Constitutional and Legislative Affairs Committee

Meeting Venue:
Committee Room 1 - Senedd

Meeting date:
3 October 2011

Meeting time:
14:30

Cynulliad Cenedlaethol Cymru
National Assembly for Wales

For further information please contact:

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Agenda

1. Introduction, apologies, substitutions and declarations of interest

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

Negative Resolution Instruments

CLA41 - The Education (Information About Individual Pupils) (Wales) (Amendment) Regulations 2011
Negative Procedure. Date made 20 September 2011. Date laid 22 September 2011. Coming into force date 14 October 2011

Affirmative Resolution Instruments

CLA42 - The Protection from Tobacco (Sales from Vending Machines) (Wales) Regulations 2011
Affirmative Procedure. Date made not stated. Date laid not stated. Coming into force date 1 February 2012

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

Negative Resolution Instruments

CLA38 - The Alien and Locally Absent Species in Aquaculture (England and Wales) Regulations 2011 (Pages 1 - 46)
Negative Procedure. Date made 12 September 2011. Date laid before Parliament 16 September 2011. Date laid before the National Assembly for Wales 16 September 2011.Coming into force date 10 October 2011

Affirmative Resolution Instruments

CLA39 - The Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2011 (Pages 47 - 68)
Affirmative Procedure. Date made 2011. Date laid not stated. Coming into force date in accordance with regulation 1(2)

CLA40 - The Mental Health (Assessment of Former Users of Secondary Mental Health Services) (Wales) Regulations 2011 (Pages 69 - 86)
Affirmative Procedure. Date made 2011. Date laid not stated. Coming into force date 6 June 2012

4. Committee Inquiries : Inquiry into the Granting of Powers to Welsh Ministers in UK Laws (Pages 87 - 112)

Wales Governance Centre, Cardiff Law School (Pages 113 - 123)
David Lambert, Research Fellow
Marie Navarro, Research Associate
Manon George, Research Assistant

5. Date of the next meeting

Papers to note

The Committee will be invited to resolve to exclude the public from the remainder of the meeting in accordance with Standing Order 17.42(vi):
A Committee may resolve to exclude the public from a meeting or any part of a meeting where:
the Committee is deliberating on the conclusions or recommendations of a report it proposes to publish

6. Consideration of the evidence submitted to Inquiry to date

Transcript
View the meeting transcript.

Constitutional and Legislative Affairs Committee Report

CLA38

Title: The Alien and Locally Absent Species in Aquaculture (England and Wales) Regulations 2011

Procedure: Negative

These Regulations provide for the implementation and enforcement of Council Regulation (EC) No 708/2007, concerning use of alien and locally absent species in aquaculture.

Technical Scrutiny

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

These Regulations have been produced in the English language only. Furthermore, no explanation has been provided as to why these Regulations have not been produced bilingually. This appears to be because "this explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs and is laid before Parliament by Command of Her Majesty." No attempt has therefore been made to have regard to Assembly procedures and practices in the Memorandum.

(Standing Order 21.2 (ix) that it is not made or to be made in both English and Welsh).

Merits Scrutiny

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

David Melding AM
Chair, Constitutional and Legislative Affairs Committee

3 October 2011

The Government has responded as follows:

The Alien and Locally Absent Species in Aquaculture (England and Wales) Regulations 2011

The Alien and Locally Absent Species in Aquaculture (England and Wales) Regulations 2011 are composite Regulations which will apply to England and Wales and are subject to negative resolution procedure in both the National Assembly for Wales and in Parliament. Accordingly, it is not considered reasonably practicable for this Instrument to be made or laid bilingually. It is

my preference that, in future, a Welsh language translation of such composite instruments should be made available by the Welsh Government after the relevant instrument has been made, balanced against the most efficient use of resources to deliver Welsh Government policy objectives.

The Explanatory Memorandum which has been laid in connection with these Regulations is in the format adopted prior to the recent change in Standing Orders which enables the Constitutional and Legislative Affairs Committee to consider items also subject to a Parliamentary procedure. Under previous Standing Orders, the Welsh Ministers would lay such an Explanatory Memorandum on a voluntary basis to assist Members in considering the subordinate legislation concerned. I accept that this format is no longer appropriate and will ensure that staff are aware that a) either the involvement of the Welsh Government in the production of the Explanatory Memorandum should be made explicit or a separate Explanatory Memorandum relating to Wales should be prepared in relation to such composite instruments; and b) Explanatory Memorandums must be addressed to the relevant Assembly Committee in future.

EXPLANATORY MEMORANDUM TO

THE ALIEN AND LOCALLY ABSENT SPECIES IN AQUACULTURE (ENGLAND AND WALES) REGULATIONS 2011

2011 No. 2292

1. This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 These Regulations provide for the implementation and enforcement of Council Regulation (EC) No 708/2007 concerning use of alien and locally absent species in aquaculture.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 The aim of Council Regulation (EC) No 708/2007 is to ensure there is adequate protection of aquatic habitats from the risks associated with the use of alien and locally absent species in aquaculture whilst contributing to the sustainable development of the aquaculture industry. It does this by providing for a system of permits and environmental risk assessment where necessary.

4.2 Council Regulation (EC) No 708/2007 exempts certain commonly used species, which are listed in Annex IV to the Regulation (Annex IV species) from the permitting requirements of the Regulation. However, Member States are able to place controls on the use of these species where they so wish. Similarly, the translocation of locally absent species within Member States is exempt from the Regulation except where Member States can foresee environmental threats due to the translocation.

