resources
Date — One of the Welsh Ministers

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Environmental Permitting (England and Wales) Regulations 2010 (S.I. 2010/675) ("the principal Regulations"), to transpose Article 14(5) to (9) of Directive 2012/27/EU on energy efficiency (OJ No L 315, 14.11.2012, p 1). Article 14(5) to (9) of the Directive require Member States to ensure that a cost-benefit analysis is carried out to assess the installation of cogeneration or the utilisation of waste heat from energy producing installations, with the aim to increase energy efficiency.

Regulation 4 amends Part 2 of Schedule 1 to the principal Regulations to provide for the aggregation of the net rated thermal input of appliances operated by the same operator on the same site. Where the aggregated net rated thermal input exceeds 20 megawatts, this means they are brought within the scope of the definition of ‘Part B installations’ for the purposes of applying the cost-benefit analysis requirements introduced by the new Schedule 8A.

Regulation 6 inserts new Schedule 8A, which provides for a cost benefit analysis to be included in applications for environmental permits and for the variation of environmental permits for specified installations.

The cost-benefit analysis must assess the cost and benefits of installations producing electricity, operating as cogeneration installations. In the case of other installations, the cost-benefit analysis must assess the cost and benefits of utilising waste heat for the purposes of district and cooling networks.

Regulations 8 and 9 contain transitional provisions. Regulation 8 provides that a Part B installation that is a regulated facility under the principal Regulations due to the application of the aggregation provisions in Regulation 4, and is in operation before the coming into force of these regulations, is to be deemed an exempt facility until it is substantially refurbished.

Regulation 9 provides that Schedule 8A does not apply to applications for an environmental permit or for a variation of an environmental permit received by the regulator prior to the coming into force of these regulations.

A full Impact Assessment of the effect that this instrument will have on the costs of business, the voluntary sector and the public sector is available from the Better Regulation Programme, Department for Environment, Food and Rural Affairs, 17 Smith Square, London SW1P 3JR and is published with the Explanatory Memorandum alongside the instrument on www.legislation.gov.uk.

Explanatory Memorandum to The Environmental Permitting (England and Wales) (Amendment) Regulations 2015

This Explanatory Memorandum has been prepared by The Department for Natural Resources 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 Environmental Permitting (England and Wales) (Amendment) Regulations 2015. I am satisfied that the benefits outweigh any costs.

Carl Sargeant AM

Minister for Natural Resources

23 February 2015

Description

1. The Environmental Permitting (England and Wales) (Amendment) Regulations 2015 transpose Article 14(5)-(9) of Directive 2012/27/EU on energy efficiency ("the Energy Efficiency Directive" – "the EED"), which aims to promote efficiency in heating and cooling. Article 14(5)-(9) specifies that when certain large, new industrial installations are planned or existing such installations are substantially refurbished, a Cost-Benefit Assessment ("CBA") must be undertaken examining the viability of operation in co-generation (Combined Heat and Power – "CHP") mode. Where the CBA finds that co-generation is viable, the installation must operate in that mode.

Matters of special interest to the Constitutional and Legislative Affairs Committee

Use of a 'composite' statutory instrument

2. The purpose of Article 14(5)-(9) is to facilitate the recovery and use of waste heat from electricity power installations and other industrial installations which could otherwise cause pollution. Nearly all of the installations subject to Article 14(5) are already subject to the environmental permitting regime, which provides for an established process for regulating industrial installations across England and Wales. In light of this, and the commonality between the Article 14(5)-(9) provisions and the existing arrangements for considering energy efficiency under the environmental permitting regime, the UK and Welsh Governments are transposing these requirements through an amendment to that existing regime. Use of this existing system allows implementation of the requirements of Article 14(5)-(9) in a manner which limits the additional burdens on operators and regulators.

3. The environmental permitting regime is established by the Environmental Permitting (England and Wales) Regulations 2010 (S.I. 2010/675) ("the 2010 Regulations"), which are composite regulations. This statutory instrument transposes Article 14(5)-(9) by making amendments to the 2010 Regulations. The 2010 Regulations, their predecessors (the Environmental Permitting (England and Wales) Regulations 2007 (S.I. 2007/3538) – ("the 2007 Regulations"), which are the origin of the single regulatory permitting framework that we have today, and subsequent amendments have almost all been made on a composite basis. This composite approach remains appropriate for these Environmental Permitting (England and Wales) (Amendment) Regulations 2015 to ensure a consistent and expedient transposition of Article 14(5)-(9) across England and Wales.

4. This composite statutory instrument applies to England and Wales and is subject to approval by the National Assembly for Wales and by the UK Parliament. Accordingly, it is not possible for this Instrument to be laid or made bilingually.

Consultation

5. In accordance with section 2(4)[1] of the Act, the Welsh Ministers have consulted, amongst others, Natural Resources Wales (NRW).

Late transposition of an EU obligation

6. The deadline for all Member States to have legislation in place for transposing the Energy Efficiency Directive was 5 June 2014. Delays to finalising the regulations following consultation have resulted in this deadline being missed.

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[1] as amended by article 4 of, and paragraphs 394 and 395 of Schedule 2 to, the Natural Resources Body for Wales (Functions) Order 2013 (S.I. 2013/755 (W.90).

Confirmation of making of the Pollution Prevention and Control (Designation of Directives) (England and Wales) Order 2015

5. These regulations are made pursuant to section 2 of, and Schedule 1 to, the Pollution Prevention and Control Act 1999 (c.24). Several paragraphs of Schedule 1 are engaged, including paragraph 20(1)(b). That paragraph may only be used in relation to a "relevant directive". An order designating the Energy Efficiency Directive as a "relevant directive" under paragraph 20(2)(c) of Schedule 1 to the 1999 Act will be made and will come into force before the draft Regulations are made. This order will revoke and replace the current Pollution Prevention and Control (Designation of Directives (England and Wales) Order 2013 (SI 2013/123).

Parliamentary Procedure

6. The draft instrument was laid before Parliament on 17 December 2014.

7. The Joint Committee on Statutory Instruments ("JCSI") considered this instrument at its meeting on 28 January 2015. In its Twentieth Report of the 2014/2015 session dated 30 January 2015, the Committee reported the draft instrument for elucidation. Department for Environment Food and Rural Affairs provided the required elucidation in a memorandum dated 16 January 2015; that memorandum is at appendix 4 to that report.

8. The draft instrument was debated, and was approved, by the Grand Committee of the House of Lords on 4 February 2015.

Known errors in the draft instrument as laid

9. A number of errors were discovered in the draft statutory instrument as laid before Parliament on 17 December 2014. A decision was made not to withdraw and re-lay the draft regulations. It was considered that there was a significant risk that, if the regulations were withdrawn and re-laid, the opportunity for debate to take place in both Houses of Parliament before prorogation would be lost, causing further delay to the transposition of Article 14(5)-(9) of the Energy Efficiency Directive. Instead, it is proposed that the errors will be corrected in the version of the instrument that is made.

10. The errors that it is proposed will be corrected prior to the making of the statutory instrument are as follows:

   a) In regulation 5(3), in the new sub-paragraph (1A) to be inserted in paragraph 1 of Schedule 8 to the principal Regulations (as defined in regulation 1(3) of the draft regulations), the reference to "paragraph 2 of Section 1.1" should be a reference to "paragraph 1A of Section 1.1". This is clearly an error as there is no paragraph 2 of Section 1.1 of Part 2 of Schedule 1 to the principal Regulations. This paragraph should refer to the new paragraph 1A as inserted by regulation 4(2), as referenced by regulation 5(2) of the draft regulations.

   b) In regulation 6, which inserts the new Schedule 8A:

      i. The title to regulation 6 reads "Energy Efficiency Directive", and the title to the new Schedule 8A reads "Energy Efficiency Directive: promotion of efficiency in heat and cooling". They are clearly in error as they do not accord with the title given to Schedule 8A in the operative provision inserted (by regulation 3 of these regulations) into regulation 35 of the principal regulations. It is proposed to correct these provisions so that Schedule 8A is consistently titled.

ii. in paragraph 1(1), in paragraph (b) of the definition of “installation”, reference to “small waste incineration operation” should refer to “small waste incineration plant”. This is clearly an error as the defined term in the principal Regulations is “small waste incineration plant” – see regulation 2(1) of the principal Regulations.

iii. in paragraph 1(2)(c) in the reference to the interpretation of installation, the words “within the meaning of Part 1 of Schedule 1” should be removed. This is clearly an error as in the previous paragraph 1(1), there is a definition of “installation” which is not the same as the definition of “installation” within the meaning of Part 1 of Schedule 1 to the principal Regulations due to the inclusion in the former of all small waste incineration plants (the latter includes only small waste incineration plants that are also Part B activities in Section 5.1 of Part 2 of Schedule 1 to the principal Regulations). Paragraph 1(2)(d) also requires this wider definition of “installation”.

iv. In the title to the table in paragraph 11, the reference to “Radios” should read “Radius”. This is clearly a typographical error.

Legislative background

11. This legislation transposes the requirements of Article 14(5)-(9) of Council Directive 2012/27/EU on energy efficiency and amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC (“the Energy Efficiency Directive”).

12. Prior to the coming into force of the 2010 Regulations on 6 April 2010, the environmental permitting regime was set out in the 2007 Regulations (S.I. 2007/3538). The 2007 Regulations created a single regulatory framework in England and Wales for waste management licensing and pollution, prevention and control activities. They transposed the provisions of 11 EU Directives which impose obligations required to be delivered through permits or capable of being delivered through permits. The 2007 Regulations were amended in 2009 to transpose the permitting and compliance requirements of the Mining Waste Directive (Directive 2006/21/EC) and the Batteries Directives (Directive 2006/66/EC) and to revise the provisions relating to exempt waste operations. The amending instruments were S.I. 2009/890, 2009/1799 and 2009/3381.

13. On 6 April 2010 the 2007 Regulations were revoked, subject to some savings and exceptions, and were re-made as the 2010 Regulations with the addition of permitting regimes covering water discharge consenting, groundwater authorisations and radioactive substances regulation. The Environmental Permitting (England and Wales) (Amendment) Regulations 2015 will amend the 2010 Regulations.

14. The power to make the Environmental Permitting (England and Wales) Regulations 2010 and subsequent amendments is contained in section 2 of the Pollution Prevention and Control Act 1999 (“the 1999 Act”). That power was, in relation to Wales, transferred to the National Assembly for Wales, except in relation to offshore oil and gas exploration and exploitation, by the National Assembly for Wales (Transfer of Functions) Order 2005 (S.I. 2005/1958). Those functions are now exercisable by the Welsh Ministers by virtue of section 162 of and paragraph 30 of Schedule 11 to the Government of Wales Act 2006. In accordance with section 2(8) and (9) of the 1999 Act, the Environmental Permitting (England and Wales) (Amendment) Regulations 2015 are subject to the draft affirmative procedure. As they are composite regulations (made by the Secretary of State in relation to England and by the Welsh Ministers in relation to Wales) they must be laid before, and approved by a

resolution of the National Assembly for Wales (and both Houses of Parliament). The reference in section 2(8) to approval by each House of Parliament has effect in relation to exercise of functions by the Welsh Ministers as if it were a reference to approval by the National Assembly for Wales by virtue of section 162 of, and paragraph 33 of Schedule 11 to, the Government of Wales Act 2006.

Purpose & intended effect of the legislation

15. The Environmental Permitting (England and Wales) (Amendment) Regulations 2015 transpose the Cost Benefit Assessment (CBA) and authorisation requirements of Article 14(5) and (7) of Directive 2012/27/EU (the Energy Efficiency Directive), together with the exemptions set out in Article 14(6) and (8), through amendments to the existing environmental permitting regime.

16. The provisions of Article 14(5) aim to promote the adoption of co-generation of heat and power (Combined Heat and Power – CHP) at industrial installations by specifying that a Cost Benefit Assessment (CBA) must be undertaken at the following industrial installations for the following purposes, where the total input is above 20MW thermal:

   a. new or substantially refurbished electricity generation installations, for the purpose of identifying cost-effective opportunities for co-generation of heat and power (Combined Heat and Power – CHP);
   b. new or substantially refurbished industrial installations generating usable waste heat, for the purpose of identifying cost-effective opportunities for co-generation or connection to a heat network; and
   c. new district heating or cooling networks, or new or substantially refurbished energy production installations within existing such networks, for the purpose of identifying cost-effective opportunities for utilising waste heat from nearby industrial installations.

17. Article 14(7) requires that the CBA must be taken into account when the installation is authorised.

18. Article 14(6) exempts peak load or back-up installations planning to operate less than 1,500 hours per year, nuclear power stations, and installations that need to be close to a geological storage site approved under Directive 2009/31/EC (a site for the purposes of geological storage of carbon dioxide). It also allows member states to set thresholds for exempting individual installations where any of a number of proximity and heat demand/supply thresholds are not met. Article 14(8) allows member states to exempt individual installations if there are imperative reasons of a law, ownership or finance for so doing.

19. The Environmental Permitting (England and Wales) (Amendment) Regulations 2015 transpose the Directive requirements principally by inserting a new schedule 8A into the Environmental Permitting (England and Wales) Regulations 2010. Necessary Amendments are also made to other parts of the 2010 Regulations.

Consultation

20. On 10 February 2014, Defra and the Welsh Government published a consultation document seeking views on the transposition of Article 14(5)-(9) of the Directive through amendments to the EPR. The consultation closed on 21 March 2014. In total 20 responses were received from a range of industry bodies, individual companies and regulators. All supported the use of the Environmental Permitting (England and Wales) regulations to transpose the requirements of articles 14 (5)-(9) of the Energy Efficiency Directive. There

were a number of concerns raised by respondents regarding the suitability and practicality of the thresholds applied in the instrument, particularly in reference to the maximum appropriate distance between the installations which would make up the network using waste heat. These concerns have been taken on board, and changes have been made to the regulations to reflect this.

Regulatory Impact Assessment (RIA)

Executive Summary

Introduction and problem under consideration

This is the final stage impact assessment (IA) for the transposition of Articles 14(5)-(9) of the Energy Efficiency Directive (2012/27/EU).

The European Union has introduced the EED as part of the strategy to meet the EU's 20% energy savings objective by 2020. It establishes 'a common framework of measures for the promotion of energy efficiency within Europe[2]'. Chapter 3 of the Directive deals with promoting efficiency in heating and cooling. Articles 14(5)-(9) require that after 5th June 2014 a cost benefit analysis (CBA) must be undertaken for the following installations where the total thermal input is above 20MW:

- new or substantially refurbished electricity generation installations;
- new or substantially refurbished industrial installations generating usable waste heat; and
- new district heating or cooling networks, or a new or substantially refurbished energy production installation within an existing network.

This CBA is intended to identify cost effective opportunities for cogeneration and waste heat recovery. Under the regulation the CBA is a financial analysis reflecting actual cash flow transactions from investing in and operating installations. Where cost effective and technically feasible opportunities are identified, then national authorities are required to authorise only installations developed as co-generation or using waste heat recovery. If an operator chooses not to take such actions, then they must not be granted a permit to operate, except in cases where imperative reasons of law, ownership or finance preclude this. Defra and the Welsh Government have elected to transpose Articles 14(5)-(9) through amendment of the Environmental Permitting (England and Wales) Regulations 2010.

A public consultation was held during February and March 2014. In total 20 responses were received from a range of industry bodies, individual companies and regulators. Additionally Defra met with representatives of industry organisations, environmental regulators, environmental NGOs and other Government departments to discuss the proposals and the IA. This IA has been updated in light of the responses received. The information and opinion received was qualitative in nature. No further evidence was identified to update the quantitative estimates as presented in the consultation stage IA.

The options that have been considered are:

- Option 0 (do nothing): For baseline purposes only as not transposing creates risk of infraction.
- Option 1 (preferred): Transpose and implement requirements with no gold plating. Operators are required to undertake CBAs when developing new installations or significantly refurbishing existing installations, to assess whether alternative cogeneration/waste recovery options are cost-effective. Where cost-effective options are identified, permits for operation will only be granted when these options are taken up except for in exceptional circumstances. Transposition is by amendment of the Environmental Permitting Regulations.

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[2] http://ec.europa.eu/energy/efficiency/eed/eed_en.htm

Rationale for intervention and policy objective

The European Commission attributes the fact that the 2020 energy savings objective is unlikely to be met without the EED due to a combination of regulatory and market failures. Specifically for cogeneration and waste heat recovery, it identifies barriers to uptake including high transaction costs and a lack of liquidity in the heat market. Articles 14(5)-(8) should identify cost-effective potential for cogeneration and waste heat recovery, and ensure that such opportunities are not missed.

The policy objective is to transpose Articles 14(5)-(8) of the EED, which should increase the uptake of energy efficiency via cogeneration and waste heat recovery. This will deliver cost savings to those installations and reduce carbon emissions. Transposition is also required to avoid infraction.

Overview of analysis

To estimate the effects of transposition we have first estimated the number of new or significantly refurbished installations that will be affected between 2014 and 2024. This baseline is set out in Section 3. The costs include the cost of undertaking a CBA (which is assumed to be completed by consultants) and the administrative costs for operators and regulators. Benefits have not been monetised because of the lack of evidence to inform such estimates, and uncertainty around the extent to which the CBAs represent additional assessments which operators would not otherwise have done.

Costs

Section 4 of the report describes the assessment of costs that has been undertaken. This focussed on the costs associated with undertaking the CBAs themselves (operator time and independent consultant fees) and the time (and associated costs) for regulators to review them. Table 1 below provides a summary of costs by type of cost and group affected. The central values presented are the midpoint of the low and high ranges. The base year for the present value calculation is 2014 and a discount rate of 3.5% has been applied (following HM Treasury Green Book).

Table 1 Summary of total costs for the period 2014-2024 (PV, £m 2013 prices)

	Low	Central	High
Costs of CBAs – operators	6.2	11.8	17.3
Admin costs – operators	0.2	0.3	0.5
Admin costs – regulators	0.2	0.3	0.4
Total	6.6	12.4	18.2

Benefits

The transposition of Articles 14(5)-(9) of the EED will result in installations in scope making investment decisions on the basis of better information, where operators would not already make use of such information as a matter of course.

The extent of the benefits will also depend on the number of new and refurbished installations carrying out CBAs and the outcomes of these. Recommendations and the choice of options

stemming from the assessments will be site and installation specific, and a number of regulatory and economic drivers will influence any decisions that are subsequently taken.
Benefits have not been monetised because of uncertainty around the extent to which the CBAs represent additional assessments which operators would not otherwise have done and the extent to which additional assessments would lead to additional co-generation development. Where transposition does bring on additional cogeneration and waste heat options, these are likely to be for the more marginal cases where benefits are less substantial.

Competition assessment and direct impact on business

Section 6 describes the competition assessment undertaken for the study. Overall, the proposed requirement to develop a CBA for new and refurbished installations is unlikely to have any adverse impacts on competition. While this IA is out of scope for One-In Two-Out, as it is an EU transposition, we present the direct cost to business with an estimated EANCB of -£1.0m (2009 prices). Other non-quantified impacts are also considered.

Wider impacts

Section 7 describes the potential distributional effects focused primarily on small and micro-businesses, and Section 8 presents the social impact assessment.

No affected plants are expected to fall within the micro-business definition. Whilst some of the affected plants could fall within the small business definition it is considered highly unlikely. An assessment of potential financial implications has shown that possible impacts (if any plants are in the small business category) are likely to be minimal and could be offset by any savings if potential for cogeneration or waste heat recovery are identified and taken forward.