4.3 These Regulations make provision for the enforcement of Council Regulation (EC) No 708/2007 and for the notification of both an intended movement of an Annex IV species and the translocation of a locally absent species from within the United Kingdom. Where measures are thought necessary to restrict the use of Annex IV species, that movement can be prohibited or allowed subject to any conditions by means of a notice. In the case of a locally absent species, notifying persons will be advised by means of a notice if there are grounds for foreseeing threats to the environment due to the translocation and in such cases Council Regulation (EC) 708/2007 will apply.

4.4 These Regulations allow for decisions concerning the grant of permits and notices concerning Annex IV species or locally absent species to be appealed.

5. Territorial Extent and Application

5.1 This instrument extends to England and Wales. The provision requiring the review of the implementing provisions in Part 2 in 5 years time applies in relation to England only.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- What is being done and why

7.1 Alien species have been identified as one of the key causes for the loss of biodiversity in the EU and the world at large. They can have significant economic and social impacts, and could undermine the EU's sustainable development objectives. Aquaculture is a fast growing innovative industry, constantly looking for new outlets and markets. In order to fully adapt to market conditions and changes, it is essential that the industry diversifies the species it produces, but that this is balanced with appropriate safeguards for aquatic environments.

7.2 Council Regulation (EC) No.708/2007 establishes a framework governing aquaculture practices in relation to alien and locally absent species. The main objective is to enable the economic growth of the aquaculture sector, whilst ensuring adequate protection for the aquatic environment from the risks associated with the use of alien and locally absent species. The framework enables us to adopt a precautionary approach to the use of such species, whereby they are subject to appropriate risk assessment protocols before their use in proposed aquaculture developments. This approach is consistent with Government policy in relation to the regulation of non-native species, which recognises that preventing the introduction of potentially invasive species is more cost-effective than trying to apply controls retrospectively.

- Consolidation

7.3 None.

8. Consultation outcome

8.1 Consultation on the Council Regulation (EC) No.708/2007 has taken place at various stages since 2006. Defra has engaged with industry stakeholders during the negotiation stages of the Regulation. This, and consultation with the Commission, enabled the UK Government to ensure that the Regulation would not apply retrospectively to established businesses, thus lessening the burden on the industry. Overall it was felt that the Regulation would not have a significant impact on the UK's established aquaculture production businesses. Most of the existing businesses concerned with non-native species deal in certain, commonly-farmed species that are already well established in trade. These have largely been exempted from any additional controls.

9. Guidance

9.1 Guidance is being developed. This will be placed on the Defra website.

10. Impact

10.1 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on www.legislation.gov.uk.

11. Regulating small business

11.1 The legislation applies to small business. There are some large operators, but in the main this industry is made up of small to medium businesses.

12. Monitoring & review

12.1 A review of the instrument will be undertaken within five years of its implementation to ensure that the measures introduced are operating effectively.

13. Contact

Barbara Franceschinis at the Department for Environment, Food and Rural Affairs, Tel: 020 7238 4394 or email: barbara.franceschinis@defra.gsi.gov.uk can answer any queries regarding the instrument.

Title:	Impact Assessment (IA)
Impact Assessment on the Implementation of Council Regulation 708/2007 concerning the Use of Alien and Locally Absent Species in Aquaculture	**IA No:** Defra 1006
Lead department or agency: Defra	**Date: 01/10/2010**
Other departments or agencies:	**Stage:** Final
	Source of intervention: EU
	Type of measure: Secondary legislation
	Contact for enquiries: Barbara Franceschinis 0207 238 4394

Summary: Intervention and Options

What is the problem under consideration? Why is government intervention necessary?

Alien species have been identified as one of the key causes of the loss of biodiversity in the EU and the world at large. Aquaculture is a fast growing, innovative industry across Europe, constantly looking for new outlets and markets. In order to adapt fully to market conditions and changes, the industry needs to be able to diversify and produce new species. Without regulation, there are insufficient incentives for the industry to take account of the potential environmental cost of the introduction of alien species. The Government is obliged to implement Council Regulation 708/2007, which introduces a framework that will ensure protection from the risks associated with the use of alien and locally absent species in aquaculture.

What are the policy objectives and the intended effects?

The main objective of this proposal is to enable the economic growth of the aquaculture industry, whilst limiting the potential threats to ecosystems posed by alien species. This would be achieved by assessing proposed introductions of novel alien species using science based risk analysis in advance in order to prevent interaction with indigenous species and damage to native ecosystems.

What policy options have been considered? Please justify preferred option (further details in Evidence Base)

Option 1 – 'Do Nothing';

Option 2 - Implementation of Council Regulation 708/2007 concerning the Use Of Alien and Locally Absent Species in Aquaculture.

Option 2 is the preferred option. This is a new EU Regulation, hence the Government along with all other Member States is obliged to implement it in its entirety.

When will the policy be reviewed to establish its impact and the extent to which the policy objectives have been achieved?	It will be reviewed 2015
Are there arrangements in place that will allow a systematic collection of monitoring information for future policy review?	Yes

Ministerial Sign-off For final proposal stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.

Signed by the responsible Minister: ..... Date: .....

Summary: Analysis and Evidence

Policy Option 2

Description: Implementation of Council Regulation 708/2007 concerning the Use of Alien and Locally Absent Species in Aquaculture

Price Base Year 2009	PV Base Year 2010	Time Period Years 5	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	**High:** Optional	**Best Estimate: N/A**

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	1	Optional	**Optional**
High	Optional		Optional	**Optional**
Best Estimate	£0.01		£0.153	**£0.724**

Description and scale of key monetised costs by 'main affected groups'

One-off costs to public bodies to set up the permit system (design of application forms/ setting up of a public register) £10.35k. Costs to public bodies for permit applications (both routine and non-routine) £23.07K on average per year. Costs to the industry for licence applications (both routine and non-routine, inclusive of quarantine facilities) £ 129.63K on average per year.

Other key non-monetised costs by 'main affected groups'

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional		Optional	**Optional**
High	Optional		Optional	**Optional**
Best Estimate	-		-	**-**

Description and scale of key monetised benefits by 'main affected groups'

Alien species can be valuable to the aquaculture industry, but current interest in new species in the UK appears to be low. Once established, non-native species can be extremely costly to control. The costs of eradicating an invasive non-native species (e.g. £2.5 million per year on average for a national eradication programme for Topmouth gudgeon) best illustrate the dangers of inadequate controls and the benefits to be derived from having appropriate regulation.

Other key non-monetised benefits by 'main affected groups'

It is impossible to put a precise monetary value on native biodiversity or the loss of an indigenous species. Continued access to varied and disease free fisheries is vital to the three million practising anglers. Healthy fisheries are an important indicator of the good ecological status of rivers under the Water Framework Directive (WFD).

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5

It is assumed that anyone starting up a new venture in aquaculture is to carry out a risk assessment analysis in advance if they intend to farm novel non-native species. We have assumed that the industry would be responsible for undertaking and financing the initial risk assessment, whilst the Government would fund the peer review of the risk assessment and the associated costs of the application. It was decided that this scheme would run for a five-year pilot period. Before the end of the pilot period we would conduct a review with a view to possibly introducing charges for permits to cover costs incurred by Government. Both the number of applications by industry and the need for quarantine facilities are uncertain.

Impact on admin burden (AB) (£m):			Impact on policy cost savings (£m):	In scope
New AB: 0.004	**AB savings:**	**Net:** 0.004	**Policy cost savings:**	No

Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?			England and Wales		
From what date will the policy be implemented?			01/10/2010		
Which organisation(s) will enforce the policy?			Cefas/PHSI		
What is the annual change in enforcement cost (£m)?			-		
Does enforcement comply with Hampton principles?			Yes		
Does implementation go beyond minimum EU requirements?			No		
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:** -	**Non-traded:** -	
Does the proposal have an impact on competition?			No		
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?			**Costs:** 0	**Benefits:** 0	
Annual cost (£m) per organisation (excl. Transition) (Constant Price)	**Micro**	**< 20**	**Small**	**Medium**	**Large**
Are any of these organisations exempt?	No	No	No	No	No

Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on…?	**Impact**	**Page ref within IA**
Statutory equality duties[1] Statutory Equality Duties Impact Test guidance	No	24
Economic impacts		
Competition Competition Assessment Impact Test guidance	No	21
Small firms Small Firms Impact Test guidance	No	22
Environmental impacts		
Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance	No	24
Wider environmental issues Wider Environmental Issues Impact Test guidance	No	24
Social impacts		
Health and well-being Health and Well-being Impact Test guidance	No	24
Human rights Human Rights Impact Test guidance	No	24
Justice system Justice Impact Test guidance	No	24
Rural proofing Rural Proofing Impact Test guidance	No	24
Sustainable development Sustainable Development Impact Test guidance	No	24

[1] Race, disability and gender Impact assessments are statutory requirements for relevant policies. Equality statutory requirements will be expanded 2011, once the Equality Bill comes into force. Statutory equality duties part of the Equality Bill apply to GB only. The Toolkit provides advice on statutory equality duties for public authorities with a remit in Great Britain and Ireland.

Evidence Base (for summary sheets) – Notes

Use this space to set out the relevant references, evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Please fill in **References** section.

References

Include the links to relevant legislation and publications, such as public impact assessment of earlier stages (e.g. Consultation, Final, Enactment).

No.	Legislation or publication
1	
2	
3	
4	
5	
6	

+ Add another row

Evidence Base

Ensure that the information in this section provides clear evidence of the information provided in the summary pages of this form (recommended maximum of 30 pages). Complete the **Annual profile of monetised costs and benefits** (transition and recurring) below over the life of the preferred policy (use the spreadsheet attached if the period is longer than 10 years).

The spreadsheet also contains an emission changes table that you will need to fill in if your measure has an impact on greenhouse gas emissions.

Annual profile of monetised costs and benefits* - (£m) constant prices

	Y_0	Y_1	Y_2	Y_3	Y_4	Y_5	Y_6	Y_7	Y_8	Y_9
Transition costs	0.0103									
Annual recurring cost	0.1527	0.1527	0.1527	0.1527	0.1527					
Total annual costs	0.1630	0.1527	0.1527	0.1527	0.1527					
Transition benefits										
Annual recurring benefits										
Total annual benefits										

* For non-monetised benefits please see summary pages and main evidence base section

Evidence Base (for summary sheets)