A high level social impact assessment was undertaken and is described in Section 8. The additional costs of compliance are not expected to have implications for employment). There could be impacts on the environment and human health (both positive and negative) as a result of any actions taken in response to the findings of the CBAs.

Uncertainties and limitations

As with any assessment of this nature, there are a number of uncertainties and limitations that should be kept in mind when considering the findings. We have assumed that operators affected are not considering cogeneration options already. The number of CBAs that will be required is considered more uncertain relative to the cost of undertaking them. This is discussed in Section 9 alongside a summary of the main uncertainties and assumptions, which were tested through the consultation.

Conclusions

The transposition of Articles 14(5)-(9) will lead to additional costs being incurred by the operators of industrial installations comprising or incorporating combustion units with a total thermal input exceeding 20 MW. The central estimate is a net cost of £12.4m (present value, for the period 2014-2024), of which £11.8m is the cost of undertaking the CBAs and the remainder are admin costs, split between regulators and operators. Costs to regulators may be recouped through environmental permitting fees and charges.

1. Introduction

1. This impact assessment concerns transposition of Articles 14(5)-(8) of the Energy Efficiency Directive (2012/27/EU) – "the EED" hereafter[3]. This report is structured as follows:
   - Further details of the Articles are covered in Section 2. This also includes an assessment of the need for legislation, its objectives and the stakeholders likely to be affected, and a summary of the consultation;
   - The baseline is defined in Section 3. This explores the number of existing and potential installations likely to be affected;
   - An assessment of costs and benefits associated with the proposals in the relevant articles are contained in Sections 4 and 5;
   - Sections 6, 7 and 8 contain a competition assessment, analysis of distributional and social effects; and
   - An overall summary is in Section 9.

2. Overview

2. This section provides further detail of the requirements of the relevant articles of the EED, including Annex IX as referred to in Article 14(5), which relate to the need to carry out a cost-benefit analysis (CBA) looking at the potential for CHP or use of waste heat when a new plant is constructed or an existing plant is substantially refurbished.

What is cogeneration?

3. Cogeneration integrates the production of electricity and useful heat into one single and energy efficient process. Cogeneration can result in up to a 30% reduction in primary fuel consumption, compared to the separate generation of heat and power. Delivering the same amount of electricity and heat, but more efficiently and using less fuel, lowers energy costs for the operator, reduces CO_2 emissions, and enhances security of energy supply.

What is district heating?

4. District heating supplies heat from a central source directly to homes and business through a network of hot water pipes. Currently it provides less than 2% of the UK's heat demand. Modelling for DECC suggests that district heating could supply up to 14% of the UK's heat demand, and be a cost-effective and viable alternative to individual renewable technologies whilst reducing the cost of energy for consumers.

Problem under consideration

5. The European Commission considers energy efficiency to be important in limiting greenhouse gas emissions, reducing dependence on energy imports and in supporting economic growth. The European Union has a headline target to achieve a 20% improvement in energy efficiency by 2020. The EED establishes 'a common framework of measures for the promotion of energy efficiency within Europe[4]'. It aims to support and accelerate the delivery of the European Union's target for a 20% reduction in anticipated energy consumption by 2020 and to support further energy efficiency improvements beyond that date. Reductions in energy consumption achieved to date currently fall short of the 2020 target.
6. The requirements in the EED aim to remove barriers and overcome specific market failures in the energy market which impede efficiency in the supply and use of energy. The Directive

[3] http://ec.europa.eu/energy/efficiency/eed/eed_en.htm
[4] http://ec.europa.eu/energy/efficiency/eed/eed_en.htm

sets out various provisions related to: energy efficiency in its buildings; energy obligation schemes, audits and management systems; the provision of consumer information, including on energy bills; and other incentives and penalties.

7. Article 14 of the EED deals with promoting efficiency in heating and cooling. The article stipulates that Member States: identify the potential for high-efficiency cogeneration and efficient district heating and cooling and analyse the costs and benefits of the opportunities that may exist, as well as enacting policies designed to increase uptake, including supporting or accommodating the development of viable projects. Complementary policies that are already in place or being developed are outlined in paragraphs 16 and 17. Specifically, Articles 14(5)-(8) require that after 5th June 2014 a CBA must be undertaken for the following installations where the total thermal input is above 20MW:
    - New or substantially refurbished[5] electricity generation installations;
    - New or substantially refurbished industrial installations generating usable waste heat; and
    - New district heating or cooling networks, or a new or substantially refurbished energy production installation within an existing network.
8. The required CBA is intended to identify cost effective opportunities for cogeneration and waste heat recovery – essentially, CHP and district heating or cooling. Under the regulation the CBA is a financial analysis of the operator's actual cash flow transactions from investing in and operating installations. Where cost effective and technically feasible opportunities are identified, national authorities are required to authorise only installations developed as co-generation or using waste heat recovery. If an operator chooses not to take such actions then they must not be granted a permit to operate, except for in exceptional circumstances where a strong case can be made to justify non-compliance.
9. Defra and the Welsh Government have elected to transpose Article 14(5)-(8) through amendment of the Environmental Permitting (England and Wales) Regulations 2010 – "the EPR" hereafter. This impact assessment examines the transposition of Articles 14(5)-(8) of the EED which is focussed on the 'promotion of efficiency in heating and cooling'.
10. A public consultation on the transposition of Articles 14(5)-(8) was held during February and March 2014. In total, 20 responses were received from respondents including industry bodies, energy companies and regulators. In addition Defra met with representatives of industry organisations, environmental regulators, environmental NGOs and other Government departments to discuss the proposals and the impact assessment. We requested further information to address the evidence formally through the consultation as well as from other departments and agencies. In particular the consultation asked for data to refine the estimates of plants affected and the likely costs incurred, however no additional evidence was identified. A number of useful points were made by respondents that have been built into the discussion in relevant parts of the IA.

Rationale for intervention

11. The European Union has a headline target to achieve a 20% improvement in energy efficiency by 2020, which is intended to address the multiple barriers to energy efficiency uptake. Market failures include high transaction costs, information failures and lack of technical or institutional capacity. These dilute price signals and thus demand for energy

[5] Article 2(44) of the EED defines substantial refurbishment as "*a refurbishment whose cost exceeds 50 % of the investment cost for a new comparable unit*". This is not to be confused with the term "substantial change" that is defined in Article 3(9) of the Industrial Emissions Directive.

savings[6]. The Energy Efficiency Directive was introduced to address the problem that the target would not otherwise be met, which was attributed to market and regulatory failures.

12. Article 14 aims to promote energy efficiency in heating and cooling. Regarding cogeneration, the Commission identify a number of barriers to uptake, including[7]:

    - High transaction costs because of lengthy administrative procedures
    - Additional complexity of cogeneration compared to single generation, as different output is sold to different markets.
    - The lack of liquidity in the heat market because of the limited customer base. This means if a customer is lost it can be hard to sell the heat elsewhere. This possibility of ending up with stranded assets could increase the investment risk and required rate of return.
    - For district heating, the historic prevalence of individual heating solutions is suggested to be a cultural barrier to uptake.

13. Transposition of Articles 14(5)-(8) is expected to promote energy efficiency to the extent that it will provide a consistent approach by which operators will assess different technology options. This could help operators deal with the added complexity of cogeneration, particularly as they will have a standardised template to follow. Where cultural barriers mean that options are not even considered then the requirement to conduct a CBA may also help address these.

14. The more fundamental barriers such as the high transaction costs are unlikely to be addressed by transposition of Articles 14(5)-(8). While the CBA process may help operators deal with the complexity of cogeneration options it will not remove this as a barrier. Limited evidence was identified during consultation to inform our understanding of the market failures. Consultation responses reflected the numerous challenges with cogeneration and waste heat options, but these did not tend to be market failures (for instance, site constraints such as not being near sources of heat demand).

15. The extent to which operators are already conducting CBAs or similar analyses is unclear. If they are already making assessments of different options then the costs associated with transposition will be lower than estimated in this IA. There will however be consistency in the approach that all operators take.

Policy objectives

16. The intention of the EED is to ensure that energy saving options are considered and opportunities are not missed, improving the ability of Member States to meet the energy savings target. Transposition of the EED is now required to avoid infraction. The policy will help us meet our carbon budgets and contributes to the Welsh Government's 2026 vision[8] that 'our distinctive Welsh environment [will be] thriving and contributing to the economic and social wellbeing and health of all the people of Wales'.

17. The overall objective of Articles 14(5)-(8) of the EED is to promote efficiency in heating and cooling, through identification of cost-effective potential for cogeneration and waste heat recovery. These options are, generally speaking, combined heat and power (CHP) and district heating or cooling.

18. There is large untapped potential for energy saving via cogeneration in the UK. DECC modelling estimates that this could be up to 18GWe in 2020 (Ricardo-AEA, 2013). Of this, 8.4GWe is projected to be built by 2020 under existing policy arrangements. There also

[6] IEA (2013) *Energy Efficiency market report 2013*, Executive Summary. Available at http://www.iea.org/Textbase/npsum/EEMR2013SUM.pdf
[7] Commission impact assessment available at: http://ec.europa.eu/energy/efficiency/eed/eed_en.htm, accessed November 2013
[8] At http://www.wales.com/en/content/cms/english/about_wales/wales_fact_file/sustainability/sustainability.aspx

might be considerable potential to recover surplus heat from industry. DECC estimates suggest that there may potentially be 7TWh/yr technically available with a positive business case, with the majority of this potential having a payback period of 2 years of less (DECC, 2014). Implementing regulations obliging plants of >20MW thermal input to consider opportunities to operate as cogeneration and/or supply their waste heat to third parties would mean that this untapped potential could be more quickly realised. Such requirements could also help increase co-ordination between parties in different sectors, who perhaps wouldn't usually be engaged in considering the development of shared heat and power installations.

What is being done to address the wider barriers to uptake of cogeneration?

19. A number of existing policy measures are already in place to help overcome financial barriers to CHP uptake. CHP schemes that are fully or partially certified as Good Quality CHP under the CHP Quality Assurance programme are exempt from the Climate Change Levy on their input fuel and on the qualifying power output generated and used on-site. Further to Budget 2014, CHP will be exempt from Carbon Price Support costs from 1st April 2015 in respect of electricity generated for on-site consumption. Fuel used to generate electricity for export will be liable still. Under the CRC Energy Efficiency Scheme, gas used in CHP installations is exempt from CRC allowance costs. CHP is only liable for CRC costs in respect of electricity produced and consumed on-site. Investment in new CHP capacity can also be eligible for Enhanced Capital Allowances allowing investment in plant and technology to be offset against tax liability on first-year profits. Good Quality CHP schemes are also eligible for preferential business rates. Under the Renewables Obligation, CHP schemes that use renewable fuels are eligible for Renewable Obligation Certificates ("ROCs") on electricity produced. Some types of renewable CHPs (including energy from Waste) are eligible for a higher level of support per MWh electrical output than power-only plant. Biomass CHP is also exempt from the cap on new build biomass power plant capacity. New renewable CHP plants may also opt to receive a Renewable Heat Incentive ("RHI") tariff on useful heat exported on top of ROCs for power-only plant instead of receiving a higher level of ROCs for being CHP.

20. DECC is also developing options for a bespoke policy to support new, good quality, natural gas CHP capacity. Modelling is on-going to show how natural gas CHP will interact with the electricity market to determine its impacts on generation displaced and on carbon emissions. In addition, qualitative research is being undertaken on Gas CHP investment decision making to inform policy development. While this bespoke policy is being developed, DECC are working with BIS to make affordable finance available from the European Structural and Investment Funds to support to new CHP and District Heating projects.

Who is affected?

21. The main stakeholders who will be affected are the operators of planned new plants and those due to be refurbished which fall into one of the relevant categories. They will be required to undertake CBAs in line with the obligations set out in the Directive. The European Commission has published guidance on the Directive as a whole[9] and on Article 14 specifically[10] which address CBAs. Furthermore, the regulatory authorities (SEPA, EA, NRW, NIEA and, for the smallest plants in England, Wales and NI, local authorities) will also be affected by the transposition as they will be required to review and assess the CBAs submitted by operators to ensure they meet the requirements of the legislation. The Environment Agency (EA) is producing guidance for operators on what is required from the

[9] At http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0762:FIN:EN:PDF
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0762:FIN:EN:PDF
[10] At http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2013:0449:FIN:EN:PDF

CBA, and this is being consulted on until 11 April 2014[11]. Potential exemptions are set out in Article 14(6) and include: peak load or backup installations planned to operate less than 1,500 hours/year; nuclear power stations; installations that need to be close to a geological storage site. Member States can also lay down thresholds to exempt individual installations from the provisions. Various thresholds were consulted on, including the maximum distance between a heat source and a heat load, the minimum amount of heat demand for a district heating network to have to be considered, and the minimum amount of heat considered worth recovering. If an installation found insufficient heat demand within the specified area, or could not generate enough useful heat, then it would be exempt from the CBA.

Scoping of Impacts

22. The key impacts associated with the transposition of Article 14(5)-(8) of the EED are likely to be the costs associated with undertaking a CBA (consultancy costs as well as the operator's own costs) and the regulator's costs for reviewing these assessments. The benefits that may be realised are entirely dependent upon the outcomes of the CBA and any decisions that result from it these. There are three potential outcomes to the CBA:

   - It may show cogeneration to have a positive return and the operator may go ahead with the option;
   - It may show cogeneration to have a negative return in which case the operator won't go ahead with the option; and,
   - It may be the case that the CBA shows a positive return but the operator decides not to go ahead with implementing cogeneration (due to other reasons).

   Outcomes will be site specific and linked to a number of other drivers including achieving compliance with other related legislation such as the European Emissions Trading Scheme (EU ETS).

23. To estimate the effects of transposition we have first estimated the number of new or significantly refurbished installations that will be affected between 2014 and 2024. These use DECC projections supplemented where necessary with estimates by AMEC based on the turnover of plants. The baseline number of plants is set out in Section 3. The costs include the cost of undertaking a CBA (which is assumed to be carried out by consultants, although some operators may choose to use their own staff) and the administrative costs for both operators and regulators. Benefits have not been monetised but are discussed qualitatively in Section 5.

Options considered

24. The following options have been considered for assessment:

   - Option 0: Do nothing (baseline). If the UK were not to transpose the requirements of Articles 14(5)-(9) then they would be at risk of infraction. The baseline is set out in Section 3.
   - Option 1 (preferred): Transpose and implement with no gold plating. Operators would be required to undertake CBAs in line with the requirements of the Directive.

25. No further options have been considered realistic. The reasons for transposing through the EPR are set out in Annex B.

[11] The draft guidance for operators alongside an excel template for carrying out the CBA is available at the EA consultation web page: https://consult.environment-agency.gov.uk/portal/ho/ep/h2energyefficiency/h2_energy_efficiency?pointId=2831815

3. Baseline definition

Overview

26. This section sets out the baseline that has been developed for the assessment. It focuses primarily on the number of plants likely to be affected by the transposition of Articles 14(5)-(9).
27. For the purpose of this assessment three rated thermal net input capacity ranges have been considered:
    - 20 – 50 MWth[12] input (equivalent to approximately 6 – 20 MWe or 16 – 45 MWth output);
    - 50 – 300 MWth input (equivalent to approximately 18 – 135 MWe or 40 – 270 MWth output); and
    - >300 MWth input (equivalent to approximately > 105 MWe or >240 MWth output).

Evidence Review

28. This section presents the data used in the IA. It comprises the numbers of plants in each category covered by Article 14(5) over a 10 year timeline (July 2014 to July 2024). Based on the data available, the assessment has been made for the whole UK. A number of data sources for the estimates of plant affected were only available at UK level and with no basis to scale to England and Wales it was considered more prudent to estimate impacts at the UK level. We have sought to identify the total number of installations affected, and have assumed that the operators affected would not be considering cogeneration or waste heat recovery options already. Consultation responses demonstrated that some respondents are already considering these options to some extent. There was an even split between those who felt they already consider cogeneration options fully, those that consider them to some extent, and those that did not give them particular consideration. Transposition is expected to lead to some additional work even for those that consider options fully, for instance liaison with the Environment Agency (EA). The number of installations affected and the costs they incur has not been adjusted for the possibility that some will already be undertaking the necessary action to some extent. As such this represents a conservative approach to the analysis, with costs more likely to be overestimates than underestimates. The assumptions used were tested at consultation and no responses provided additional information with which to refine our estimates. As such, the estimates are unchanged from the consultation stage IA.

New installations

29. Two sets of data were used for estimating the number of new installations:

DECC data

30. The first dataset was provided by DECC and included forecasts for electricity generation and district heating for the UK. No data were provided for installations of 20 – 50 MWth or for industrial thermal plants.
31. Many of the existing coal and oil fired electricity generation plants are close to the end of their operating life and therefore can be expected to shut down and be replaced during the assessment period. According to DECC forecasts, a total of 76 plants for electricity generation and 45 district heating combustion plants are expected to be commissioned

[12] MWth refers to thermal power produced which includes heat lost to the surroundings whilst MWe is solely electrical power produced.

between July 2014 and July 2024. DECC data for electricity plants included annual figures for each thermal input range. Data for district heating was in five-year intervals. It was assumed that plants were being commissioned evenly across the years covered by each interval. Numbers for the years 2014 and 2024 were halved in order to account only for the relevant time period (which starts in July 2014 and runs until July 2024).

32. Original data provided by DECC was based on DECC analysis and the Consultation on the draft Electricity Market Reform Delivery Plan (2013). An upper and lower range of plant numbers was provided for these projections, which has been used in the analysis to calculate the potential range of impacts. The figures include existing plants that close and then re-open using new technology (CCGT[13] upgrades to CCGT with CCS[14] and coal plant conversions to biomass). Installations fitting CCS would be exempt from conducting a CBA under Article 14(6)(c). As CCS on CCGT has yet to be demonstrated on a commercial scale plant, it is assumed that the likelihood of such installations being commissioned before 2014 is low and within the uncertainty range. Therefore no further adjustment to the plant numbers has been made to subtract these possible installations.

Gap filling

33. In order to fill the gap for industrial thermal plants and for installations of 20 – 50 MWth, a second set of data was developed by AMEC based on the total turnover of plants. This was calculated using the number of existing plants in 2014, average operating lifetime of plants and the expected annual growth for each type of fuel.

34. For industrial plants with a rated thermal input capacity above 50MWth the current number of 162 plants was extracted from the LCP Inventory (Defra 2009) and modelled by fuel type and capacity range category. The number of existing plants of 20-50 MWth is estimated to be 451 in an AMEC (2012) study for the European Commission on 1-50 MWth plant. That estimate was based largely on an earlier IA carried out by AMEC (then Entec) in 2009 during the early discussions on the proposed industrial emissions Directive when the Commission was proposing to lower the threshold for combustion installations in Annex I of the Directive to 20MWth (this was subsequently dropped during negotiations). These plants have been assumed to be gas fired for the growth modelling, as this is by far the most widely used fuel type in this size range, and divided evenly into each category (electricity, industry and district heating).

35. The table below shows the estimated number of plants for 2014. Since the DECC dataset only provided estimates for future projections, the following table also includes estimates for existing plant numbers for electricity generation and district heating plants with a capacity greater than 50 MWth (also taken from the Defra 2009 LCP Inventory).