Summary of Approach

1. This Impact Assessment is for implementing Council Regulation 708/2007 on the use of alien and locally absent species in aquaculture. The Regulation introduces an EU framework that will ensure adequate protection for the aquatic environment from the risks associated with the use of alien and locally absent species in aquaculture. This would be achieved by assessing proposed introductions of novel alien species using science based risk analysis in advance of any proposed introduction, in order to prevent interaction with indigenous species and damage to native ecosystems. This approach is consistent with Government policy in relation to invasive non-native species, and the need to control the spread of non-native fish and other aquatic organisms.
2. We wish to maintain a 'light touch' and avoid additional administrative burden, where possible. However, the Government is obliged to implement this Regulation.
3. The Evidence Base contains the following sections:
    - Introduction
    - Aquaculture Sector and Scale of the Affected Industries
    - Existing Arrangements
    - Council Regulation 708/2007 on the Use of Alien and Locally Absent Species in Aquaculture
    - Risk Analysis Process
    - Policy Aim
    - Options considered
    - Costs and benefits
    - Competition Assessment
    - Small Business Assessment
    - Annexes

Introduction

4. It has long been recognised that the spread of non-native species can have far-reaching and undesirable ecological consequences for animal and plant communities in rivers and lakes. Introduced non-native species can have direct effects on native species, for example by predation, or can upset the natural balance that operates between native species. Non-native species can also introduce and spread novel diseases and parasites to which our native species may have little or no resistance. Private firms are unlikely to take these issues fully into account since they do not bear the full cost of any spread of non-native species. It is therefore vital that, if we intend to protect native species, their habitat, and conserve the unique diversity of animal and plant life in our rivers and stillwaters, that we are able to regulate introductions of non-native species and restrict their spread in the wild.
5. Invasive non-native species of fauna and flora are considered to be the second biggest threat to biodiversity worldwide after habitat loss and destruction[2]. Releasing such species into the wild or having inadequate measures to prevent their escape can be particularly serious given that the control or eradication of an invasive species, once established, is, at best, extremely difficult and costly, and in many cases unachievable. While not all introduced non-native species will become invasive, they can still have adverse impacts. Given this, and the fact that their precise impact can be unpredictable, a precautionary approach based on a risk-based system for the management and control of such species is deemed to be appropriate.
6. On 28 May 2008, Defra launched the Invasive Non-Native Species Framework Strategy for Great Britain jointly with the Welsh Assembly Government and the Scottish Government. Both the Strategy

[2] Convention of Biological Diversity Invasive Alien Species Introduction: http://www.biodiv.org/programmes/cross-cutting/alien/default.aspx

and implementation plan are available at:
http://www.nonnativespecies.org/02_GB_Coordination/08_Strategy_Working_Group.cfm

7. The Strategy delivers against one of the main Member State measures in the EU action plan for the 2010 biodiversity target. It provides a high-level framework within which the actions of all stakeholders, including government departments and their related bodies can be better co-ordinated and made more effective in minimising the risks posed, and reducing the negative impacts caused by invasive non-native species in Great Britain.

8. The Strategy sets a key objective to minimise the risk of invasive non-native species entering and becoming established in GB, and to reduce the risks associated with the movement of species outside their natural range within GB. It recognises that prevention and early intervention are the most successful and cost-effective approaches for controlling the spread and impact of non-native species, and thus focuses efforts around the three-pronged approach agreed under the Convention on Biological Diversity - i.e. prevention measures, early detection and then carefully considered appropriate action. The Strategy also recognises the crucial need for greater awareness of the issues across all stakeholders, including the public, to achieve this.

Aquaculture Sector

9. Aquaculture in England and Wales is split into the finfish and shellfish sectors, as well as plant sector. The finfish sector is subdivided into fish farmed exclusively for human consumption and those produced for use in recreational fisheries. Both types of business keep and feed juvenile fish, either bred on the farm or supplied by another business, until they are of marketable size. Molluscan shellfish farming is similar, in that juveniles, often supplied by another business or sourced from the wild, are placed in selected areas which promote rapid growth and recovered when they reach a suitable size. There are a handful of farms rearing crustacea, either lobsters for stock enhancement programmes or non-native prawns for human consumption. As far as aquatic plants are concerned, the definition of aquaculture would encompass watercress production, water reed production, algae for industry and the production of ornamental aquatic plants.

Fish and Shellfish Farms

10. In England and Wales there are 518 registered fish and shellfish farms. Of these, 193 are coarse fish farms, the majority of which are located in Southern England, 197 trout and other fin fish farms, and 128 shellfish farms. The number of registered coarse fish farms has increased by 56% since 1997.

11. The main finfish species farmed is rainbow trout (7,294 tonnes). There is also limited production of other species, such as brown trout (441 tonnes), common carp (175 tonnes) Atlantic salmon (63 tonnes), turbot (63.5 tonnes), tilapia (33 tonnes), for a total fish farm production in England and Wales of 8,127 tonnes (2006 figures). Shellfish farm production totalled 15,449 tonnes in 2006, the main species cultivated being mussels (14,553 tonnes) and oysters (880 tonnes).

12. In 2006, the farm gate value of finfish farming in England and Wales was estimated to be £23 million, of which £13 million was salmonids, £0.5 million other food fish and £10 million coarse fish for re-stocking of fisheries and ornamental purposes. The value of shellfish farming is estimated to be around £20 million.

13. Employment figures for 2006 show that the number of people employed by registered fish and shellfish farms were 916 and 414, respectively.

Plant Sector

14. Whilst these industries should be little affected by the implementation of this EU regulation, the value of plants produced in aquaculture is estimated at £0.9 million for water reed production, and less than £1 million for algae (although this may represent a potential for growth for the industry, e.g. as biofuel or waste treatment). In 2004, estimates showed that the production of ornamental plants for ponds and aquaria was in the region of £8 million per year on average. In 2007, the retail value of watercress in the UK was approximately £55 million, much of which is UK produced.