[13] Combined Cycle Gas Turbines are a form of energy generation technology which combines a gas fired turbine with a steam turbine

[14] Carbon Capture and Storage

Table 2. Estimated number of plants in 2014

Plant type	Fuel	Plant numbers 2014[1]		
		20-50 MW[2]	50-300 MW	>300 MW
Thermal - electricity generation	Coal	0	1	18
	Gas	150	31	59
	Oil/diesel	0	11	6
	Biomass	0	2	0
	All	150	46	83
Thermal - industrial	Coal	0	2	0
	Gas	150	156	12
	Oil/diesel	0	3	1
	Biomass	0	1	0
	All	150	163	13
District heating/cooling	Coal	0	0	0
	Gas	150	11	2
	Oil/diesel	0	0	0
	Biomass	0	0	0
	All	150	12	2
Overall total		451	220	98

Notes

1. Values are rounded, hence difference between totals
2. As indicated above the estimate of plant numbers for the 20-50 MW category has been based on AMEC (2012) data. We have assumed an even distribution of installations between each of the categories (electricity generation, industry and district heating). For calculation purposes all plant have been assigned as gas fired, as this is the most common fuel, and because for the results, plant numbers are aggregated by category, without distinguishing fuel type.

Electricity generation plants >50MW

36. The number of new electricity generation plants in the table above could be overestimated. This is because new plants >50MW electrical capacity (approximately 100-150MWth depending on fuel) already have to consider the potential for waste heat recovery as part of the consenting regime. Consents can include conditions for plants to be built in a way so that it can supply heat in the future if a suitable recipient became available. Industrial or district heating/plants are not covered by equivalent requirements. This existing assessment means that transposition of Articles 14(5)-(8) may not result in additional costs for operators and regulators as they could already be covered by the existing regulatory regime.

37. Furthermore, >50MWth power stations currently have to undertake a BAT (Best Available Techniques) assessment as a requirement of the Industrial Emissions Directive. BAT for energy efficiency for combustion plants includes operating as a cogeneration/CHP plant. The assessment justifies the chosen techniques to minimise environmental impact, taking into account their cost and the location-specific characteristics of the installation. If an operator does not meet BAT, the Environment Agency can refuse the permit or may issue a permit which includes pre-operational or improvement conditions.

38. These BAT requirements will effectively be superseded by the combined requirements of Article 14(5) as considered in this IA and Article 14(3) (which is being transposed separately). The installation-level CBA under Article 14(5) requires a financial analysis to determine the financial viability of supplying heat. Article 14(3) considers the wider

economic, socio-economic and environmental benefits of potential cogeneration and district heating schemes.

39. The consultation asked whether existing BAT requirements mean some of the requirements of Articles 14(5)-(8) are already being undertaken. This was to understand better whether transposition is likely to result in additional activity and cost for operators. A number of responses were received. The majority of respondents felt that additional costs resulting from permit/consenting activities are unavoidable, although many seem to be doing some form of assessment already. The permit application process for combustion installations already includes the need to evaluate BAT through which cogeneration would be considered. The additional requirements of Option 1 are not significantly new. As the estimates here assume the CBA represents completely additional activity the cost estimates are considered an overestimate.

Plant lifetimes and annual growth estimates

40. The average operating lifetime of plants provided by DECC is presented in the following table. The DECC estimates are not fuel specific, therefore the lifetimes provided were compared against information derived from DUKES (DECC, 2013) which lists the age of currently operating installations in the electricity generation sector, by fuel type and capacity. The DECC lifetime estimates are considered to be too low for coal and oil fuelled plants, and biomass fired plants >300 MW, since the majority of existing installations are already much older than those estimates. Therefore in these cases an estimate of 50 years, based on the oldest existing plant in DUKES, have been used in the modelling for this assessment.

Table 3. Average operating lifetime

Capacity (MWth)	Lifetime		
	Low	High	Average
<20	20	28	-
20 – 50[1]	-	-	25.5
50 - 300	24	31	27.5
>300	22	25	23.5

Notes

1. No data estimate provided – therefore average calculated using <20 (low) and 50-300 (high)

41. The current average plant age was also taken into account when estimating the number of new build plant that would occur during the 2014-2024 assessment period. This average age of electricity generating 20-50 MWth plant was based on DUKES (DECC, 2013). For industrial and district heating facilities, the current average age was assumed to be half of the estimated lifetime, assuming there is an even distribution of plant of each age (e.g. if the lifetime is assumed to be 28 years the current average age is assumed to be 14 years).

42. The annual growth by fuel type was estimated from DECC Updated Energy Projections (DECC 2013b). For industrial plants, the “Iron and steel” and “Other industrial sectors” categories were used. For district heating, the categories “Domestic”, “Public administration” and “Commercial” were used. CHP plants were assumed to be evenly distributed between the three plant categories considered (electricity, industrial and district heating).

Table 4. Estimated annual growth

Plant type	Fuel	Annual growth %
Thermal - electricity generation	Coal	-17.0
	Gas	4.0
	Oil/diesel	0.0
	Biomass	8.6
Thermal - industrial	Coal	-0.8
	Gas	-1.1
	Oil/diesel	-1.1
	Biomass	11.7
District heating/cooling	Coal	-0.9
	Gas	-0.5
	Oil/diesel	-5.6
	Biomass	12.3

43. Table 5 in the summary section below presents the forecasted number of plants covered by Article 14(5) for the period 2014-2024 based on the DECC forecast and AMEC gap filling[15].

Installations envisaged for substantial refurbishment

44. To estimate the number of plants requiring substantial refurbishment during the period assessed the current number of plants and their average lifetime, presented in Section 3.2.1 above, were considered. Plant lifetime by category, thermal input range and fuel type, was estimated from DUKES (2013) and from information provided by DECC. It was assumed that plants are subject to one substantial refurbishment[16] during their lifetime with the exception of coal and oil plants, as well as large (<300MW) biomass plants, which are assumed to conduct two refurbishments due to the longer lifetime and higher overall capital value of plant.

Baseline summary

45. As detailed above, projections of new installations for electricity generation and district heating plants >50 MWth have been provided by DECC. Projections for new installations in the industrial sector and installations of 20 – 50 MWth in all three sectors have been developed by AMEC based on the current number of plants and the projected changes in fuel consumption. The number of plants requiring substantial refurbishment was calculated by AMEC from the average plant lifetime and making assumptions on the number of refurbishments per plant.

46. The period between July 2014 and July 2024 has been modelled (a ten-year appraisal period, but spanning 11 calendar years). The DECC projections of new installations are variable over the time period. District heating plant projections have been provided for five

[15] Tables 2, 3 and 4 combine to produce the estimate of plant numbers used to fill the gaps in the DECC forecasts (plant in the 20-50MW category and estimates of refurbishments). The calculation for new plant is: (1/(2*(max age plant – average age plant in 2014))) * (1 + annual growth) * (number of plant). For refurbishments it is: (number refurbishments in lifetime * (1/max age of plant) * (number of plant).

[16] Defined as a refurbishment whose cost exceeds 50% of the investment cost for a new comparable unit

year intervals and electricity plant projections per year. The AMEC based estimates have assumed a constant rate of turnover and refurbishment for this period.

47. Table 5 below summarises the forecast for the number of plants covered by Article 14(5). It combines the estimates based on the AMEC model and the DECC forecast. Numbers for 2014 and 2024 reflect the fact that only half the year is considered. Plant estimates are in general constant across the years, apart from new thermal electricity generation plant. The variation here comes from the DECC forecasts from the Electricity Market Reform analysis. Plant numbers based on AMEC's modelling produce constant plant numbers across years.

Table 5. Estimated number of new and refurbished plants by year for the period 2014-2024

		2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	Total
Thermal-Electricity Generation	New	6	13	15	15	17	11	8	12	15	14	10	139
	Refurbishment	6	11	11	11	11	11	11	11	11	11	6	111
Thermal-Industrial	New	6	12	12	12	12	12	12	12	12	12	6	122
	Refurbishment	6	12	12	12	12	12	12	12	12	12	6	124
District Heating	New	4	7	11	11	11	11	11	11	11	11	5	104
	Refurbishment	3	6	6	6	6	6	6	6	6	6	3	64

Notes

1. Numbers are rounded, so may not sum to the totals.

48. To reflect the uncertainty associated with developing any projections, a high and low range of plant number projections has been modelled. These are set out in Table 6 below. The associated uncertainty estimates are presented in the following table, based on AMEC's judgement, or DECC's reported range where indicated. A full statistical uncertainty analysis has not been performed for this assessment. Uncertainties are discussed in greater detail in Section 9.

Table 6 Total Plant Numbers in Central, low and high scenarios for the period 2014-2024

		Central	Low	High
Thermal-Electricity Generation	New	139	122	164
	Refurbishment	111	89	133
Thermal-Industrial	New	122	110	141
	Refurbishment	124	99	148
District Heating/Cooling	New	104	89	124
	Refurbishment	64	51	77

4. Costs

Overview

49. This section sets out the costs that are expected to be incurred as a result of transposition of Articles 14(5)-(8) of the EED. This assessment is focussed on the costs associated with undertaking the CBAs themselves (operator time and independent consultant fees) and the time (and associated costs) for regulators to review them. The cost assessment does not include the potential costs associated with any decisions and subsequent actions that result from the findings of the CBA as these will be site specific and influenced by a number of other drivers such as compliance with other legislation (e.g. EU Emissions Trading Scheme) and other economic factors. As discussed previously, if the CBA shows a positive return to cogeneration/heat recovery then an operator will only be granted a permit if they implement the findings, except for where a strong case can be made to prove why the cost effective option cannot be pursued.
50. The consultation asked whether the cost estimates were reasonable. No responses were received that provided additional evidence of the likely costs to operators or regulators of undertaking and assessing the CBAs. There was varying opinion on the extent to which transposition would lead to additional effort and cost over and above that already incurred by operators. This would affect the total cost estimates and is discussed in the next section.

Additional activity implied by transposition

51. The estimates of affected plant as set out in Section 3 are used to estimate the costs of Option 1. It is assumed that all plants that fall into scope must conduct a CBA and that this represents entirely additional activity. Both of these assumptions can be questioned.
52. Not all plants that fall into scope will have to conduct a CBA. The draft Environment Agency guidance for operators on conducting an Article 14 cost benefit assessment (CBA) involves a number of initial steps to decide whether or not a CBA is required, including identification of existing and potential heat loads in the area. Part of this process will consider whether or not it will be technically feasible for the installation to supply those heat loads. The main reason would be if the demand for or supply of heat was not appropriate, within the radius defined by the EA CBA guidance. The radii range from 2 to 15km depending on the type of installation, grade of heat and amount of heat required or available. Where operators can demonstrate insufficient demand for or supply of heat from within that area, they will be exempt from conducting a full CBA. The estimated number of plants do not take into account the operators that might be excluded as a result of this, because of a lack of data to inform how many might be affected, and because they would still incur a share of the costs determining the nature of the local heat market.

53. Articles 14(5)-(8) are based on the premise that operators are not considering cogeneration and heat recovery options as a matter of course, however where these offer potential cost savings it would be expected that some sort of assessment might be made. This was tested at consultation and whilst the majority of respondents felt transposition would result in additional costs, it was clear that many operators already consider the options to some extent.
54. These two assumptions therefore represent a conservative approach to the cost estimates, with costs more likely to be overestimates than underestimates.

Cost of Compliance

55. The cost of an independent consultant undertaking a cost-benefit analysis has been based on estimates provided by DECC for this study in their initial draft IA for the overall Directive (dated 17/05/12), and AMEC's judgement as a consultancy providing such services to industry. It has been assumed that the requirements, and therefore the cost, will be the same for a new build or a significant refurbishment. Furthermore, the cost is also assumed to be the same for each category (electricity generation, industry and district heating/cooling). However, the cost is assumed to be higher for larger installations due to the additional information that would need to be assessed. There is likely to be variation in cost for different complexity of installation and therefore a high and low cost estimate has been developed. We do not know the frequency with which operators consider the options covered by the CBA, so have assumed that they would not otherwise consider them. It is possible that this will overestimate the cost of compliance. If operators are already considering some of the options we would only count their additional costs, which would be lower than the total estimated here. The estimated costs are presented in the following table.

Table 7. Assumed cost of a CBA (£2013/installation)

Capacity (MW_{th})	Low	High
20-50	10,000	25,000
50-300	15,000	30,000
>300	20,000	40,000

56. The costs above were applied to the low and high range forecast number of new and refurbished installations per year, to calculate a low-low and high-high cost per year. The number of plants affected per year changes through the 2014-2024 period for new >50MWth plant in the electricity generation and district heating categories. For other categories the number of plants, and therefore the costs, are estimated to be constant across the period.

57. The present value of the projected annual costs of undertaking CBA for the period 2014-2024 by plant type are detailed in Table 8 below. The base year for the PV calculation is 2014 and a discount rate of 3.5% has been applied (HM Treasury Green Book). Table 12 shows the yearly profile of the costs to operators of undertaking CBAs.

Table 8. Total PV costs of conducting CBAs for the period 2014-2024

Installation type		£m, 2013 prices (low)			£m, 2013 prices (high)		
		20-50 MW	50-300 MW	>300 MW	20-50 MW	50-300 MW	>300 MW
Thermal - electricity generation	New	0.43	0.58	0.39	1.60	1.28	0.81
	Refurbishment	0.40	0.17	0.47	1.50	0.35	0.94
Thermal - industrial	New	0.39	0.74	0.08	1.48	1.63	0.23
	Refurbishment	0.40	0.60	0.07	1.50	1.20	0.15
District heating/cooling	New	0.40	0.26	0.35	1.49	0.57	1.01
	Refurbishment	0.40	0.04	0.01	1.50	0.09	0.02

Administrative Burden

58. There will be an administrative burden on the operator to prepare information for the CBA, to engage with the provider of the CBA, to submit the CBA to the regulator and to respond to any queries that arise from the application. There will also be time required by the regulator to review the CBA and follow up on any gaps and uncertainties with the regulator. In each case the cost of this administrative burden has been estimated using an assumed associated time requirement and wage rate. The time assumption is based on AMEC's judgement, informed by information from the EA indicating that to review the recent Tilbury Power Station CBA (refurbished biomass - 870MW output power) took the permitting officer 5 days. The wage rates have been taken from the ONS's Annual Survey of Hours and Earnings 2011, assuming the operator time is priced at £20.11 per hour for category 112 Production Manager and the regulator time is £14.51 per hour for category 3551 Conservation and Environmental Protection officers. Wage rates are median values in 2011 prices, inflated to 2013 prices using HMT's GDP deflator, and uplifted by 30% to account for non-wage costs. The resulting wage rate is hence assumed to be £20.88 per hour for operators and £15.06 per hour for regulators.

59. The assumed hours and the resulting costs are presented in the following table. A low-high range is presented to reflect the variation in complexity of different installations.

Table 9. Assumed administrative burden of a CBA (per installation)[17]

Capacity (MW_{th})	Operator time (hours)	Operator cost (£)	Regulator time (hours)	Regulator cost (£)
20-50	14-28	380-760	21-35	411-685
50-300	14-28	380-760	21-35	411-685
>300	21-35	570-950	28-45	548-881

60. The present value of the projected total administrative burden associated with the preparation and review of CBA for the period 2014-2024 is detailed in the table below for both operators and regulators. The base year for the PV calculation is 2014 and a discount rate of 3.5% has been applied (HM Treasury Green Book). Table 12 provides the discounted yearly profile of admin costs.

Table 10. Total present value of administrative burden for operators and regulators for the period 2014-2024 (2013 prices, £m)

		£m (low)			£m (high)		
		20-50 MW	50-300 MW	>300 MW	20-50 MW	50-300 MW	>300 MW
Operator	New	0.05	0.04	0.02	0.14	0.09	0.04
	Refurbishment	0.05	0.02	0.02	0.14	0.04	0.03
Regulator	New	0.05	0.04	0.02	0.13	0.08	0.04
	Refurbishment	0.05	0.02	0.02	0.12	0.04	0.02

Non-quantified costs to business

61. The majority of costs have been quantified, some respondents to the consultation raised concerns regarding what the CBA would include. The EA is separately consulting on

[17] The estimates are unchanged from the consultation stage IA, as no further evidence was identified to refine the estimates. However some errors in the table have now been corrected. These were presented correctly elsewhere in the previous version of the IA, so overall impacts remain the same.

guidance on the CBA to provide clarity on this for operators. Respondents suggested non-quantified costs including some that are expected to be addressed through the EA's guidance or through heat supply contracts, such as who is responsible for providing back-up heat.

62. The requirements could result in investment being deterred if the operators do not pursue the most cost-effective option identified by the CBA. This could occur where operators do not believe the outcome of the CBA. A specific issue highlighted from consultation concerned the issue of who bears infrastructure costs. In establishing a high efficiency cogeneration or district heating scheme, one of the most significant costs will be the infrastructure (pipe work) required to connect the heat source with the heat user. The default case for completing the CBA assumes that this cost will be met by the operator. However where an operator has agreed that the heat user will meet the infrastructure costs they will be required to indicate this and include these costs from the CBA. Another issue identified was regarding the cost of capital that would be used for the CBA. To address this issue the EA CBA guidance provides operators with flexibility to apply alternative assumptions, including for the cost of capital, provided that operators can demonstrate that the EA's prescribed cost of capital rate is inappropriate for their specific case. This flexibility should enable operators to accurately reflect the specific risks for their particular project. Since it is a financial analysis it is expected that monetisation of the relevant impacts will be possible in the CBA and therefore the risk that development is deterred is considered to be low.

63. If CBAs identify cost-effective options which operators are unwilling to pursue, it is possible that some development will be deterred. One possible reason for this would be where operators face capital constraints that mean they cannot afford the option shown to be more cost-effective. As cogeneration and waste heat recovery options are often more expensive than single-generation alternatives, the risk of deterred investment was identified as an important possibility to explore through the consultation. There is an exemption in Article 14 that enables the regulator to permit an option which is not the most cost-beneficial scheme on financial grounds. This means that where operators face capital constraints limiting their ability to go ahead with more expensive cogeneration options they could receive a permit for single generation if they can provide the Environment Agency with evidence of their capital constraints. It is possible a permit could still be refused if evidence was not considered sufficient. The EA are considering how to mitigate the possibility that capital constraints lead to deterred investment, and are exploring this through their consultation.

64. It is possible that development could be deterred for reasons other than capital constraints. The Environment Agency recognises that there will be some factors which are outside of the operator's control, for example if a potential heat recipient has no interest in being supplied with heat from the installation or refuses to provide information to allow the CBA to be properly completed. In this case it is likely to be appropriate to exclude the heat load in question from the assessment, although the Environment Agency will expect the operator to submit evidence to support this. Such situations will be dealt with on a case by case basis by the Environment Agency.

65. An issue that was flagged in consultation responses was whether the CBA process could increase the time taken to complete the permitting process. It is expected that businesses will develop appropriate timescales factoring these new processes in. The EA usually suggest a 13-week turnaround time for their assessments to be completed, although timescales can be raised with the EA in pre-application discussions. It was also noted that cogeneration options could take longer to design and plan than single-generation options. This means that investment could take longer under Option 1 than under the baseline, but these differing timescales can be accounted for in the CBA. As such Option 1 is not expected to delay investment significantly.

66. Additionally it is possible that operators might decide to develop smaller installations than they would otherwise have done, so as to keep below 20MW total thermal input and avoid the need to complete a CBA. This would result in potential benefits from cogeneration being missed and the adoption of sub-optimal sized single generation.

67. Having examined these possible sources of cost to business, it is concluded that unquantified costs to business are unlikely to be significant, as measures have been considered to mitigate potential costs. Further, it is noted that the quantified cost estimates are conservative as they assume no businesses conduct similar CBAs already, and no downward adjustments are made for operators that are not required to conduct a CBA (for instance, if no demand for waste heat is identified).

Wider Costs

68. Air quality impacts of CHP deployment will depend on the specific nature of the additional CHP capacity deployed, the heat and power generation capacity which does not operate as a result of CHP being deployed and the location of both CHP and displaced generation. Although it might be expected that, as a more energy efficient form of generation CHP will reduce air quality emissions this is not necessarily the case. For example reciprocating engine technology has inherently higher NOx emissions per unit of power generated than larger Combined Cycle Gas Turbine (CCGT) power plant and might therefore worsen air quality relative to larger remote power plant, especially if deployed in urban situations. Evidence of this potential air quality cost is provided by recent studies such as "Economic and Air Quality Assessment of CHP and DH[18]". Owing to the dependency of air quality impacts on CHP project-specific factors it is not possible to assess the likely impacts in this Impact Assessment. Other possible non-quantified costs could include technological 'lock-in' to cogeneration or waste heat recovery options. It is unclear how lock-in to these options might differ to lock-in to the technologies operators might have chosen in the baseline. The reliability of CHP compared to grid electricity and gas could also generate some non-quantified costs, although this could be reflected in the CBA.

Summary of costs

69. Table 11 below summarises the estimated costs of option 1. It shows the present value costs per year, in 2013 prices. Central values represent the midpoint of the high and low estimates. The base year for the PV calculation is 2014 and a 3.5% discount rate is used.

[18] December 2012 by Par Hill Research for the Royal Borough of Kensington & Chelsea Available at At: https://static.squarespace.com/static/5006f1cc84ae2a41e73b7aad/t/5152ed55e4b047ba3da65984/1364389205697/Economic%20&%20Air%20Quality%20Impacts%20Of%20CHP%20&%20DH.pdf

Table 11. Profile of discounted yearly costs (PV, £m, 2013 prices)

	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	Total
CBA costs - operators	0.6	1.2	1.3	1.3	1.3	1.1	1.0	1.1	1.1	1.1	0.6	11.7
Admin costs – operators	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.3
Admin costs - regulators	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.3
Total (central)	0.7	1.3	1.4	1.4	1.4	1.2	1.1	1.2	1.2	1.1	0.6	12.4
Low	*0.4*	*0.7*	*0.8*	*0.7*	*0.7*	*0.6*	*0.6*	*0.6*	*0.6*	*0.6*	*0.3*	*6.6*
High	*1.0*	*1.9*	*2.1*	*2.0*	*2.0*	*1.7*	*1.6*	*1.7*	*1.7*	*1.6*	*0.9*	*18.2*

Notes:

1. Numbers are rounded, so may not sum to the totals.

5. Benefits

70. Where installations would not have considered cogeneration options fully the transposition of Articles 14(5)-(8) of the EED will result in installations in scope making investment decisions on the basis of better information.

71. The extent of the benefits will depend on the number of new and refurbished installations carrying out CBAs, the outcomes of these and the difference they make to investment decisions. Recommendations and the choice of options stemming from the assessments will be site and installation specific. In order to estimate the net benefits to operators of any cogeneration/waste heat recovery options resulting from the regulation, evidence or assumptions for the following would be required:

- an estimate of the likely proportion of installations for which the CBA will identify cost-effective cogeneration or waste heat recovery options;
- an estimate of the number of operators already carrying out CBAs;
- evidence on the marginal cost of developing cogeneration rather than single generation, for installations within the range covered by the amended Regulations;
- further information on the savings that may result from the implementation of cost-beneficial schemes. This requires information on the annual saving to the operator from installing cogeneration rather than single generation (taking into account cost differences, following the previous point), and an understanding of possible variation between plants, sectors and sites; and,
- any evidence on the cost of capital for cogeneration.

72. Evidence to address these gaps was sought during consultation. In particular the consultation sought to understand the extent to which operators already consider cogeneration and waste heat options, and undertake CBAs. However as insufficient information was received benefits have not been estimated. A number of respondents felt that all options are already considered, at least to some degree. A respondent from the glass sector pointed out that the energy intensity of production and large amount of waste heat produced means that energy efficiency and reducing operating costs are top priorities for glass companies. Less information was received from operators where the options might be considered more marginal.

73. Where large cost savings can be achieved through cogeneration or waste heat recovery it is considered likely that operators will already assess such options when making investment decisions. This suggests that better informed investment decisions may result in the more marginal cases, and it will be here that sub-optimal investment decisions may be avoided as a result.

74. The benefits associated with any improvements in energy efficiency resulting from Option 1 include the economic benefits resulting from reduced costs and /or additional income from sale of waste heat. The savings of interest are the net savings, taking into account the associated costs of the technology installed. CHP has higher capital costs compared to single generation, and these higher costs would be included in the CBA. The draft EA guidelines include a recommended cost of capital but also make provision for alternative rates to be used where appropriate and supported by evidence.

75. The CBAs are intended to reflect the costs and benefits to businesses in making an investment, rather than wider impacts. As such it should be possible to estimate the relevant costs and benefits needed to carry out a CBA. This is being tested with stakeholders through the EA's consultation, which includes a draft CBA template alongside the draft guidance. To make an accurate assessment of different options the CBAs will need to use an appropriate cost of capital, to ensure that any cost savings identified are feasible and fully reflect the risk of a specific project. Where heat is sold to others this is important because the limited customer base means there is a risk of stranded capital if a customer is lost. This increases the investment and social risk linked to cogeneration. Using an appropriate cost of capital in the CBA will help reduce the possibility that cost-effective options are wrongly identified. The Environment Agency is producing guidance on the CBA assessments, which is currently out to consultation. The draft guidance proposes a nominal pre-tax cost of capital of 16.5%. There is discretion to adjust this in certain circumstances, provided the operator can robustly justify the use of another discount rate. Assuming that the final content of the EA's guidance does not differ substantively from that being consulted on this provision is considered to provide operators with sufficient flexibility to apply an appropriate cost of capital.

76. It is expected that where cogeneration options offer substantial cost savings operators should already be considering them when making investment decisions. Transposition of Articles 14(5)-(8) is therefore more likely to bring on smaller-scale options where the case is more marginal and for which cost savings are likely to be lower. Given the uncertainty around what additional capacity will result from transposition, the lack of required evidence as set out above, and the likelihood that cost savings will be relatively low, it is considered most appropriate not to quantify possible benefits.

77. Although it has not been possible to quantify benefits, evidence has been sought to provide an indication of the possible cost savings to operators (Box 1). The case studies described in Box 1 have been provided by DECC and are for installations compatible with those that would fall in scope of Articles 14(5)-(8). However as they are case studies they cannot be used to generalise and estimate the possible benefits of transposition. They do however serve to indicate the possible scale of energy cost savings that could occur at the operator level. The annual savings do not take account of the variations in capital and operating costs between single and cogeneration options, so Box 1 does not present net impacts.

Box 1: Case study examples of possible options and their illustrative benefits

This box provides some examples of the possible benefits for operators of developing CHP instead of a single-generation technology. This information has been provided by DECC based on information from their Quality Assurance certification scheme for CHP. These examples are intended to give an indication of the possible scale of benefits that could occur at the operator level. The size of the installations described above is consistent with those in scope of Articles 14(5)-(8). The following equations have been used to calculate the key figures:

$$Annual\ Savings = Energy\ Cost + Fiscal\ benefits$$

(based on predicted 2020 energy and policy prices and 2013 prices)

$$Simple\ Payback = \frac{Marginal\ Capital\ Cost\ (CHP - Alternative)}{Total\ Annual\ Savings}$$

$$CO2\ Saving = Avoided\ Emissions - Additional\ Emissions\ from\ new\ scheme$$

Case 1: <u>CHP installed where the alternative would have been an industrial boiler</u>

Key Assumptions

- CHP Capital and O&M costs are entirely additional
- Displaced Boiler Efficiency = 81% GCV
- The comparison is against a heat only boiler and importing all electricity from the grid.

1.

Case 1a) A 35 MWe gas-fired CCGT CHP providing heat and electricity to the site with surplus electricity exported to the grid.

- Annual savings: £7.44m/year
- Simple payback: 5.8 years
- CO2 Saving: 51,058 TCO2/year

Case 1a) delivers savings of over £7.44m per year. It is considered likely that where operators could make energy cost savings of this scale and with this rate of payback they would be aware of cogeneration options and their benefits already, so would assess them in the baseline.

Case *1b)* A 3.6MWe gas-fired OCGT[19] CHP providing heat and electricity to the site with surplus electricity exported to the grid.

- Annual savings: £1.61m/year
- Simple payback: 2.6 years
- CO2 Saving: 8,194 TCO2/year

Both of these options could enable operators to save money compared to if they had installed an industrial boiler.

[19] Open Cycle Gas Turbine is a form of energy generation technology which uses a gas turbine to generate electricity. It may also recover heat.

Case 2: CHP installed where the alternative would have been a District Heating Boiler

Key Assumptions

- CHP Capital and O&M costs are entirely additional
- Displaced Boiler Efficiency = 81% GCV
- The comparison is against a heat only boiler and importing all electricity from the grid.

2.

Case 2a) A CHP scheme comprising 2 x 2.4MWe gas engines providing heat to the DH scheme with electricity exported to the grid.

- Annual savings: £0.59m/year
- Simple payback: 6.5 years
- CO_2 Saving: 2580 TCO_2/year

3. **Case 2b)** A CHP scheme comprising 2 x 2.3MWe gas engines providing heat to the DH scheme with electricity exported to the grid

- Annual savings: £0.56M/year
- Simple payback: 6.8 years
- CO2 Saving: 2,547 TCO2/year

The operator of the both these installations would be expected to go ahead with the CHP option.

Case 3: CHP installed where the alternative would have been a power only plant

Key Assumptions

- CHP would have a capital cost 20% higher than the power only plant alternative
- The CHP and counterfactual plant would have the same condensing capacity, fuel consumption and O&M cost
- Displaced Boiler Efficiency = 81% GCV

4.

5. **Case 3a)** A 300 MWe gas fired CCGT CHP providing heat and electricity to the site with surplus electricity exported to the grid.

- Annual savings: £4.49M/year
- Simple payback: 8.8 years
- CO2 Saving: 16,632 TCO2/year

6. **Case 3b)** A 50 MWe gas fired CCGT CHP providing heat and electricity to the site with surplus electricity exported to the grid.

- Annual savings: £3.76M/year

- Simple payback: 2.4 years
- CO2 Saving: 14,583 TCO2/year

Wider benefits

78. The recovery and use of heat that would otherwise be ‘wasted’ should give additional benefits which have not been quantified in this assessment. These include:

- reduced carbon emissions, contributing to the achievement of set targets and low carbon economy and potentially improving air quality (see Section 8). This cannot currently be quantified due to uncertainty over the number of plants that will install cogeneration or waste heat recovery;
- possible air quality benefits, although this is likely to depend on the technologies that are installed, what they replace from the baseline, and their location; and
- improved security of energy supply through a reduction of fuel use and exposure to domestic and international energy market risks.

The level of these wider benefits depends on the outcomes of the CBAs and what technologies are installed as a result, as the carbon and air quality impacts will depend on the technology chosen and fuel saving achieved. As such the wider benefits have not been quantified.

6. Competition assessment and direct impact on business

79. The competition assessment guidelines[20] set out four questions to establish whether a proposed policy is likely to have an effect on competition. In particular, the assessment needs to establish whether the requirement to carry out a CBA across a range of new and refurbished combustion installations >20MWth would affect the market by:

- directly limiting the number or range of suppliers;
- indirectly limiting the number or range of suppliers;
- limiting the ability of suppliers to compete; or by
- reducing suppliers’ incentives to compete vigorously.

80. A brief summary of the four questions and a response considering the proposed requirement is presented in Table 12 below.

[20] OFT http://www.oft.gov.uk/shared_oft/reports/comp_policy/Quick-Guide1-4.pdf

Table 12. Competition Assessment Filter Questions

Do the proposed requirement to carry out a CBA	Response	Comment
Q1. …directly limit the number or range of suppliers?	No	The proposed requirement to carry out a CBA does not seek to directly limit the number of suppliers
Q2. …indirectly limit the range of suppliers?	No	The proposed requirement to carry out a CBA is not likely to limit the range of suppliers. In particular, the proposed requirement does not prevent entry or exit from the market for any of the sectors affected, e.g. Electricity Supply Industry (ESI), refineries, iron and steel, chemical industry etc. Furthermore, the cost associated with developing a CBA accounts for less than 1% of Gross Operating Surplus available to plants even in the case of small enterprises and, therefore, are unlikely to create further barriers and limit the range of suppliers.
Q3. …limit the ability of suppliers to compete?	No	Carrying out the required CBA will provide new and refurbished installations with better information on relative costs and benefits of alternative heat supply and waste heat management options available to them and avoid investing in sub-optimal options. In the longer-term the proposed policy option should result in increased energy efficiency and, potentially in cost savings. Furthermore, taking into account the relatively low compliance costs, the proposed requirement is not likely to affect the ability of suppliers to compete.
Q4. …reduce suppliers' incentives to compete rigorously?	No	The proposed requirement does not seek to limit the incentives for suppliers to compete. In particular, implementing energy saving measures in line with CBA recommendations could result in reduction of (energy) cost or additional revenue and place the installation in an advantageous position.

81. Overall, the proposed requirement to develop a CBA for new and refurbished installations is unlikely to have any adverse impacts on competition. As the regulation is being transposed with no gold plating it is not expected that operators in the UK will be disadvantaged relative to their European counterparts.

Direct cost and benefit to business

82. As this impact assessment concerns the transposition of a European Directive, it is out of scope of "One-In, Two-Out" (OITO). The direct impact on business has nevertheless been calculated. The net present value of the cost to business for the period July 2014 to July 2024 is £12.05 million (£6.41 to £17.69 million).

83. The Equivalent Annual Net Cost to Business (EANCB) incorporates only the direct costs and benefits associated with the policy change that would be incurred by businesses. The EANCB is £1.03million (2009 prices)[21].

Non-quantified impacts on business

84. Some possible non-quantified costs have been identified that could affect businesses. These are discussed in greater detail in the unquantified costs part of Section 4. They largely relate to whether investment could be deterred as a result of transposition. As the EA has the discretion to permit less cost-effective options if capital constraints make the more cost-effective option unaffordable, this risk is considered to be low. Additionally operators have flexibility around the assumptions they apply in the CBA to reflect their particular circumstances. As such the results of the CBA should be robust.

85. The possibility that the requirement to complete a CBA could introduce delays to investment was also considered. Timescales for the EA to assess CBAs will be discussed with operators as part of their ongoing discussions, so that this can be planned for. The CBAs

[21] For the purpose of OITO, net costs to business are to be presented in 2009 prices and discounted to 2010 using the GDP deflator, in order to enable all policies to be compared using consistent pricing and discounting.

will be able to factor in appropriate timescales for cogeneration options to be designed and planned. The risk of unforeseen delay should therefore be low.

86. Considering these possible sources of cost to business, it is concluded that unquantified costs to business are unlikely to be significant. Further, it is noted that the quantified cost estimates are conservative as they assume no businesses conduct similar CBAs already, and no downward adjustments are made for operators that are not required to conduct a CBA (for instance, if no sources of waste heat are identified).

87. No quantitative estimates of benefits have been produced in this impact assessment. The likely benefits to business are the cost savings that result from operators taking up cogeneration/waste heat recovery options. These benefits would not count towards the EANCB calculation as they are not direct.

7. Distributional effects

Definitions and the Small and Micro-business Assessment

88. Small and micro-businesses are affected disproportionately by the burden of regulation and all new regulatory proposals should be designed and implemented in a manner aiming to mitigate disproportionate burdens. The default assumption set in the Better Regulation Framework Manual (June 2013) is that there will be a legislative exemption for small and micro-businesses where a large part of the measure can be achieved without including such businesses in the scope of the policy proposal. There is no exemption for SMEs in the EED so this section considers the possible impacts on them.

89. The Better Regulation Framework Manual defines micro and small businesses according to a staff headcount. Micro-businesses are those employing up to 10 FTE staff members while small businesses employ between 11 and 49 FTE staff. The Manual provides guidance on Small and Micro-business Assessment including a range of potential mitigation measures if the proposed policy option does have an impact on small and micro-businesses.

Assessment of Businesses likely to be affected

90. Annex A sets out the consideration given to the businesses that are likely to be affected. Overall, the key sectors affected include Electricity Supply Industry (ESI sector), Iron and Steel, Petroleum Refineries and other industrial sectors, including non-ferrous metals, chemical, food and drink, pulp and paper production etc.

91. This analysis concludes that operators of combustion plants >50MWth are unlikely to fall within small and micro-business categories. Similarly operators of combustion plants between 20 and 50MWth in the electricity supply and refinery sectors are not expected to be small or micro-businesses. However in the industrial sector it is possible that some operators of combustion plants between 20 and 50MWth may fall within the small enterprise category. None are expected to be micro-businesses.

Measurement of the Impact on Micro and Small Enterprises

92. The impact of the proposed regulation on micro and small enterprises relates to whether the operators are able to meet the costs of compliance i.e. costs associated with carrying out CBA for planned or refurbished installations as well as the administrative costs associated with the regulation. These costs can then be assessed by comparing the compliance and administrative cost per plant against the level of financial resources available to the operator for investment, as indicated by the gross operating surplus (GOS). Annex A details the comparison conducted.

93. The assessment suggests that even in the case of small enterprises (10-49 FTE), the expected annual compliance and administrative cost per enterprise is negligible and corresponds to 0.03%-0.7% of the average GOS across the affected sectors. Furthermore, any adverse impacts, may potentially be counteracted by the financial savings associated with increased energy efficiency and additional revenues if waste heat is used on site or sold to a third party.

8. Social Impact Assessment

94. The proposed policy option requires a cost benefit analysis (CBA) to be undertaken for a range of new and refurbished plants > 20MWth. The policy requirement per se would only affect the installations concerned and environmental and energy consultancy sector that is likely to be assisting in carrying out these CBAs.

95. As discussed above it is very unlikely the proposed legislation will impact SMEs significantly. In particular, the costs of developing CBAs are estimated to be below 1% of annual Gross Operating Surplus across the sectors affected even in the case of small enterprises. Although the legislation does not allow for derogations for SMEs, the impact on SMEs if they are affected is likely to be small.

96. Depending on the outcomes of the CBAs carried out on new and refurbished installations, a range of energy efficiency measures might need to be implemented resulting in further costs and potentially employment impacts. However, the results of these assessments will be site and installation specific and no predictions with regard to the associated costs can be made at this stage.

97. The reduction in total energy consumption has the potential to lead to environmental and health benefits of reducing air pollution, including NOX, SO2 and dust (PM) as well as other air pollutants. However, this cannot be determined without further information on the originally proposed schemes and the alternative approach taken as a result of a requirement to fit CHP. For example, installation of a diesel fired reciprocating engine CHP plant instead of meeting the same demand using a gas fired boiler and grid electricity can actually lead to an increase in air pollutant emissions.