Existing Arrangements

Fish & Shellfish

The Aquatic Animal Health (England and Wales) Regulations 2009

15. These Regulations, which implement European Commission Directive 2006/88/EC, require all aquaculture production businesses (APBs) to be authorised or registered by the competent authority for the purpose of controlling specific fish diseases.

16. Existing or new fish farms and fish dealer businesses have to be authorised, while put and take fisheries (defined as those maintained by the introduction of aquaculture animals) are derogated from the requirement for authorisation and simply require registration by the competent authority.

17. The Fish Health Inspectorate (FHI) at the Centre for Environment, Fisheries and Aquaculture Science (Cefas) is the competent authority for this activity in England and Wales. It maintains a database, which records relevant details of all authorised farms and dealer operations, and is in the process of registering all stocked fishery waters.

Authorised APBs

18. Prospective aquaculture business owners must demonstrate that they are able to operate such a business to appropriate standards, to protect animal health, before they are authorised to farm or trade in such animals.

19. They must apply to Cefas, with full details of their potential aquaculture operation, including confirmation that they have all necessary planning permissions as well as consents to abstract and discharge water as required. The FHI will then arrange an inspection of the potential business site to discuss how the business will operate and establish the requirements of a bio-security measures plan for the business.

20. The authorisation will include specific conditions about the species of animal that can be farmed or traded by the business. The FHI will ensure that the Environment Agency (EA) are content for the proposed species to be held, where the business premises are connected to natural waters or would otherwise require consents from the Environment Agency for stock introduction. Similar procedures will continue to apply under proposed new fish movement controls. Where there is a proposal to farm any species listed in Orders made under the Import of Live Fish Act 1980 (ILFA), then FHI will assess the suitability of the business to keep such animals, and arrange for a licence to be issued following the normal protocols.

21. All authorised aquaculture businesses will be subject to risk-based programmes of compliance checks and disease surveillance according to the species of fish held and the nature of the business operations.

22. If an aquaculture business operator fails to comply with the conditions of authorisation, then the FHI are able to issue enforcement Notices requiring that person to rectify the problem to a specific standard and within a specified timescale. Failure to do so could result in prosecution or in the revocation of the authorisation to carry out that business.

Registered APBs

23. Stocked fishery waters, those cropped occasionally with a view to the sale of live animals and other businesses such as zoos, public aquaria, and scientific research sites, which by the nature of their operations pose a lower risk of disease transmission than farms or dealer premises, are derogated from the requirement to be authorised, but their details are maintained on a register by the FHI.

24. The owners/operators of the businesses operating such lower risk sites must apply to the FHI for registration, supplying details of the nature of the facilities involved and the species that are to be held or traded from the business. In the event that such sites are considered to pose an increased risk of disease transmission due to the nature or scale of their activities, then the FHI may require that the businesses be subjected to authorisation as above. Registered sites are not routinely subject to monitoring by the FHI.

The Import of Live Fish Act 1980 (ILFA)

25. This Act regulates the import, keeping and release of non native fish in England and Wales, by means of Orders relating to specific listed species. Two Orders are in operation at present:

26. The Prohibition of Keeping of Live Fish (Crayfish) Order 1996, prohibits, with one exception, the keeping of any non-native crayfish in England and Wales, other than under a licence issued by the Secretary of State. The one exemption is for the signal crayfish (Pacifastacus leniusculus) kept in areas where it has become established in the southern half of England. The keeping of this species is only controlled in certain no-go areas listed in the Order. Licences under the Order have been issued enabling the keeping of live crayfish in restaurants and markets holding the animals for consumption, and for the keeping of a single species, the redclaw (Cherax quadricarinatus) as an ornamental animal in indoor aquaria.

27. The Prohibition of Keeping and Release of Live Fish (Specified Species) Order 1998, as amended in 2003, prohibits the keeping or release of listed non-native species except under licence. Defra policy restricts the keeping of some of these species to particular trade sectors, with only the least invasive, or those with a long established history of use, being licensed for keeping in natural waters.

28. Applications for licences under the above Orders are administered by the FHI, and subject to scrutiny by the Environment Agency (EA), Natural England (NE), Countryside Council for Wales (CCW) and Cefas Lowestoft laboratory before approval. Enforcement on fish farms and in trade is carried out by the FHI, while EA enforcement officers act in respect of offences at fishery or other inland waters.

29. A revision to the Prohibition of Keeping and Release of Live Fish (Specified Species) Order 1998 was consulted upon in 2010. While Council Regulation (EC) No 708/2007 on the use of alien and local absent species requires Member States to control the use of these species in aquaculture, to prevent impacts on native habitats and species, it makes no provision for the control of such species in other areas, such as the ornamental fish industry. It is therefore important that we act to increase the scope of existing controls on the keeping and release of potentially invasive non-native species outside aquaculture, and this has been addressed through the proposals contained in the Impact Assessment of an amendment to the 1998 Order. Further information is available on the Defra website at http://www.defra.gov.uk/corporate/consult/fish-imports/index.htm

Wildlife and Countryside Act 1981

30. The Wildlife and Countryside Act 1981 (WCA) precludes the release 'to the wild' of any animal not ordinarily resident in GB, and certain established non-native species listed on Schedule 9 of the Act, without an appropriate licence. Thus, fish farms may require a WCA licence to hold non-native species where some or all of the fish farm site qualifies as 'the wild'.