9. Uncertainties and assumptions

98. As with any assessment of this nature, there are a number of uncertainties and limitations that should be kept in mind when considering the findings, these include:

- DECC provided data covering new electricity and district heating plants for two of the three considered thermal input categories. This was complemented with AMEC estimations based on plant turnover to fill the gaps. Although filled using the best available estimates, this adds a degree of uncertainty to the final results. In particular, no information on industrial plants was provided by DECC and therefore the forecast applied in the analysis is solely based on AMEC modelling. Similarly, no data was provided for plants between 20-50MW.
- There is uncertainty over how many of these plants may already be required to undertake a CBA as part of existing permitting requirements, and how many may be exempt from conducting a CBA (for instance, due to lack of identified heat demand in the surrounding area).
- Plant forecasts in the model also rely on a number of assumptions. For example, growth data is based on energy consumption projections by fuel type and sector. However, it is impossible to discern if the projected change in consumption is directly linked to a proportional change in the considered plant types or is the result of other factors. Assumptions regarding the number of refurbishments in current and future plants are also applied introducing uncertainty in the results of the model. Emerging technologies may

increase the lifetime of the plant but may also trigger more frequent refurbishments. Future regulations may also alter the lifetime and the number of required refurbishments.

- Uncertainties with respect to the costs associated with undertaking and reviewing a CBA. This will depend largely on the complexity of the plant in question. We have applied ranges to try and reflect this variation.
- It is uncertain what benefits the CBAs might identify (and what benefits would result in practice).

99. There is greater uncertainty associated with the number of CBAs compared to the cost of the CBAs. The estimated number of plants affected was developed based on the best available information from DECC and AMEC, however the range remains uncertain. In view of the uncertainty we have taken a conservative approach, for instance by including all generators >50MW because the extent to which they are already covered by existing requirements is unclear.

100. Given the uncertainties outlined above, no benefits have been estimated. It is not clear what benefits might be expected from the policy. Just as the costs are considered conservative because they don't take account of where operators already make similar assessments, this represents a conservative approach on the benefits side.

Assumptions

101. The key assumptions are listed in the table below, along with their source. These assumptions were tested at consultation but respondents did not provide any additional evidence that suggested these assumptions were inaccurate or information enabling us to improve them. In consequence the calculations and assumptions are the same as those presented in the consultation stage IA.

Table 13. Assumptions and sources

Assumption		Source
Wage costs: operator	£27.14/hour	ONS Annual Survey of Hours and Earnings (2011)[22]. 2011 prices inflated to 2013 (HMT GDP deflator) and uplifted by 30% for non-wage costs. Operators assumed to be Production Manager (112) and regulator assumed to be Conservation and Environmental Protection Officer (3551).
Wage costs: regulator	£19.58/hour	
Costs of CBA	£10,000-£40,000/CBA	From DECC's consultation stage impact assessment on the EED and supplemented by estimates from AMEC.
Time: operator Time: regulator	14-35 hours/CBA 21-45 hours/CBA	Larger installations assumed to require more time. AMEC expert judgement plus information from Environment Agency on the time taken to review the recent Tilbury Power Station CBA (870MW output power). Time for operator could be higher if they don't commission consultants to complete the CBA. Total costs of this are not expected to be greater than when consultants are commissioned.
Number of installations affected	See Table 3.4 for summary	DECC forecasts and data (included DUKES, 2013; Updated Energy Projections 2013); AMEC – previous analysis and expert judgement; Large Combustion Plant Inventory (Defra, 2009);
Price year	2013	Except for direct impact on business, when 2009 prices are used.
PV base year	2014	

Implementation

102. Implementation will be a matter for the regulators, in accordance with guidance from the European Commission[23] and, if necessary, from Government.

103. The preferred option will be delivered through amendment of the Environmental Permitting (England and Wales) Regulations 2010. As already amended[24], these Regulations as a whole have to be reviewed in relation to England and a report published by 6 April 2017. This review will therefore provide a means of **post-implementation review**.

104. Article 24(6) of the EED requires Member States to submit to the European Commission before 30 April each year statistics on:

- national electricity and heat production from high and low efficiency cogeneration
- cogeneration heat and electricity capacities and fuels for cogeneration, and
- district heating and cooling production and capacities, in relation to total heat and electricity production and capacities.

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[22] ONS Annual Survey of Hours and Earnings was available. The hourly wage cost for a production manager changed from £20.11 in 2011 to £19.89 in 2012. The corresponding wage rate for an Environmental Protection Officer (EPA) was not available. A similar job title to EPA was checked. However its suitability as a substitute was questionable due to a large drop in employment of over 75% between 2011 and 2012. As the wage of a production manager fell between 2011 and 2012 our estimates (in which we use 2011 figures) are likely to be an overestimate and hence are conservative estimates.

[23] http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013SC0449

[24] Specifically, by regulation 11 of the Environmental Permitting (England and Wales) (Amendment) Regulations 2012 (SI 2012 No.630) which inserts a review requirement.

In that way, information relevant to the effectiveness of the measures covered by this impact assessment will be accumulated.

105. Defra has a long established arrangement through which representatives of industry organisation, environmental regulators, environmental NGOs, the devolved administrations and other Government Departments meet regularly to discuss issues arising from the EPR as they concern pollution control at industrial installations component Directives. This arrangement will continue to provide an effective means of reviewing the implementation of Articles 14(5)-(8) of the EED.

10. Conclusions

106. Overall the transposition of Articles 14(5)-(8) will lead to additional costs being incurred primarily by developers/operators as a result of needing to undertake CBAs of the potential for using waste heat. Regulators will also incur costs as a result of needing to review any CBAs provided to ensure they meet the requirements of the legislation and agree what further actions, if any, may need to be undertaken. In practice these costs for the regulators are likely to be passed onto operators.

107. As highlighted above, a CBA must be undertaken by developers of installations above 20MWth and if the result is positive, the appropriate authorisation criteria and/or permit will require operation as cogeneration or with waste heat recovery. A permit will not be granted for operation without cogeneration/heat recovery where the CBA is positive except for in exceptional circumstances.

108. Overall, the total additional cost for both regulators and developers/operators associated with the transposition of these articles is estimated to be £12 million in the central case, within a range of £6-18million, over the assessment period (2014-2024). This assumes that all new or refurbished plants in scope are required to undertake a detailed CBA. This cost assessment may be an overestimate as some of the plants already have to consider recovering waste heat as part of the existing consent regime or choose to conduct similar assessments anyway.

109. Benefits have not been quantified due to their site specific nature and uncertainty around the extent to which the CBAs will represent additional activity. Where benefits do arise for operators, they are likely to include improvements in energy efficiency. Wider benefits could include reductions in carbon emissions as well as potential economic benefits for the use of waste heat (either on site or elsewhere).

References

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Annex A: impact on small and micro-businesses

Overview

110. The scope of Articles 14(5)-(8) of the Energy Efficiency Directive (2012/27/ EU)[25] includes the following installations:

- New or refurbished electricity generation installations;
- New or refurbished industrial installations generating usable waste heat; and
- New district heating or cooling networks, or a new or refurbished energy production installation within an existing network.

111. The requirement to undertake a CBA concerns only new or refurbished installations. The number and the size of new or refurbished installations, in particular across different industrial sectors, is highly uncertain. For the purpose of the assessment, it is assumed that the existing composition with regard to the sectors affected and typical size of the companies remains over the assessment period.

112. Overall, the key sectors affected include Electricity Supply Industry (ESI sector), Iron and Steel, Petroleum Refineries and other industrial sectors, including non-ferrous metals, chemical, food and drink, pulp and paper production etc.

Combustion plants >50 MWth

113. The assessment of the number and size of the businesses likely to be affected was based on the analysis of the UK LCP 2009 emissions inventory[26] that captures plants >50MWth and DUKES 2013 data.

Electricity Supply Sector

114. According to the inventory there were about 130 large combustion plants within the electricity supply sector split equally between 50-300MW and >300MW plants. In total, about 30 companies are operating these plants including E.ON, EDF Energy, Scottish and Southern Energy, Scottish Power, AES Corporation, Centrica, GDF Suez, RWE Npower, Drax Power Limited and others. Overall, the operators within the sector tend to be large multinational corporations (e.g. GDF Suez, AES Corporation etc.) employing up to tens of thousands of employees or large plant operators, e.g. Eggborough Power Ltd or Drax Power Ltd employing 800 staff members. It is, therefore, unlikely that companies operating LCPs within electricity supply sector fall within small and micro-businesses category.

Refineries

115. The LCP Inventory 2009 reports about 55 combustion plants within refinery sector with the capacity above 50MWth located on about twelve sites (although as of 2013 there are only seven operational sites), including,

[25] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0001:0056:EN:PDF
[26] Available from: http://cdr.eionet.europa.eu/gb/eu

for instance, Grangemouth, Fawley, Humber and other refineries. The analysis of their ownership and operation indicates that these refineries are owned and operated by large international corporations, including, for example, Valero Energy Corporation, Essar Energy, Philips66, Ineos, Murco, ExxonMobil, and Total. The majority of these plants have a capacity of 50-300MWth and there are no refineries with a capacity between 20 and 50MWth. No small and micro-businesses within refineries sector will be affected by the new requirements.

Iron and Steel Sector

116. The UK LCP 2009 inventory suggests that there are about 10 plants within the iron and steel sector >50MWth situated on four different industrial sites. All of these steelworks are owned and operated by two international corporations employing thousands of people on the affected industrial sites alone. All these plants except for one fall within 50-300 MWth capacity.

Other Industrial Sectors

117. A wide range of sectors also appear on the UK LCP Inventory including, in particular, chemical sector (organic and inorganic), pulp and paper production, food manufacturing, textiles production, manufacturing of cars as well as specialised utilities services companies and gas compressor stations.

118. The majority of these plants, i.e. about 95% are between 50-300 MWth. Like with the other sectors, large national and international companies that employ hundreds and thousands of staff dominate the list. For instance, food production is represented by companies such as British Sugar, British Salt, Tate & Lyle; while chemical sector combustion plants are owned by companies such as Shell, BP, Ineos, SABIC Petrochemicals, Ciba UK etc. No impact on small and micro-businesses is anticipated for plants > 50MWth.

Combustion plants 20-50 MWth

Electricity Supply Sector

119. The assessment of the data available (DUKES) suggests that it is unlikely that companies operating installations with a capacity between 20MWth and 50MWth within the electricity supply sector fall within small and micro-businesses category

120. According to DUKES 2013 data, as of May 2013 there were in total 18 plants with a capacity between 20-50MWth. All of these installations are owned and operated by the same large energy companies, including E.ON, Scottish and Southern, EDF Energy, GDF Suez and others.

Refineries

121. No small and micro-businesses within the refineries sector are likely to be affected by the new requirements as there are no further refineries with a capacity between 20 and 50MWth.

Industrial Sectors

122. No data is available on operators of the installations with a capacity below 50 MWth across a wide range of sectors.

123. For some of these sectors, Eurostat Structural Business Statistics (SBS) provides sectoral data on enterprise size categories, thus allowing for a preliminary assessment of SMBA-relevance to be made. The key sectors affected may include iron and steel, pulp and paper, chemical industry, textiles, food production, car manufacturing etc.

124. Eurostat data suggests that a significant proportion of the industrial sectors affected fall within micro enterprise group (0-9 employees). In practice, however, installations with a thermal input of 20-50MW are typically a part of a bigger complex requiring more than 9 employees to maintain and operate, and therefore it is highly unlikely that any micro-size enterprises would operate such installations.

125. A number of the plants within 20-50 MWth are directly associated to an IED regulated installation, which is extremely unlikely to be an SME and are assumed to be large-size enterprises. Furthermore, 20-50 MWth plants are captured under the EU ETS and unlikely to be micro or small enterprises.

Table A1. Enterprise Size Categories per Sector in 2007 for UK (numbers and %)

Sector	Micro (0-9)	Small (10-19)	Small (20-49)	Notes
Basic metals manufacturing	21,604	3,469	2,440	Basic metals and fabricated metal products
	75%	12%	8%	
Chemical production	2,369	368	381	
	64%	10%	10%	
Pulp and Paper	24,053	2,426	1,405	
	83%	8%	5%	
Food Industry	4,006	1,021	862	
	57%	14%	12%	
Textiles	6,585	817	573	
	79%	10%	7%	
Manufacture of vehicles	2,017	329	270	Manufacture of motor vehicles, trailers and semi-trailers
	66%	11%	9%	
Manufacture of coke, refined petroleum products	184	14	13	Manufacture of coke, refined petroleum products and nuclear fuel
	76%	6%	5%	

Note: Number of enterprises per size category, available in Eurostat Structural Business Statistics (SBS) for various sectors in 2007, used to estimate the proportions of different enterprise size categories for the sectors considered in this report.

126. Based on these arguments it can be assumed that no plant operators are micro-sized enterprises, although some of the installations could fall within the small enterprise category.

Non-industrial sectors

127. In addition to the sectors discussed above, 20-50MWth plants can also be found in non-industrial sectors such as public buildings (e.g. hospitals and universities) as the 20MWth threshold is aggregate.

128. In some cases they are owned and operated by specialist companies providing such services. As such, the size of the organisation(s) using the output of a combustion plant (e.g. a hospital) may not be the same as the size of the enterprise operating it. In addition, as demonstrated by the analysis of plants >50 MWth, in many cases an enterprise owns and operates more than one combustion plant.

129. It is unlikely that any of these plant operators are micro-sized enterprises although some could potentially fall within the small enterprise category.

Measurement of the impact on Micro and Small Enterprises

130. The impact of the proposed regulation on micro and small enterprises relates to whether the operators are able to meet the costs of compliance i.e. costs associated with carrying out CBA for planned or refurbished installations as well as the administrative costs associated with the regulation. These costs can then be assessed by comparing the compliance and administrative cost per plant against the level of financial resources available to the operator for investment.

131. In the case of 20-50 MW plants the costs of undertaking a CBA range between £10,000 (low estimate) and £25,000 (high estimate). Administrative costs range between approximately £360 up to £715 per plant. The lifetime of a new installation is around 26 years while that of refurbished installations is about 13 years. The equivalent annual compliance and administrative cost ranges between £620 and £1,020 per new/refurbished installation as a low cost estimate and £1,540 and £2,530 per new/refurbished plant as a high cost estimate.

132. Information available in Eurostat Structural Business Statistics includes gross operating surplus (GOS), which is the capital available to companies which allows them to repay their creditors, to pay taxes and eventually to finance all or part of their investment[27]. Considering that GOS can be used for financing investment, total cost per plant are compared against GOS per operator to assess the economic impacts of proposed regulation. For each enterprise size category and per sector, GOS was divided by the number of operators to estimate the level of capital available at the operator level on an annual basis and compared with the cost estimates. The table below provides an indication of the regulatory burden[28] in general and for small businesses in particular on a sectoral basis.

[27] http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Glossary:Gross_operating_surplus_(GOS)_-_NA

[28] By dividing total annualised cost per enterprise by the GOS for the relative size class to express the costs as a percentage of the GOS.

Table A2. Total Annual Compliance and Administrative Costs per Enterprise as a Proportion of GOS

20-50 MWth	GOS: small enterprises (10 to 49 employees)	Low cost estimate		High cost estimate	
		New, % of GOS	Refurbished, % of GOS	New, % of GOS	Refurbished, % of GOS
Basic metals manufacturing	372,212	0.17	0.27	0.41	0.68
Chemical production	706,008	0.09	0.14	0.22	0.36
Pulp and Paper	359,567	0.17	0.28	0.43	0.70
Food Industry	545,512	0.11	0.19	0.28	0.46
Textiles	416,906	0.15	0.24	0.37	0.61
Manufacture of vehicles	533,556	0.12	0.19	0.29	0.47
Manufacture of coke, refined petroleum products	1,962,963	0.03	0.05	0.08	0.13

Note: Total annual costs per enterprise consist of annualised compliance costs (i.e. annualised capital costs) and annual administrative costs. Administrative costs only include those for operators. The assessment is relevant to the installations with the thermal input 20-50 MW and concern small businesses only. No micro businesses (0-9) are assumed to operate installations of such size.

133. The assessment suggests that even in the case of small enterprises (10-49 FTE), the expected annual compliance and administrative cost per enterprise is negligible and corresponds to 0.03%-0.7% of the average GOS across the affected sectors. Furthermore, the adverse impacts, if any, are likely to be counteracted by the financial savings associated with increased energy efficiency and additional revenues if waste heat is used on site or sold to a third party.

TRANSPOSITION NOTE

This Note shows how the requirements of article 14(5)-(9) of Council Directive 2012/27/EU on energy efficiency and amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC ("the Energy Efficiency Directive"), have been implemented in England and Wales.

Approach of the Regulations

The environmental permitting procedure under the Environmental Permitting Regulations 2010 (S.I. 2010/675) ("the 2010 Regulations") will be used to implement the requirements of article 14(5)-(9) of the Energy Efficiency Directive in England and Wales. The 2010 Regulations will be amended by the 2015 Regulations by the insertion of a new schedule 8A and consequential amendments to provisions in the 2010 Regulations. Other amendments to the 2010 Regulations will be made to include installations not previously regulated under the 2010 Regulations, for the purposes of applying the requirements of the Energy Efficiency Directive to those installations. Environmental permitting, implemented through the 2010 Regulations, is an established process for regulating the development, operation and refurbishment of industrial installations in England and Wales. Nearly all of the installations subject to Article 14(5) are already subject to the 2010 Regulations and amending these regulations was determined to be the most appropriate route to transpose these provisions of the Energy Efficiency Directive in England and Wales.

The aim of the Directive is to drive improvements in energy efficiency across the EU. It is intended to put the EU on track to reduce energy use by 20% by 2020 (against 2007 Business-as-Usual projections).

This Transposition Note refers only to Article 14(5)-(9) of Directive 2012/27/EU and their transposition in England and Wales. These provisions have been transposed separately in Scotland and Northern Ireland. The Energy Efficiency (Encouragement, Assessment and Information) Regulations 2014, laid in Parliament in June 2014, transposed, among other provisions, Article 14 (1) and (3) in relation to the UK and Article 14(10) in relation to Great Britain.

Copy-out has not been used to transpose all the provisions in article 14(5)-(9) of the Energy Efficiency Directive. The articles impose obligation that are required under the EED to be applied through authorisation or permit criteria. These obligations will to be incorporated into the existing integrated pollution prevention and control regulatory regime in 2010 Regulations. Therefore the application of some of the provisions of the Energy Efficiency Directive to installations already regulated by way of permit conditions under the 2010 regulations had to be made clear. A departure from copy-out was necessary to ensure clarity and legal certainty. The impact of this departure from using copy-out has been assessed and does not go beyond the minimum necessary to transpose article 14(5)-(9) of the Energy Efficiency Directive.