Plants

The Plant Health Order 2005

31. The Plant Health Order implements the EU Plant Health Directive 2000/29 and restricts the entry of plants and plant pests. Any consignment of plants for planting imported from a third country requires a phytosanitary certificate attesting that it meets the import requirements of the UK. Certain plant species are banned from import, as are any plant pests and diseases which are not normally present in Great Britain and which are likely to be injurious to plants in Great Britain. Imports of banned material may be allowed under licence for scientific and trialling purposes

Wildlife and Countryside Act 1981

32. Under the Wildlife and Countryside Act 1981, it is illegal, without an appropriate licence, to plant or otherwise cause to grow in the wild any plant listed on Schedule 9 of the Wildlife and Countryside Act 1981. The schedule includes alien plants which may pose a threat to our native flora.

Council Regulation 708/2007 on the Use of Alien and Local Absent Species in Aquaculture

Background

33. Alien species have been identified as one of the key causes for the loss of biodiversity in the EU and the world at large. They can have significant economic and social impacts, and could undermine the EU's sustainable development objectives. In its Biodiversity action plan for fisheries (COM (2001) 162, Vol.IV), the Commission undertook to evaluate the potential impact of non-indigenous species in aquaculture, and to promote the application of the International Council for the Exploration of the

Seas (ICES) Code of Practice on introductions and transfer of marine organisms, as well as the European Inland Fisheries Advisory Commission (EIFAC) Code of Practice and Manual of procedures for introductions and transfers of marine and freshwater organisms.

34. Aquaculture is a fast growing innovative industry across Europe, constantly looking for new species and markets. In order to adapt fully to market conditions and changes, it is essential that the industry diversifies the species it produces.

35. Building on the existing voluntary ICES and EIFAC rules, Regulation 708/2007 seeks to introduce an EU framework that will ensure adequate protection for the aquatic environment from the risks associated with the use of alien species in aquaculture.

Rationale for Government Intervention

36. Industry is motivated by commercial gain. Without intervention, industry is unlikely to take account of the potential cost of non-native species introduction since the costs will not be borne by an individual company but instead be spread more widely. It is important that the industry considers and addresses the environmental risk associated with the use of new species in aquaculture. Moreover, if the development of aquaculture is to be regulated, then this should be done in accordance with a common European framework that is sufficiently flexible to recognise the variety of aquatic environments and the nature of the risk posed to those environments by proposed aquaculture development.

37. The fact that introductions of alien species for the purpose of aquaculture can have significant adverse environmental impacts is amply demonstrated by the damage caused in England and Wales by the North American signal crayfish. This species was imported in the late 1970s with government support, specifically for the development of small-scale aquaculture, in open ponds, as an agricultural extensification scheme. However, crayfish escaped from such sites and colonised many rivers in England and Wales. The species competes with the native White-clawed crayfish and carries a disease, crayfish plague, to which our native crayfish has no immunity. Native White-clawed crayfish have now all but disappeared in the southern half of England. Signal crayfish is also responsible for a number of other adverse environment impacts. This case highlights the need for prior scientific assessment of the potential impact of species introduced for use in aquaculture.

38. We, therefore, welcomed the Commission's proposal to require Member States to ensure, by means of a rigorous risk assessment process, that aquaculture of non-native species poses no risk to the biodiversity of natural waters or other aquatic environments within the EU. We believe that this regulation largely eliminates the risks posed by aquaculture, and that, in the long term, it will be beneficial to the industry permitting them to diversify and trade in novel non-native species. Also, it endorses the ICES Code of Practice on introductions and transfers of marine organisms, to which the UK already subscribes.

Pre-regulation Consultation

39. An expert group of 46 people, made up of representatives from the Member States, industry, NGO's, ICES, EIFAC, the North Atlantic Salmon Conservation Organisation (NASCO) and other private sector experts, was consulted prior to the drafting of the Regulation. The proposal was also discussed on three occasions in 2004/5 in the Commission's Aquaculture Working Group of the Advisory Committee for Fisheries and Aquaculture.

40. The initial proposal was to include measures for containment of farmed salmon. However, owing to the response from the consultation, it was decided to decouple this aspect so that it could be dealt with separately in the future. Consultees other than the NGOs advised against an over-centralised and heavy handed approach and the proposal was modified to respect the competence of Member States in this field. On the other hand, the requirement for harmonised guidelines for the notification, risk assessment and quarantine was called for and these have been provided to allow for even application of the legislation across Member States.

41. To follow international practice regarding risk analysis, it was decided to separate the risk assessment function (advisory committee) from the risk management function (competent authority). The original option of combining both functions within the competent authority was therefore not advanced.

42. The industry's main concern was that the cost of funding the notification, risk assessment and quarantine would prevent future applications for the introduction of alien species. Consequently, the

Regulation leaves to Member States the option of deciding who should bear the cost of conducting the risk assessment.

43. As regards England and Wales, the general consensus is that the farming of novel non-native species is a fairly specialised area, which only a few will want to consider or have the resources to exploit. By introducing an alien species, operators are risking a potential negative effect and impact on the environment. It is, therefore, of extreme importance that those contemplating the use of alien species in aquaculture take full account of the risks posed by their projected actions and bears the associated costs. Consequently, the burden of minimal risk and of risk mitigation would rest with operators.

Scope

44. Council regulation 708/2007 applies to the introduction of alien species and translocation of locally absent species for their use in aquaculture in the Community.