The requirements of article 14(5)–(9) of the Energy Efficiency Directive, will be implemented by the 2015 Regulations as follows:

Article in the Energy Efficiency Directive	Objective	Implementation
14(5)(a)	Requires Member States to ensure that a cost benefit analysis is carried out when a new thermal electricity generation installation with a total thermal input exceeding 20 MW is planned, to assess the costs and benefits of providing for the operation of the installation as a high-efficiency cogeneration installation.	Paragraph 2 of Schedule 8A provides that an application for the grant of an environmental permit for combustion or waste incineration plants generating electricity must contain a cost benefit analysis which assesses the cost and benefits of providing for the operation of the installation as a high-efficiency cogeneration installation. Paragraph 1(2)(c) of Schedule 8A provides that the requirements of Schedule 8A apply to installations which have a net rated thermal input exceeding 20 MW. Regulation 5 amends Part 2 of Schedule 1 to the 2010 Regulations to ensure that where the net rated thermal input of individual appliances on the same site exceeds 20 MW, they are treated as a single installation with a net thermal input exceeding 20MW. Paragraph 1(2)(d) of Schedule 8A makes similar provision in relation to small waste incineration

		plants. Elaboration has been used in these provisions to clarify the scope of the obligation in relation to installations carrying out activities under the permitting regime in the 2010 Regulations. Article 14(5)(a) is intended to create and obligation which has to be complied with and this obligation must be sufficiently clear so that it can be understood.
14(5)(b)	Requires Member States to ensure that a cost benefit analysis is carried out when an existing thermal electricity generation installation with a total thermal input exceeding 20 MW is substantially refurbished, to assess the costs and benefits of converting it to high-efficiency cogeneration.	Paragraph 3 of Schedule 8A provides that the regulator must ensure that an application for a variation of an environmental permit is made before the energy plant of a combustion or waste incineration plant generating electricity is substantially refurbished. Paragraph 4 of Schedule 8A provides that the application for a variation must include a cost-benefit analysis which assesses the cost and benefits of converting the installation to high-efficiency co-generation. Regulation 5 amends Part 2 of Schedule 1 to the 2010 Regulations to ensure that where the net rated thermal input of individual appliances on the same site exceeds 20 MW, they are treated as a single installation with a net thermal input exceeding 20MW. Paragraph 1(2)(d) of Schedule 8A makes similar provision in relation to small waste incineration plants.

		Paragraph 1(2)(c) of Schedule 8A provides that the requirements of the Schedule apply to installations which have a net rated thermal input exceeding 20 MW. Elaboration has been used in these provisions to clarify the scope and extent of the obligation in relation to installations carrying out specified activities under the permitting regime in the 2010 Regulations. Article 14(5)(b) is intended to create an obligation which has to be complied with and this obligation must be sufficiently clear so that it can be understood.
14(5)(c)	Requires Member States to ensure that where an industrial installation with a total thermal input exceeding 20MW generating waste heat at a useful temperature level is planned or substantially refurbished a cost benefit analysis is carried out to assess the costs and benefits of utilising the waste heat to satisfy economically justified demand, including through cogeneration, and of the connection of that installation to a district heating and cooling network.	Paragraph 7 of Schedule 8A provides that an application for an environmental permit for a new installation, generating waste heat at a useful temperature level, other than an electricity generating installation in paragraph 2 of that schedule, must contain a cost benefit analysis. Paragraph 8of Schedule 8A provides that the regulator must ensure that an application for a variation of an environmental permit is made before the energy plant of an installation, generating waste heat at a useful temperature level, other than an electricity generating installation in paragraph 4 of that Schedule, is substantially refurbished. Paragraph 9 of Schedule 8A provides that the application for a variation of the environmental

		permit must contain a cost benefit analysis. Paragraph 10 of Schedule 8A provides that the cost-benefit analysis required by paragraphs 7 and 9 must include an assessment of the cost and benefits of utilising the waste heat to satisfy economically justified demand, including through cogeneration and connection of that installation to a district heating and cooling network. Elaboration has been used in these provisions to clarify the extent of the obligation. Article 14(5)(c) is intended to create an obligation which has to be complied with and this obligation must be sufficiently clear so that it can be understood.
14(5)(d)	Requires Member States to ensure that where a new distract heating and cooling network is planned or in an existing district heating and cooling network a new energy production installation with a total thermal input exceeding 20MW is planned or is to be substantially refurbished, a cost benefit analysis is carried out to assess the costs and benefits of utilising the waste heat from nearby industrial installations.	Paragraph 12 of Schedule 8A provides that an application for an environmental permit for a combustion or waste incineration plant which forms part of a new district heating and cooling network must contain a cost benefit analysis. Paragraph 13 of Schedule 8A provides that the regulator must ensure that an application for a variation of an environmental permit is made before the energy plant for a combustion or waste incineration plant which forms part of an existing district heating and cooling network is substantially refurbished. Paragraph 14 of Schedule 8A provides that the application for the variation of the environmental permit must contain a cost benefit analysis.

		Paragraph 15 provides that the cost benefit analysis must include an assessment of the cost and benefits of utilising the waste heat from nearby industrial installations. Elaboration has been used in these provisions to clarify the scope and extent of the obligations in relation to installations carrying out specified activities under the permitting regime in the 2010 Regulations. Article 14(5)(c) is intended to create obligations which have to be complied with and these obligation must be sufficiently clear so that they can be understood.
14 (5) First paragraph	This provides that the fitting of equipment to capture carbon dioxide produced by a combustion installation with a view to its being geologically stored shall not be considered refurbishment.	Paragraph 1(2)(e) of Schedule 8A provides that fitting of equipment to carry out the activity of carbon dioxide capture from and installation for the purposes of geological storage is excluded from the definition of "substantial refurbishment". Elaboration has been used because this provision limits the extent of the application of the obligations in paragraphs 3, 8 and 13 of Schedule 8A, and is necessary to clarify the scope of the exception in relation to installations carrying out a specific activities under the permitting regime in the 2010 Regulations.
14(5)	This provides that Member States may require that the cost-benefit analysis in article 14(5)(c) and (d)	This optional provision has not been transposed.

Second paragraph	to be carried out in co-operation with the companies responsible for the operation of district heating and cooling networks.	Requiring district heating and cooling network operators to be involved in the cost benefit analysis required under Articles 14 (5)(c) and (d) would have placed an unreasonable burden on them. In practice we expect that developers of such installations are likely to involve the network operators in order to accurately reflect costs. Permit applications are subject to public consultation which will ensure an alternative opportunity for network operators to provide input should they wish.
14(6) (a)-(c).	Enables Member States to exempt certain installations from the application of the cost-benefit obligations in article 14(5).	Paragraph 5 of Schedule 8 provides that the cost benefit obligations do not apply to peak load and back-up electricity generating installations that are planned to operate under 1500 hours per year as a rolling average over 5 years. Copy-out has been used to transpose this provision. Paragraph 21(a) of Schedule 8A provides that the cost benefit obligations do not apply to installations which have to be located close to a geological storage site for the storage of captured carbon dioxide. Copy-out has been used to transpose this provision. Paragraph 21(b) of Schedule 8A provides that the cost benefit obligations do not apply to combustion and waste incineration plants carried on within a nuclear site.

		Elaboration has been used to clarify the scope of the exception in relation to its application to installations carrying out specific activities under the permitting regime in the 2010 Regulations.
14(6) First paragraph	This provides that Member States may lay down thresholds for exempting individual installations, in terms of available useful waste heat, the demand for heat or distances between installations and district heating networks, from the cost benefit obligations in articles 14(5)(c) and (d).	Paragraph 11 of Schedule 8A exempts installations from the requirement to carry out cost-benefit on the basis of waste heat temperature, heat demand and the distance between heat source and heat demand installations. Elaboration has been used because this provision exempts installations from the application of the obligations in paragraphs 7 to 10 of Schedule 8A in specific circumstances.
14(6) Second paragraph	This provides that Member States have to notify the exemptions adopted to the Commission by 31 December 2013 and any subsequent changes.	This provision has not been transposed. This provision concerns only relations between Member States and the Commission, and therefore does not have to be transposed.
14(7)(a)-(c)	This provides that Member States shall adopt authorisation criteria as referred to in Article 7 of Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, or equivalent permit criteria, to take account of the comprehensive assessment in article 14(1) and the cost benefit analysis, and ensure that the requirements of article 14(5) are fulfilled.	Paragraphs 16 of Schedule 8A provides that the regulator must take into account the outcome of the cost-benefit analysis and from 31 December 2015 the comprehensive assessment under article 14(1) when considering applications for the grant of variation of environmental permits for the installations covered by schedule 8A. Paragraph 17 and 18 provide that where the cost benefit analysis shows that benefits exceeds costs, the regulator must include conditions in the

		environmental permit which give effect to the outcome of the analysis. The installations described in paragraphs 2, 7, and 12 of Schedule 8A are required to include the cost benefit analysis as required by article 14(5) with an application for the grant of an environmental permit. Under paragraphs 3, 8, and 13of Schedule 8A the regulator is required to ensure that an application for a variation of an environmental permit is made before a substantial refurbishment is carried out, and include a cost-benefit analysis must be included with the application. Elaboration has been used in these provisions to clarify the scope of the obligations in relation to installations carrying out specified activities under the permitting regime in the 2010 Regulations. Article 14(7)(a)-(c) are intended to create obligations which have to be complied with and these obligation must be sufficiently clear so that they can be understood.
14(8)	This provides that Member States may exempt individual installations from the implementation of options whose benefits exceeds costs where there are imperative reasons of law, ownership or finance for doing so. The Member State must submit a notification to the Commission within three months of the decision to exempt.	Paragraph 19 of Schedule 8A provides that the obligation to include conditions to give effect to the cost-benefit analysis in paragraphs 17-18 does not apply if the regulator decides that there are imperative reasons of law, ownership of finance for them not to apply. Paragraph 20 requires the regulator to the appropriate authority of that decision.

		Copy out has been used for this provision.
14(9)	This provides that articles 14.5-8 shall apply to installations covered by Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control) without prejudice to the requirements of that Directive.	Paragraph 22 of Schedule 8A provides that nothing in this Schedule affects the application of the Industrial Emissions Directive to installations. Elaboration has been used for this provision to comply with drafting practice.
2(30)	Definition of “cogeneration”	Paragraph 1(1) of Schedule 8A. Copy-out has been used for this definition.
2(31)	Definition of “economically justifiable demand”	Paragraph 1(1) of Schedule 8A. Copy out has been used for this definition.
2(34)	Definition of “high-efficiency cogeneration”	Paragraph 1(1) of Schedule8A. Copy out has been used for this definition.
2(44)	Definition of “substantially refurbished”	Paragraph 1(1) of Schedule 8A. Elaboration has been used for this definition to provide clarity regarding the application of this definition to a specific part of the installation.

Agenda Item 6

Llywodraeth Cymru
Welsh Government

WRITTEN STATEMENT
BY
THE WELSH GOVERNMENT

TITLE	**Statement on the Social Services and Well-being (Wales) Act tranche 1 consultation outcomes.**
DATE	**27 February 2015**
BY	**Mark Drakeford, Minister for Health and Social Services**

In November 2014, the Welsh Government started consulting on the first tranche of regulations, the related codes of practice and statutory guidance, to be made under the Social Services and Well-being (Wales) Act 2014.

Following the end of the consultation on February 2, 2015, this statement updates Assembly Members about progress to date and the additional funding and support which will be made available as the Act is implemented in Wales.

The consultation covered five parts of the Act – specifically parts 2, 3, 4, 7 and 11 – in line with the approach to implementation set out by the former Deputy Minister for Social Services Gwenda Thomas AM in her written statement on July 16, 2014.

During the 12-week consultation period, two successful events were held, involving 250 delegates from a wide range of stakeholder bodies from across Wales. More than 300 substantive written responses were received in response to the consultation from a wide range of individuals, representative groups, Local Government and professional organisations.

The overall response to the consultation was positive. Respondents were supportive of the principles and detail of the draft regulations, codes of practice and statutory guidance.

Work is ongoing to analyse the responses in detail, however a number of common themes have emerged:

- The need for a comprehensive approach to learning and development to ensure staff across the sector and partners have the knowledge and skills to deliver the new requirements and organisations are supported to make the necessary cultural changes;
- The need for a considered approach to transition to the new system;

- The need to raise awareness among the public about the changes that will be introduced;

- The need to ensure all delivery partners are fully engaged in considering the way resources are targeted on implementation;

- The need to embed collaboration, not only in delivery through partnership arrangements such as local authorities and health boards, but also in policy delivery through different parts of the Act;

- The need to continue to work together to embed new practice and arrangements beyond April 2016, including co-developing guidance around good practice.

The responses will inform the development of final regulations, codes of practice and statutory guidance, which will be laid before the National Assembly from May 2015. In order to have a full suite of information to support the making of the Regulations, working drafts of the first tranche of the codes of practice and statutory guidance will be published alongside the consultation report.

A second tranche of regulations, codes of practice and statutory guidance, in relation to parts 5, 6 and 9 of the Act, will be made available for consultation from May, with a view to being laid before the National Assembly late in 2015.

This second tranche will create a system, which secures outcomes for looked after and accommodated children; drives regional collaboration; puts in place a system of charging, financial assessment and paying for care; supports the making of representations and provision of advocacy and addresses the issues raised by provider failure.

The work of implementing the Social Services and Well-being (Wales) Act – and through it the new system for social care required by *Sustainable Social Services* – goes beyond making subordinate legislation, as important as this is. There are three pieces of work underway covering workforce readiness, awareness-raising among the wider population, and key regional implementation activity.

The Care Council for Wales, as the lead body for workforce development, will lead on the development and implementation of a national learning and development strategy. The strategy is critical to the implementation of the Act and will need sustained, deliberate and high-profile leadership, which can reach out across a wide range of organisations and partners beyond the boundaries of the traditional social care sector.

The Care Council will take this work forward with key stakeholders to ensure we have a strategy which covers all of those involved in the provision of social care, together with their key partners, and that it is delivered jointly and in collaboration with those partners.

The strategy will include a training deployment plan and a one-stop-shop information hub, playing a key supporting role for the sector in ensuring its own readiness for the changes the Act and its regulations will bring into force.

It will be supported by £1m in 2015-16 from the social care workforce development programme. A further £7.1m from the programme, together with the local authority match funding, making a total of some £11m will support the development and implementation of cross-sector regional training plans, which will align with both the national strategy and regional implementation plans. This approach will ensure coherence across the service and workforce planning for implementation at a national, regional and local level.

The Welsh Government will continue to support local government and its partners in making the transition to the new arrangements. In 2013-14 and 2014-15, a *Delivering Transformation* grant was made available to the six regional partnerships and selected national partners to enable local government and its partners to put in place the requirements of the new Act.

The six regions have carried out some impressive work to date, which demonstrates their commitment to the Act's implementation and provides an excellent base for the more detailed implementation plans which are now being developed.

The Welsh Government will double the funding available through the *Delivering Transformation* grant to £3m in 2015-16. This is in addition to the £20m already announced this year to carry on the work of projects funded through the Intermediate Care Fund and the £10m increase in the Revenue Support Grant for Social Services purposes..

Subject to budgetary decisions, a further £3m in grant funding will be made available in 2016-17 to support the embedding process, with a view to transferring this sum into the Revenue Support Grant from 2017-18 in recognition of the ongoing change which the Act is driving.

The work underway now will build on the national consensus we have to make the changes we need to improve social services in Wales. We will continue to ensure all the key aspects *Sustainable Social Services* are taken forward with the close involvement of citizens and strong joint leadership from local government, the NHS and private and third sector providers.

The Welsh Government will continue to work with the national partnership forum, the leadership group and citizens panel to support this, and ensure that people who use services remain at the heart of our programme for change.

Carl Sargeant AC / AM
Y Gweinidog Cyfoeth Naturiol
Minister for Natural Resources

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref LF/CS/0214/15

Alun Ffred Jones AM
Chair
Environment and Sustainability Committee
National Assembly for Wales
Ty Hywel
Cardiff Bay
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CF99 1NA

26th February 2015

Dear Alun Ffred Jones AM

Planning (Wales) Bill

During the general principles debate on 10 February I committed to write to you in response to the Stage 1 Committee Reports from the Environment and Sustainability Committee and the Constitutional and Legislative Affairs Committee, on the Planning (Wales) Bill.

I have detailed below, my response to all the recommendations of both Committees, although where both Committees made the same recommendation I have only addressed the recommendation of the Responsible Committee.

I outline how I intend to respond to the recommendations and clearly state where I agree that there is a need to make an amendment to the Bill. I also outline where I have already tabled Government amendments in response to the Committee recommendations.

I trust the Committee will find my responses useful in further scrutiny of the Bill.

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Recommendations from the Environment and Sustainability Committee's Stage 1 Report on the Planning (Wales) Bill

Recommendation 1 - We recommend that the Assembly supports the general principles of the Bill.

I thank the Committee for recommending that the Assembly accept the general principles of the Bill and I was pleased to see the Bill receive unanimous support during the vote on 10 February.

Recommendation 2 - We recommend that the Minister brings forward an amendment to the Bill to give Place Plans a formal development plan status under Section 38 of the Planning and Compulsory Purchase Act 2004 and gives further consideration to how local communities can be given greater opportunities to engage in the preparation of all development plans.

I have instructed my officials to explore Place Plans further to ensure communities are able to retain maximum flexibility in the preparation of Place Plans that can be varied to suit the aspirations and the capabilities of different communities. I propose a consistent approach for communities working with local councils as part of Supplementary Planning Guidance. I believe this approach would assist local communities in engaging with the plan making process and would be a quicker, more cost effective and less bureaucratic process than giving Place Plans development plan status. The IAG report considered that there was a benefit in adding consistency to the Place Plans process and that this could be achieved through Supplementary Planning Guidance.

Recommendation 3 - We recommend that the Minister lays a revised Regulatory Impact Assessment before the Assembly in advance of the debate on the general principles of the Bill.

I committed to issue a revised Regulatory Impact Assessment before the Assembly; however, my intention is to lay a revision before Stage 3 as required by Standing Order 26.28, to reflect the changes to the Bill as a result of Stage 2 amendments. I will also use this opportunity to rectify the minor errors identified during Stage 1 and on which, I wrote to the Finance Committee on 13 November 2014.

Recommendation 4 - We recommend that the Minister brings forward an amendment to the Bill in order to insert a statutory purpose for planning. This should be drafted along similar lines to the statutory purpose recommended by the Independent Advisory Group in its report.

And

Recommendation 5 - We also recommend that the Bill is amended to include a provision that would allow Welsh Ministers to issue guidance to Local Planning Authorities on how to apply the statutory purpose.

It is not my intention to insert a statutory purpose for planning and sustainable development on the face of the Planning Bill. I stand by my previous statements to the Committee that my Well-being of Future Generations Bill provides the overarching framework and goals for all public bodies, which includes local planning authorities and Welsh Ministers when undertaking their functions under the Planning Acts. The IAG report predates the Well-being of Future Generations Bill and you will be aware that they recommended that any definition of SD should be contained in that Bill.

Recommendation 7 - We recommend that the Minister brings forward an amendment to Section 70 of the Town and Country Planning Act 1990, to make it clear to all involved in planning that decision makers can have regard to the impact on the Welsh Language so far as it is material to an application. Any amendments should be clarificatory and not change the position as to weight.

I have tabled a number of amendments which strengthen the Welsh language through the plan making process. I am currently considering this recommendation in terms of its legal effect and policy intention.

Recommendation 8 - We recommend that the Minister introduces a requirement to carry out Language Impact Assessments for certain major planning applications.

I tabled a government amendment on 11 February to strengthen Welsh language consideration as part of the sustainability appraisal for Development Plans. Therefore I consider that an amendment with regard to major planning applications would represent duplication of effort, as the Development Plan and the impact assessment which accompanies it provides a firm basis for rational and consistent decisions on planning applications and appeals. The approach which I have outlined allows the cumulative impacts of development to be considered thoroughly and suitable mitigation measures to be identified and secured. However I accept that there may be limited situations where major development proposals come forward outside the LDP and have not been subject to an impact assessment. In response to this recommendation, I have instructed officials to update planning policy and guidance to set out the circumstances in which LPAs should carry out a Language Impact Assessment at the planning application stage.

Recommendation 9 - We recommend that the Welsh Language Commissioner should be given a formal role in assessing the quality of language impact assessments, both for development plans and for certain major planning applications to ensure consistency. In making this recommendation we wish to

be clear that we are calling for a role for the Welsh Language Commissioner in assessing the quality of language impact assessments and not to have a role in the planning application process.