45. For the purpose of this Regulation, 'alien species' means a species or a subspecies of a non-native aquatic organism, whereas a 'locally absent species' is a species or a subspecies of an aquatic organism that is locally absent from a zone within its natural range of distribution for bio-geographical reasons. Aquatic organisms are defined as any species living in water belonging to the animalia, plantae and protista (i.e. all unicellular organisms lacking a definite cellular arrangement, such as bacteria) kingdoms.

46. Also, for the purpose of this Regulation, aquaculture is taken to include activities such as bottom cultivation of mussels, which use aquaculture techniques as their basis. Ornamental fish and plants are covered by this Regulation only insofar as they are reared, commercially farmed or propagated in the EU for onward sale. While there is a significant trade in non-native organisms, mainly fish species for ornamental use, they are normally kept in pet shops, garden centres and commercial and private aquaria and thus do not fall within the scope of this Regulation[3].

The Competent Authority

47. Member States are required to designate a competent authority, which will take responsibility for ensuring compliance with the Regulation. Each competent authority may also appoint an advisory committee that will incorporate appropriate scientific expertise. The Commission have proposed that anyone intending to undertake an introduction or translocation of an aquatic organism will have to apply for a permit from the competent authority of the receiving Member State.

48. We would anticipate the competent authorities in England and Wales to be Cefas for introductions and translocations of aquatic animals and the Plant Health and Seeds Inspectorate (PHSI) where aquatic plants are involved. The Great Britain Aquaculture Board (GBAB) will act as the advisory committee.

Permits

49. The Regulation provides for a system of permits governing the use of alien and locally absent species in aquaculture, to minimise the possible impact of these and any associated non-target species on the aquatic environment and thus contribute to the sustainable development of the sector. The intention is that such permits will be granted only if the risk associated with the activities proposed by applicants can be considered low, or if the risk can be reduced to a low level by mitigating action on the part of the applicant.

Application process

50. Aquaculture operators intending to undertake the introduction of an alien species or the translocation of a locally absent species will need to apply for a permit from the competent authority of the receiving Member State. Applications may be submitted for multiple movements to take place over a period of not longer than seven years. Certain species covered by Article 2(5)[4] and listed in

[3] Council Regulation (EC) No. 708/2007, Article 2 (Scope) paragraph 4.

[4] Council Regulation 708/2007, Article 2(5) states that this regulation, except for Articles 3 (definitions) and 4 (measures to avoid adverse effects), shall not apply to the species listed in Annex IV. The risk assessment in Article 9 shall not apply to the species listed in Annex IV except in cases where member States wish to take measures to restrict the use of the species concerned in their territory.

Annex IV[5] , may be exempt from the requirements of the Regulation, although this is subject to interpretation by Member States and thus such exemptions may not apply. In all cases, therefore, clarification will need to be sought from the competent authority.

51. During the initial consultation with the applicant, the competent authority will make a provisional assessment of the proposed venture based on policy guidance documentation, over-arching conservation concerns and the perceived level of risk. This will inform the decision as to whether the venture will involve 'routine' or 'non-routine' movements and the level of associated risk assessment likely to be needed in support of the application. Routine movements are those where the movement of aquatic organisms is from a source where there is low risk of transferring non-target organisms[6] to the open environment. This includes the movement of organisms between two closed facilities. The assessment of risks in defining what constitutes a routine movement must consider the nature of the aquatic organism and/or the method of aquaculture (e.g. a closed system) at the recipient location such that the movement is not likely to result in adverse ecological effects. Non-routine movements are those that do not fulfil these criteria.

52. On the basis of the application and dialogue with the applicant and the advisory committee, the competent authority will establish whether the proposed movement or introduction can be regarded as 'routine' or 'non-routine'. For routine movements, the competent authority will be able to grant a permit, following whatever risk assessment procedures are considered necessary (e.g. in relation to the means of transport and the features of the recipient facility), and where applicable stipulating requirements for quarantine provisions. Non-routine movements will require a full environmental risk assessment as well as a contingency plan before any permit is issued. The risk assessment procedures are outlined in more detail immediately below and in the 'Options Considered' section.

Risk Analysis Process

53. The risk analysis process involves four main components: risk identification, risk assessment, risk communication and risk management. The general principles, or guidelines, to be considered during the risk analysis process were outlined in Annex II of the Regulation, pending the development of a risk analysis framework suited to aquaculture. A risk framework and its various protocols have subsequently been developed for this purpose for the EU in the EC Coordination Action 'IMPASSE' (environmental IMPacts of Alien SpecieS in aquaculturE), which submitted its report to the EC in November 2008. The risk analysis procedures developed by the IMPASSE project have been named the European Non-native Species Risk Analysis Scheme (ENSARS). This consists of a series of risk assessment protocols and management procedures to aid in the decision-making process as regards applications for the use of alien species in aquaculture (Figure 1). The risk analysis process will lead to the ranking of applicant species according to their relative, likely risk (low, medium, high) so as to aid decision makers as regards the issue of permits. The competent authority will only issue permits for non-routine movements where the risk assessment, including any mitigation measures, indicates a low risk to the environment.

54. ENSARS is modular in structure (Figure 1), with the questions used and the assessment of uncertainties being adapted from the GB Non-native Species Risk Assessment Scheme, which is itself adapted from protocols developed by the European Plant Protection Organisation (EPPO). The various ENSAR modules consider all aspects of the aquaculture process, including transport pathways, rearing facilities, infectious agents, non-target organisms, as well as environmental and socio-economic impacts. These modules evaluate the risks of escape, introduction to and establishment in open waters, of any non-native aquatic organism being used in aquaculture. A range of expertise is required to complete the risk assessment modules appropriately. The EC has accepted the final reports from the IMPASSE project, including the report that outlines the ENSARS scheme, and it is assumed that the ENSARS scheme will be incorporated into the Regulation, but this has not yet been confirmed.