I agree that the Welsh Language Commissioner should continue to be consulted by local planning authorities during LDP preparation when they undertake the Sustainability Appraisal, as set out in TAN 20, and acknowledged by the committee at paragraph 55 of their report.

Further, I have asked officials to update planning policy and guidance to make it clear how and when developers and LPAs should notify the Welsh Language Commissioner of potentially sensitive developments. It is my view that the Commissioner's role should continue to be on a non-statutory basis, a position which is supported by the Commissioner.

However if the National Assembly decides that there should be a wider remit for impact assessment than that proposed in my response to recommendation 8 I would wish to give further consideration to making the Commissioner a statutory consultee for all planning applications subject to such an assessment.

Recommendation 10 – We recommend that the Welsh Government clearly explains how the proposed national Natural Resources Policy and area-based Natural Resources plans will interface with the planning regime before the introduction of the Environment Bill.

I thank the Committee for making it clear that it is seeking an amendment to the Planning Bill through the Environment Bill, once it is introduced to ensure that there is a clear link between the area-based Natural Resource plans and the planning regime. I have instructed my officials to work together to draft an amendment to the appropriate planning legislation through my Environment Bill.

Planning Policy will articulate the relationship between the NDF, SDP, LDPs and Natural Resources Policy once the Environment Bill is introduced.

Recommendation 11 - We recommend that the Minister brings forward amendments to the Bill to ensure that marine and terrestrial planning is closely aligned and that plan-makers (including Welsh Ministers) are required to have due regard for the interrelationship between these two environments.

Development plans set the context for decision making for an LPA area, in line with national polices and must set out the LPA's objectives for the development and use of land in its administrative area. Plans must be based on evidence and prudent use of resources, meeting social, environmental and economic needs. Planners are required to take into account all other plans or strategies with implications for the coastal area, such as the Marine Spatial Plan or Integrated Coastal Zone Management Plans.

A European Union Directive (2008/56/EC, marine environmental policy) has been transposed into UK legislation. It requires the Secretary of State to prepare a marine strategy and the Welsh Ministers "in exercising any functions so far as affecting the marine strategy area, (to) have regard to any marine strategy".

The European Union is also bringing forward Directive 2013/0074 establishing a framework for maritime spatial planning and integrated coastal management. This stipulates that integrated coastal management is a tool for the integrated management of all policy processes affecting the coastal zone, addressing land-sea interactions of coastal activities in a coordinated way with a view to ensuring the sustainable development of both coastal land and marine areas.

Chapter 5 of Planning Policy Wales already identifies that Integrated Coastal Zone Management is a material consideration in formulating land use plans and strategies, and in taking decisions on development in the coastal area.

Therefore it is not necessary to legislate for this in the Planning Bill.

Recommendation 12 - We recommend that the Minister brings forward amendments to the Bill to link statutory national and regional transport planning arrangements and the National Development Framework and Strategic Development Plans.

<u>National Development Framework</u>
Development plans must be based on evidence and a prudent use of resources; meeting social, environmental and economic needs. Planners are required to take into account a variety of plans and strategies when producing development plans including transport, minerals and waste and biodiversity for example. These plans and strategies will also inform the production of the National Development Framework.

The Bill requires the Welsh Ministers to set out their policies in relation to the development and use of land in Wales as they consider appropriate. This will include the national transport plan ensuring alignment of both plans will enable the delivery of key infrastructure projects.

I do not consider that it would be prudent to identify specific plans in primary legislation as these could change over time, or may expire. The current approach enables flexibility to cover new policies of the Welsh Ministers as they emerge in the future.

<u>Strategic Development Plans</u>
Current powers within the PCPA, section 62(5)(g) enable transport plans to be listed as a matter that LPAs must have regard to when developing their LDP. The same

approach will be adopted for SDPs, and section 5, 60I(6)(f) of the Planning (Wales) Bill gives the regulation making power to achieve this in a proportionate and responsive manner.

Recommendation 14 - We recommend that the Minister confirms that the regulations for Strategic Development Plans will include a requirement for these plans to have regard to the relevant Local Well-being Plans.

It is my intention to use regulations to ensure that the local well-being plans are specific additional matters that must be taken into account during the plan making process of SDPs. The Well-Being of Future Generations (Wales) Bill makes an amendment to the Planning and Compulsory Purchase Act 2004 to ensure LDPs have regard to local well-being plans.

Recommendation 15 - We recommend that the Minister leaves the Bill as drafted in relation to National Parks and that he reconsiders his intention to bring forward amendments to give Welsh Ministers the power to create Joint Planning Boards that could in future include whole or part of a National Park.

I thank the Committee for this suggestion. I am currently considering this recommendation.

Recommendation 16 - We recommend that the Minister considers whether a requirement to undertake Health Impact Assessments should be included in the Bill at the development plan stage and for some types of planning application. Associated policy and guidance should be revised to ensure that the health impacts of development are appropriately considered.

The Strategic Environmental Assessment (SEA) Regulations already require health impacts to be comprehensively considered during the preparations of all plans and strategies. It currently applies to LDPs and would also apply to the proposed SDPs and NDF. Creating a stand alone Health Impact Assessment would therefore add unnecessary duplication.

The SEA, which forms part of the Sustainability Appraisal, is part of the evidence base which justifies and demonstrates the robustness of the plan.

We are working with key stakeholders, including health colleagues and the British Medical Association to ensure that the objectives of the health impact assessments can be achieved without recourse to primary legislation.

The new European Environmental Impact Assessment (EIA) Directive will result in improved emphasis on health consideration as part of the Environmental Assessments to accompany applications for EIA development. The assessment of health will therefore be built into the EIA process when the new Directive is transposed.

Recommendation 18 - We recommend that the Minister brings forward amendments to enable the National Assembly for Wales to determine its own procedure for considering the draft National Development Framework and, as part of these amendments, the Minister removes any restriction on the Assembly's consideration of the draft National Development Framework, in particular the 60-day consideration period specified in Section 2 of the Bill.

The Bill does not prescribe the detail on how the Assembly should scrutinise the NDF, other than the time period. It is for the Assembly to determine if, for example, assistance from a planning expert would be advantageous to its deliberations. The precise mechanism is open for the Assembly to determine.

A specified period is felt to be necessary in order to ensure that the Assembly conclude its consideration of the NDF and that it is undertaken in a reasonable period. The current time period is 60 days, beginning with the day on which the draft is laid before the Assembly and disregards anytime when the Assembly is dissolved or in recess for more than 4 days. As I mentioned to the Committee, I am happy to consider a different time period but am of the view that a specified time period is necessary.

Recommendation 19 - We recommend that the Minister must amend the Bill to require Assembly approval of the National Development Framework.

It remains to be my view that the process set out in the Bill ensures robust scrutiny by the Assembly of the National Development Framework, but enables the Welsh Ministers to reflect and shape the NDF according to the Government's policies and priorities.

Recommendation 22 - We recommend that the Minister brings forward amendments to the Bill in order to enhance the pre-application arrangements that apply to Developments of National Significance applications and to outline these arrangements on the face of the Bill.

I do not consider it appropriate to include the pre-application arrangements for Developments of National Significance on the face of the Bill. These are detailed procedural issues, which have not been consulted upon and are more appropriately contained in secondary legislation. To set out these procedures in primary legislation would be inconsistent with arrangements for the pre-application process for major applications.

It is my intention to prescribe in secondary legislation enhanced pre-application arrangements for DNS which will be subject to consultation.

The Committee received evidence from stakeholders, including Energy UK that these processes need to be responsive to allow for changes to the DNS consenting process or to align it to changes to the consultation process for regular applications.

Recommendation 23 - We recommend that the Minister brings forward amendments to the Bill in order to make the regulations setting out which categories of development should be subject to the pre-application procedure are subject to the affirmative resolution procedure.

I do not agree that this provision should apply the affirmative procedure, as I consider the negative procedure is appropriate, as it is a technical matter of detail which may change from time to time. The use of these provisions will be informed by consultation and engagement with stakeholders. The level of engagement and consultation will ensure that the process will be transparent and open to comment from all. A consultation on the detailed aspects of the pre-application consultation procedure has recently closed.

Recommendation 24 - We recommend that subject to any matters of legislative competence, the Minister considers making water undertakers statutory consultees. We ask that the Minister reports back to us on his consideration of this issue by the end of March 2015.

I have asked officials to bring forward existing programed work to make Water and Sewerage Companies Statutory Consultees, on the basis that agreement can be reached between them as to the type and scale of applications that they will be consulted upon. They will be required to provide substantive responses within a specified time period for both pre-applications, and planning applications. I will report back to the Committee by the end of March 2015 on the progress of this matter.

Recommendation 25 - We recommend that the Minister amends the Bill to include the definition of what constitutes Development of National Significance on the face of the Bill, with a provision that would enable this definition to be amended that would be subject to the affirmative resolution procedure.

The purpose of prescribing the thresholds for DNS in secondary legislation is to ensure that the process can respond quickly to changing circumstances, such as where further devolved powers in relation to energy or other planning consents come to Wales or as new technologies and categories of development are introduced over time. I will be issuing further consultation to establish what should constitute DNS before these are defined in secondary legislation.

It is my view that having the original definitions and subsequent changes in separate legislation has the potential to confuse. The proposal in the Bill retains the criteria and thresholds in one place and provides more clarity.

Recommendation 26 - We recommend that the Minister sets out how he intends to decide above 50MW energy schemes in Wales should further devolution occur. In addressing this recommendation, we ask that the Minister is clear about whether the NSIP Development Consent Order process will be replicated for Wales; whether these larger schemes will be included in the Development of National Significance process; or whether some other process will apply.

Energy projects above 50MW are within the remit of the Minister for the Economy, Science and Transport. I have passed your comments onto my colleague as the Minister with portfolio responsibility. Nonetheless, the proposed system for DNS will be capable of handling on-shore energy projects above 50MW, should they become subject to planning permission.

Recommendation 27 - We recommend that the Minister takes steps to make it clear that Section 18 of the Bill could be used to give the Welsh Ministers the power to decide on Development of National Significance associated developments as well as secondary/ancillary consents.

My statement of policy intent makes it clear that the proposals for secondary consents will be able to handle planning permissions (associated development) connected to the DNS project and a selection of other key secondary consents. I replicate the statement here for ease of reference:

A number of secondary consent types have been identified, which may be appropriate to supplement an application for DNS. This section allows for those consents to be prescribed in secondary legislation, subject to the conditions at subsection 62H(3).

Those which are likely to be initially prescribed by regulations are:

- *Control of works affecting scheduled monuments, grant of scheduled monuments consent (Ancient Monuments and Archaeological Areas Act 1979 (s.2));*
- *Works on common land (Commons Act 2006 (s.38));*
- *Exchange of common land (Commons Act 2006 (s.16 and s.17));*
- *Restriction on placing rails, beams etc. over highway (consent) (Highways Act 1980 (s.178));*
- *Applications for hazardous substance consent; applications for consent without condition attached to previous consent and application to continue consent on change of control of land (Planning (Hazardous Substances) Act 1990 (s.4, s.13 and s.17));*

- *Control of demolition in conservation areas and authorisation of work, listed building consent Planning (Listed Buildings and Conservation Areas) Act 1990 (s.8 and 74);*
- *Requirement for planning permission & grant of planning permission (Town and Country Planning Act 1990 (s.57 and s.58)); **[associated development]***
- *CPO acquisition of land for development (Town and Country Planning Act 1990 (s.226));*
- *Stopping up or diversion of highway (Town and Country Planning Act 1990 (s.247));*
- *Highways crossing or entering route of proposed new highway, etc. (Town and Country Planning Act 1990 (s.248));*
- *Extinguishment of rights of way over land held for planning purposes (Town and Country Planning Act 1990 (s.251));*
- *Acquisition of land in connection with highways (Town and Country Planning Act 1990 (s.254)); and*
- *Order-footpaths, bridleways or restricted byways affected by development (Town and Country Planning Act 1990 (s.257)).*

Additional regulations may add, amend or remove a consent from this list.

Recommendation 29 - We recommend that the Minister clarifies whether he intends to take responsibility for the issuing of environmental permits for Development of National Significance applications and, if he does, he brings forward amendments to the Bill to require Natural Resources Wales's consent before Welsh Ministers can decide on the issuing of environmental permits alongside the Development of National Significance process.

The proposals for what should be included as a secondary consent will be consulted on and contained in secondary legislation (I have agreed to explore an amendment to the Bill to make this subject to affirmative procedure). The consenting process for DNS and secondary consents will also be set out in secondary legislation, and will be subject to consultation.

The question of whether or not to include environmental permits will be considered as part of that consultation exercise.

Recommendation 31 - We recommend that the regulations for a national delegation scheme when introduced should follow the model proposed by the Welsh Government's own research – i.e. a national scheme with some local flexibility, with each local scheme still to be approved by Welsh Ministers.

A number of responses to the recent consultation suggested that there is a need for some local flexibility within the national scheme of delegation.

I have asked my officials to engage further with stakeholders to identify suitable measures that provide for a degree of consistency while remaining responsive to local circumstances. Notwithstanding this action, an approval process for local authority delegation schemes adds complexity to the planning system. It raises issues of how schemes would be assessed and the criteria to be used in that assessment. The criteria against which a scheme could be considered would need to be published, and this would in effect be a 'scheme of delegation' in itself. I therefore intend to look further at how local flexibility can be built into the delegation proposals but I do not intend to pursue a formal government approval process.

Recommendation 32 - We recommend that the Minister amends the Explanatory memorandum to the Bill to clearly explain how he intends to use the powers in Section 37 of the Bill.

In response to your recommendation, the Explanatory Memorandum will be updated before Stage 3 to provide further clarity in respect of how I intend to use the proposed powers in section 37. Further to this, a list of the application types that are to be prescribed in regulations and consequently included in the national scheme of delegation is attached at annex A.

As I mentioned above, officials will be engaging with stakeholders to identify specific application characteristics such as development size that will be subject to delegation requirements.

Regulations will not prescribe how the Local Planning Authority makes decisions about its other functions (such as discharging planning conditions, enforcement, Tree Preservation Orders etc.). LPAs will continue to make their own arrangements as they do now, in terms of delegation of these other functions.

Recommendation 33 - We recommend that the regulations for a national delegation scheme when introduced should require the referral of a planning decision to a committee when a local town or community council objects to an application.

A consultation on delegation proposals has recently closed and a wide range of stakeholders have responded. I have asked my officials to engage further with these stakeholders with an aim to issue an additional consultation in the autumn to inform the proposals to be prescribed in regulations.

It would therefore be premature to agree to such a detailed recommendation at this stage, however, the views of stakeholders concerning the merits and practical effect of the inclusion of an exception relating to objections by town or community councils will be sought.

Recommendation 36 - We recommend that the Minister brings forward an amendment to Section 42 of the Bill to reflect the Law Society's proposal, but this should include a requirement for an amended application to be returned to a Local Planning Authority to be consulted on again.

I do not accept this recommendation as this would be contrary to the provision in the Bill which have been designed to encourage better working relationships and more productive negotiations between applicants and local planning authorities and promote fairness in the appeals process for all parties.

There is an expectation that the local planning authority should have explored any potential amendments with the applicant that could have made the application acceptable before it came to a decision to refuse. Subsequently an appeal should be the course of last resort once that process has been followed and once an appeal is made the community has an expectation that a decision will be issued within a prescribed timescale. This recommendation will reduce the certainty that this will happen.

Further, this process could be used several times by an applicant thus creating inconsistency in how applications and appeals are handled and causing uncertainty and confusion for third parties and the community generally; in effect creating a revolving door for the application.

Recommendation 37 - We recommend that, before Section 44 is commenced, Circular 23/93 'Awards of costs incurred in planning and other (including compulsory purchase order) proceedings is updated to reflect the changes to costs recovery in appeal proceedings made by this Bill.

It is my intention to update Circular 23/93 prior to the introduction of new costs provisions.

Recommendation 38 - We recommend that the Minister brings forward amendments to Section 45 of the Bill to set minimum time limits for responding to requests for information resulting from appeals, call-ins and direct applications.

I would argue that time limits for requests for information are a detailed procedural issue and are more appropriately prescribed in secondary legislation rather than on the face of the Bill. The powers are more appropriate in secondary legislation as they need to allow different time limits commensurate with differing complexities of appeals and applications.

Further, this recommendation does not promote timely decision making as a minimum time limit for supplying additional information on appeals, call-ins or direct applications would mean that in practice an applicant who is in possession of all the relevant information would have to delay providing this information until after the minimum time period had expired.

Recommendation 41 - We recommend that the Minister brings forward amendments to the Bill to remove Section 47 i.e. provisions that would reduce the time for submission of a Town and Village Green application from two years to one year.

In my view one year is a fair time to allow for an application for registration to be made. Once the application has been made there is further time for the preparation and evidence gathering required for the determination of the application, which is a separate process. I attach at Annex B an explanation of the procedures for registering an application for town or village green status and the evidence basis for the proposed change to the registration period.

Recommendation 42 - We recommend that the Minister brings forward amendments to remove Section 50 from the Bill i.e. provisions that would allow Welsh Ministers to set fees for applications to amend registers of common land and town or village greens.

There is already provision at section 24 of the Commons Act 2006 that enables the Welsh Ministers to prescribe a fee to be payable to the authority to whom the application to register a Town and Village Green is made. The proposal in Section 50 in relation to fees is a fair change. It allows the Welsh Ministers to make regulations for fees also to be payable to the determining authority for an application to register a Town and Village Green, if that is different from the registering authority.

The purpose of this provision being included in the Bill is to ensure that I can future-proof the process to allow for fees to be charged should economic or other circumstances change. This will safeguard services for the future.

Recommendations from the Constitutional and Legislative Affairs Committee's Stage 1 Report on the Planning (Wales) Bill

Conclusion 1 - We believe that it would have been helpful for the Explanatory Memorandum to have outlined in detail how the Bill has taken account of human rights issues given their relevance to matters of planning.

Human rights issues in respect of the Bill have been considered as part of the overall legal advice provided to Ministers. The Welsh Government consider the proposals contained in the Bill are compatible with Convention Rights given that planning is by its very nature required to balance the rights of the individual and the interests of the wider community.

Conclusion 2 - We believe that more detail should be placed on the face of Bill, particularly in relation to significant policy matters.

I have made no apologies for this Bill creating a framework; I would argue that framework legislation should not be condemned in all circumstances, there are instances where the detail of the legislation is simply too complex and lengthy to be contained in an Act, or because the details are constantly having to change to reflect a rapidly changing world. The exercise of powers contained in this Bill in many circumstances will require review and refreshing when the real world changes. These changes are not something which I am prepared to speculate on or attempt to wrongly enshrine in primary legislation, which would then require further primary legislation to ensure we as a legislature can keep up with the real world.

Prescribing such detail on the face of the Bill would at best require frequent revision of primary legislation and at worst reduce the lifespan of the Bill itself. In these circumstances therefore, I am firmly of the view that the balance between primary and secondary legislation is not only proportionate, but necessary.

A major Bill of this sort needs to create a framework. This Bill is needed to deal with the challenges, economic, social and environmental, that we face now. The subordinate legislation which follows will provide detail and will quite properly face scrutiny in its turn. In response to comments made about the Bill being a framework piece of legislation, this Bill either creates a framework for laws about planning in Wales or works within the existing framework. That is what a Bill of this nature should do.

I would further argue that there are good reasons for having so many provisions which rely on delegated powers. This Bill is the first part of a wider reform of Planning laws in Wales and we are using this Bill, as our first opportunity to use primary legislative powers, to make substantive changes to the existing legislative framework to ensure that planning functions in Wales work with devolved planning policy and deliver for the people of Wales.

Recommendation 1 – We recommend that the Minister should table an amendment to the Bill applying the affirmative procedure to the making of regulations under section 60D(1) of the Planning and Compulsory Purchase Act 2004.

This power enables the establishment of a Strategic Development Plan area and corresponding Panel, the establishment of which is subject to work by the responsible authority or the Welsh Ministers and will require consultation. The regulations will specify the details that cannot be known in advance of this process, allowing the LPAs to have the democratic responsibility to lead the process.

What is reserved for subordinate legislation are technical matters of detail relating to numbers of members and name of a Strategic Planning Panel that will be different depending on the individual circumstances of each panel. The negative procedure is considered appropriate as this will require flexibility as the defined area or make up of the Panel may need changing in the future.

Recommendation 5 - We recommend that the Minister explains and clarifies during the Stage 1 debate on this Bill, the purpose of section 20 and how it will operate in practice, including:

- **the criteria to be used in determining whether a local authority is underperforming;**
- **the types of developments to which it will apply;**
- **what assessment he has made of whether a provision similar to that contained in section 62B of the Town and Country Planning Act 1990 would be appropriate.**

My statement of policy intent provides the majority of the detail sought in relation to the criteria to be used in determining whether a local authority is underperforming and the types of development to which it will apply. I replicate that information here for ease of reference:

The criteria to be applied in assessing and determining whether an LPA is underperforming, and should therefore be designated by the Welsh Minsters for that purpose, is likely to be drawn from the indicators contained in the proposed performance framework that establishes what constitutes a good LPA, which was set out in the Positive Planning consultation paper.

They are likely to focus on the LPA's performance in terms of efficiency and quality of determining planning applications, which could be assessed on the speed within which applications for major development are determined, and the extent to which such decisions are overturned at appeal.

The criteria to be applied in assessing and determining whether or not to revoke the designation could include the consideration of:

- *the capacity of the designated LPA to deal effectively with applications for major development in the future;*
- *the effectiveness of the designated LPA in dealing with those major applications that were submitted to them during the period of designation;*
- *the degree of improvement against areas of weakness identified in the initial performance assessment; and,*
- *the designated LPA's performance administrating applications that are submitted direct to the Welsh Ministers for determination, e.g. their performance as a consultee on such applications, and in undertaking any actions required by the Welsh Ministers to assist them in the processing and consideration of such applications.*

It is anticipated that the type of development to which the option to make direct applications applies will be limited to major development, as these types of proposals drive economic growth and have the greatest bearing upon communities.

The definition of major development is likely to be similar to that contained in article 2(1) of the DMPWO 2012, which formed part of the hierarchy of development consulted upon in the Positive Planning consultation paper issued in December 2013 and includes:

- *houses of 10 or more units or site areas 0.5ha or more;*
- *buildings with proposed floor space of 1,000 sq metres or more;*
- *development on a site of 1 hectare or more.*

The Bill specifies that a 'qualifying application' includes full, outline and reserved matters applications.

It excludes the ability for applications that fall within Section 73 of the TCPA 1990 (applications to vary or remove conditions) to be treated as a 'qualifying application', unless specified otherwise in regulations.
Applications to renew planning permission for major development deal with the principle of development. It is therefore proposed through regulations that renewal' applications are to be considered as a 'qualifying application.

Other types of applications that fall within Section 73 of the TCPA 1990, such as to vary or remove other conditions and in making material amendments to planning permissions, will continue to be submitted to the LPA for determination.

We will work with stakeholders to operate a continuous incremental approach to setting targets. Publishing the criteria supports this flexible approach rather than following section 62B.

Recommendation 8 - We recommend that the Minister should table an amendment to the Bill to apply the negative procedure to orders made in accordance with section 54(5)(b)(ii) of the Bill.

It is a longstanding principle of law that commencement orders are not subject to any procedure. This is because the legislature has already considered and approved the relevant provisions and the commencement order gives effect to the intention of the legislation. Further scrutiny, in my view, would be unnecessary on provisions that have recently been subject to such detailed scrutiny.

The transitional, transitory and savings provisions flow from commencement and are intended to provide for a smooth and fair transition between the 'old' and the 'new' law. This will be particularly relevant for planning matters as there will be many applications that are live and going through the decision making process under the 'old' law when the 'new' law comes into force. Without the use of transitional and savings provisions, these applications would be subject to the 'new' law when they have already started a process using the 'old' law. This would be unfair and could cause considerable additional costs and delay, with some applicants effectively having to start the process again.

I am happy to amend the Explanatory Memorandum before Stage 3 to provide more detail on how the Welsh Government intends to use the transitional, transitory and savings provisions that will result from commencement orders made in connection with the coming into force of a provision of this Bill.

Recommendation 9 - We recommend that the Minister confirms categorically during the Stage 1 debate that the Queen's or Prince's consent is not required in respect of the Bill and that in so doing, he sets out the reasons for his view, taking account of the views we express at paragraphs 130 to 134 of this report.

As mentioned during the General Principles debate I have instructed my officials to write to Her Majesty, The Queen to seek express consent in relation to the Bill. The First Minister's Office wrote to the Her Majesty, The Queen on 25 February 2015. I will update the Assembly prior to the end of Stage 3 proceedings as required by Standing Order 26.67.

I have also tabled a number of Government amendments, some of which relate directly to recommendations made by the Committee and I would like to take this opportunity to outline these below:

Environment and Sustainability Committee

Recommendation 6 - We recommend that the Minister brings forward amendments to place a requirement on those formulating plans to undertake an assessment of the impact development plans will have on the Welsh Language when preparing, Local Development Plans, Strategic Development Plans and the National Development Framework. For Place Plans, a language assessment should form part of a general sustainability appraisal.

I have tabled a Government amendments (amendment numbers 1 to 3) to Section 60-62 of the PCPA 2004, making the Welsh language a mandatory element of the sustainability appraisal in the development of the National Development Framework and at all levels of the plan making process.

Recommendation 21 - We recommend that the Minister brings forward amendments to the Bill to remove voting rights from non-elected members of Strategic Planning Panels.

I have tabled a Government amendment (amendment numbers 7 to 9) to remove the voting rights for non-elected members of the Strategic Planning Panels. Further to this I have also tabled Government amendments (amendment numbers 5 and 6) to remove the requirement for locally elected members to choose the non-elected members from a list published by the Welsh Ministers. This will allow for locally elected members to select the nominated members based on local needs and circumstances.

Recommendation 40 - We recommend that the Minister brings forward the amendments to Schedule 6 (Town and village greens: new Schedule 1B to the Commons Act 2006) of the Bill to remove trigger events, as outlined in his letter to the Chair dated 7 January 2015 at the earliest opportunity.

I have tabled a Government amendment (amendment numbers 19 to 22) to limit the right to register land as a town or village green only where a planning decision has been made.

Further, I have asked my officials to consider amendments in relation to the following recommendations, and subject to their approval, it is my intention to table these as soon as possible during Stage 2 (unless otherwise specified):

Environment & Sustainability Committee

Recommendation 13 - We recommend that the Minister brings forward amendments to the Bill to link it to the Well-being of Future Generations Bill. These amendments should include a formal link between the National Development Framework and the well-being goals.

I have committed to making a formal link between the Planning Bill and the Well-being of Future Generations Bill. It is my intention to make a formal link to the Well-being goals and the National Development Framework on the face of the Planning Bill. My officials are working together to achieve this during Stage 3 of the Planning Bill as this will allow for the National Assembly for Wales to have considered the Well-being of Future Generations Bill at Stage 3 and this will ensure the Planning Bill to makes correct reference.

Recommendation 17 - We recommend that the Minister brings forward an amendment to the Bill to specify the length of the consultation period for a draft National Development Framework on the face of the Bill. We recommend that such a period should be longer than 12 weeks.

I agree with the Committee that it would be useful to specify a statutory length of time for the formal consultation period for the draft National Development Framework. I have asked my officials to prepare an amendment for introduction during Stage 2.

However, I consider that a 12 week timescale for consultation is appropriate; as this is the period of statutory consultation and would not be the only consultation and engagement exercise when preparing the National Development Framework. Currently, the Local Development Plan process has a statutory 6 week consultation period but in reality the pre-consultation engagement covers a significantly longer period.

As with the progression of Local Development Plans there will be a series of consultation and engagement events undertaken to inform the emerging National Development Framework. Details of these events including how and when they will take place will be set out in the statement of public participation. The consultation and engagement events will include a variety of different approaches depending on the audience and stage of plan development but could include, roadshows, questionnaires etc.

These events will help to shape the draft National Development Framework that would be formally consulted upon over the statutory 12 week period. The statement of public participation will also set out the details of how this consultation will take place and will set out a clear timetable for preparing the plan to give all stakeholders advance warning of key engagement dates, thereby ensuring they are prepared to engage at the appropriate time.

A variety of engagement techniques could be used to ensure everyone who wants to be involved has the opportunity to engage in the preparation of the National Development Framework. The type of engagement used may vary by target audience such as members of the public, development industry, environmental groups etc., time of plan production and part of plan production i.e. designation or broad policy. This could include:

- Exhibitions & Roadshows;
- Website;
- Launch by Minister;
- Social Media; and
- Press adverts

Focused engagement with Stakeholders could include:

- Direct correspondence; and
- Targeted stakeholder meetings & workshops.

Focused engagement with members of the public could include:

- Ensuring a plain language approach to documents and website;
- Ensuring documents are bi-lingual;
- More informal way of commenting such as social media, map based response form;
- Ensuring key information is presented in a user friendly format;
- Online Q&A with Minister; and
- Roadshows in particular areas of change.

These approaches could be interchangeable for different groups but give a broad outline of the types of engagement techniques available to steer the production of the draft National Development Framework.

Recommendation 20 - We recommend that the Minister brings forward amendments to the Bill to specify the period for which the National Development Framework is to have effect.

In line with other plans, I consider it would be consistent for the National Development Framework to specify the period for which it has effect. I have asked my officials to explore a Government amendment to the Planning (Wales) Bill to ensure that the time period and end date of a National Development Framework (NDF) for Wales are specified.

Recommendation 28 - We recommend that the Minister should bring forward amendments to the Bill in order to include a list of secondary consent that could be decided directly by the Welsh Ministers alongside a Development of National Significance application on the face of the Bill, with a power to amend the list by affirmative resolution. If the Minister is not inclined to make such an amendment, we believe that he should bring forward amendments to ensure that any order made to define these types of consent should be subject to the affirmative procedure.

I am grateful to the Committee for providing an option in respect of the application of this recommendation. I am of the view that it would not be appropriate to set out the list of secondary consents that could be decided in connection with DNS applications because this process needs to be responsive to ensure that it captures the consents that will be relevant to the DNS applications in the future. For that reason, I have asked my officials to explore an amendment to Bill to require the affirmative procedure for prescribing the secondary consents in relation to DNS applications.

Recommendation 30 - We recommend that the Minister brings forward amendments to the Bill in order to establish a statutory maximum timescale within which Developments of National Significance and associated secondary consents will be determined by Welsh Ministers after such an application has been formally submitted. In cases where this timescale is not met, these amendments should include a provision that requires Welsh Ministers to lay a statement before the National Assembly for Wales explaining the reasons for this timescale being exceeded.

I have considered this to be a fair expectation and have asked my officials to consider a Government amendment to the Bill to prescribe a maximum statutory timescale for determining Developments of National Significance on the face of the Bill. I have also asked my officials to explore a Government amendment which will require the Welsh Ministers to lay an annual report to the National Assembly on the

Welsh Minister's performance against the statutory time scale. I believe this would be consistent with arrangements for local planning authorities and statutory consultees to report on their annual performance.

Recommendation 34 - We recommend that the Minister brings forward amendments to Section 37 of the Bill to make the regulations under Section 319ZB of the Town and Country Planning Act 1990 that allow Welsh Ministers to prescribe requirements relating to the size and composition of planning committees subject to the affirmative resolution procedure.

Due to the impact on local planning authorities I have asked my officials to prepare a Government amendment to prescribe that the regulations relating to the size and composition of planning committees will be subject to the affirmative resolution procedure.

Recommendation 35 - We recommend that the Minister brings forward amendments to the Bill to make the planning committee protocol statutory.

I have asked my officials to explore an amendment which will introduce a statutory basis for the planning committee protocol on the face of the Bill.

Recommendation 39 - We recommend that the Minister retains the primary legislative requirement for Design and Access Statements by removing Section 27 and that associated secondary legislation should be amended to only require statements for larger developments and listed buildings.

The recent consultation on Design in the Planning Process identified substantial support for the retention for Design and Access Statements for larger developments and those in sensitive locations. In light of this significant support for their retention, and the recommendation of the Committee, it is proposed that a Government amendment is tabled that seeks to remove Section 27 of the Bill.

Constitutional & Legislative Affairs Committee

Recommendation 7 - We recommend that the Minister should table an amendment to section 53(1) of the Bill to delete the words "as they consider appropriate in connection with" and insert in their place "as they consider necessary for the purpose of, or in consequence of giving full effect to any provisions of".

I am considering an amendment to amend the wording in Section 53(1) to reflect the comments of the Committee.

I hope that the information provided in this letter will assist Committee Members in their scrutiny of the Planning (Wales) Bill at Stage 2. I look forward to working with you and the Committee as the Bill progresses through Stage 2 and I would like to offer a meeting to clarify any of the issues raised above and to discuss how we can work together to progress the Bill.

Yours sincerely

Carl Sargeant AC / AM
Y Gweinidog Cyfoeth Naturiol
Minister for Natural Resources

CC: Chair Constitutional & Legislative Affairs Committee

Annex A - list of the application types that are to be prescribed in regulations and consequently included in the national scheme of delegation

Town and Country Planning Act 1990:

S62 & S70 – Applications for planning permission

S73 – Applications to vary/remove conditions (including renewals and minor-material amendments).

S73A – Retrospective applications for planning permission

S92 – Outline planning permission

S96A – Applications for non-material amendments

S316 – Applications for planning permission made by LPAs, or relating to land of interest to LPAs.

S191 – Application for certificate of lawfulness of existing use of development

S192 – Application for certificates of lawfulness of proposed use or development

S220 – Applications for advertising consent (made under the Town and Country Planning Applications (Control of Advertisements) Regulations 1992

Planning (Listed Building and Conservation Areas) Act 1990:

S16 – Applications for Listed Building Consent.

S19 – Applications for variation or discharge of conditions

S74 – Applications for Conservation Area Consent (for demolition).

S82 – Applications relating to land and works of LPA

Planning (Hazardous Substances) Act 1990:

S9 – Applications for hazardous substances consent.

S13 – Applications to vary or remove conditions on hazardous substances consent.

S18 – Applications for continuation of hazardous substances consent.

Section 47 Planning (Wales) Bill: The reduction of the period for making certain applications for registration

Provision in the Planning (Wales) Bill

Section 47 of the Planning Wales Bill amends section 15(3)(c) of the Commons Act 2006 so as to reduce the period within which a town or village green ("TVG") application can be made (after the requisite 20 years of recreational use "as of right" has ceased) from two years to one year. It also repeals existing law applicable to England only.

Environment and Sustainability Committee recommendation

Recommendation 41 of the Planning (Wales) Bill Stage 1 Committee Report by the Environment and Sustainability Committee recommends that the Minister brings forward amendments to the Bill to remove Section 47 from the Planning (Wales) Bill. The report does not present a reason for this change.

Supporting evidence for change

As part of their consultation on reforms to the TVG registration system[1], DEFRA had received evidence which suggested that while some felt that the two year period of grace for registering new greens was too short; the majority felt it was too long [2]. This change was taken forward in the Growth and Infrastructure Act 2013, which amended section 15 of the Commons Act 2006 to reduce the period in which a TVG application can be made (after the requisite 20 years of recreational use "as of right" has ceased) from two years to one year.

Evidence has been received in Wales which suggests that the TVG registration system is used to frustrate development rather than for the purpose of protecting an important area of land[3]. The provision at section 47 of the Planning (Wales) Bill forms a package of reforms which seeks to remedy the negative way in which the TVG registration system is used.

In their evidence to the Committee, the Open Spaces Society's main objection to the proposals was their fear that people will not know that the land that they have used "as of right" is under threat from a proposed development until it is too late to save it[4]. This evidence makes no specific mention of the reduction of the period of grace from two years to one year, and relates mainly to the trigger and termination events at Schedule 1B. Their evidence does not counter the view that the planning process

[1] DEFRA: Consultation on the registration of new town or village greens, July 2011
[2] DEFRA: Town and Village Green consultation: Summary of responses, November 2012
[3] Welsh Government: Positive Planning, November 2013
[4] Open Spaces Society: Evidence to the Environment and Sustainability Committee, 27 November 2014

provides ample opportunity for the community to comment on the future use of land, where a proposal to develop a site is made.

We consider that our proposal to change the 2 year period of grace will have a positive impact in removing a prolonged period of uncertainty for developers and communities where land has ceased use "as of right".

One of the perceptions of the TVG registration system is that significant time and resources are required to compile and submit an application to register a TVG. Hence, there is a perceived requirement for a two year period of grace. It is our view that the work required to produce an application to register a TVG does not merit a two year period of grace as one year provides ample opportunity for the community to produce an application and to become aware that land is no longer used "as of right".

The Commons (Registration of Town or Village Greens) (Interim Arrangements) (Wales) Regulations 2007 sets out the requirements to be contained in applications to register TVGs. Those requirements are[5]:

- The TVG application form and statutory declaration[6], signed by the applicant or duly authorised officer of applicants which are bodies;
- A map of the site at a scale of at least 1:2,500; and
- A copy of any other documents which support the applicant's case.

We consider the requirements of the application to be less onerous than that to produce a planning application, as there is no requirement for technical information or surveys. The more complex information required by the application form comes in the form of a justification of the proposed registration from the applicant. This is simply a statement, and others may be provided from witnesses.

The bulk of the work relating to applications to register TVGs is undertaken by the Commons Registration Authority following the presentation of an application to register a TVG which complies with the minimum standards set out in the Regulations. At this point, an application to register a TVG would have already been made within the period of grace. The remit of the Commons Registration Authority will be to look carefully at the evidence supplied with the application, and they may accept or invite further evidence from the applicant or third parties after the submission of the application. They may also decide to inquire into the application

[5] Commons (Registration of Town or Village Greens) (Interim Arrangements) (Wales) Regulations 2007; Regulation 3

[6] TVG application form and statutory declaration: http://wales.gov.uk/topics/environmentcountryside/farmingandcountryside/common/commonsact2006/guidelines-on-the-commons-act-2006/section-15-application-form/?lang=en

through either a hearing, inquiry or a case before the Council's relevant committee of the authority, to test the evidence impartially.

The DCLG issued a call for evidence in their consultation on the registration of new town or village greens in July 2011 asking TVG applicants to quantify the time spent gathering evidence from potential users of an application site. In response to that consultation the time taken ranged from 9 days to 22 days[7]. This time is taken to include the information gathered before the making of an application as well as after the submission of an application to register a TVG.

We therefore consider the change at section 47 of the Planning (Wales) Bill gives a proportionate amount of time to gather sufficient evidence to submit an application to register a TVG.

[7] Reforms to the town and village green registration system: Impact Assessment No: Defra1470, September 2012.