[5] Annex IV to Council Regulation 708/2007, as amended by Commission Regulation (EC) No 506/2008 sets out the list of species to which certain provisions of that Regulation do not apply. Member States may request the Commission to add species to that Annex.

[6] For the purpose of Council Regulation 708/2007, 'non-target species' means any species or subspecies of an aquatic organism likely to be detrimental to the aquatic environment that is moved accidentally together with an aquatic organism that is being introduced or translocated not including disease-causing organisms which are covered by Directive 2006/88/EC.

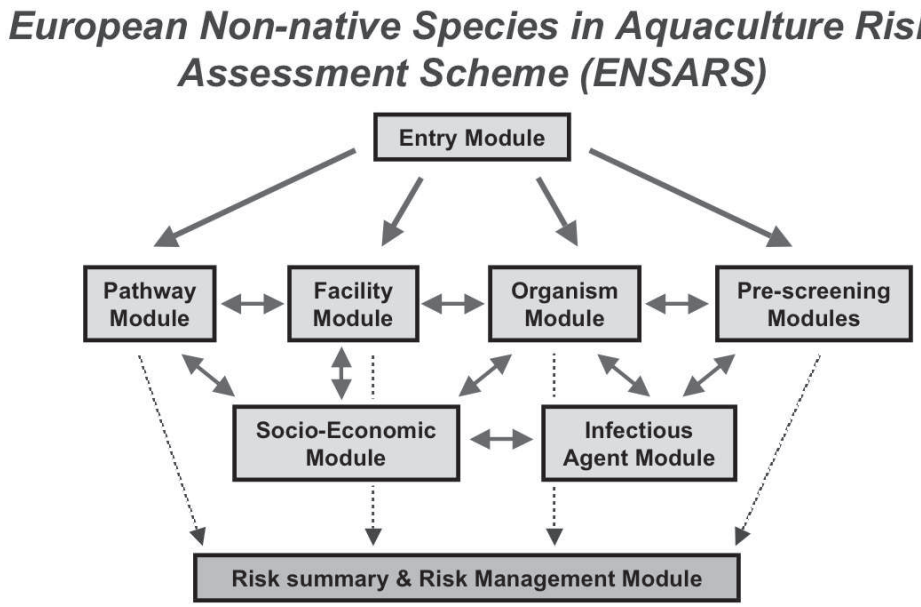

Figure 1. Schematic of the European Non-native Species Risk Analysis Scheme (ENSARS), regarding the Use of Alien and Locally-Absent Species in Aquaculture. The scheme consists of seven risk assessment modules (upper boxes in light blue) and a Risk Summary & Risk Management Module (lower box in light mauve) into which the risk assessment outcomes feed information.

55. Whatever risk analysis scheme is adopted, it is expected that the 'competent authority' will have the task of processing the applications and guiding applicants through the relevant risk assessments. The amount of time required to complete these assessments will depend upon the species involved, the number of assessment modules required[7] and the quantity of information available. It is anticipated that a fish farmer will probably wish to engage a specialist consultant to complete the necessary risk assessment modules, since a range of expertise will be needed to complete all the modules appropriately. However, a basic premise is that efforts will be made to ensure that only essential risk assessment modules are addressed and that decisions are reached as early as possible to avoid unnecessary delays and expenditure on the part of the applicant on risk assessments where these are not needed. Thus, for example, the proposed farming of a new tropical species in a closed aquaculture facility will, most likely, require only limited assessment and could be approved rapidly. In contrast, there is expected to be a general presumption against the farming of novel, temperate species in on-line sites, so applicants could be advised at an early stage that approval in such instances was highly unlikely and detailed risk assessments could be avoided.

56. The Regulation specifies that the applicant should be informed in writing within a reasonable time of the decision, but not longer than six months from the date of application.

Exemptions

57. The UK ensured in negotiations that the Regulation would not apply retrospectively, so that those already farming alien species will not be required to go through the application and risk assessment process. We also argued that where there had been a history of introductions of a proposed species within a Member State, the risk assessment process could be substantially reduced. This would allow applicants to concentrate more on the characteristics of the proposed introduction site and whether this was fit for purpose. However, as set out in Article 2(5), this is not a carte blanche, and Member States still retain the right to impose restrictions and require an environmental risk assessment for any listed non-native species.

58. Probably the most important part of the Regulation from a UK perspective is Article 2(5) and Annex IV, which can be used to exempt certain non-native species from the permitting requirements of the Regulation including the risk assessment process set out in Article 9[8]. These species, while

[7] For example, in the case of a proposed new species, the 'Organism' module could be completed within a day for species about which there is little published information, whereas a number of days could be required for a species about which a large body of literature exists.

[8] Please refer to footnote 4.

technically alien to the Member State, have typically been established in aquaculture (or otherwise) for so long that retrospective regulation would be inappropriate. Of main interest to the UK industry are rainbow trout, common carp, Pacific cupped oyster and Manila clam.

59. Controls on the movement of alien species to be reared in closed aquaculture facilities can be exempted from prior environmental risk assessment, under Article 2(6)[9], except in cases where Member States wish to take appropriate measures. Member States may also make provision for species not listed in Annex IV, which comply with the Annex IV criteria for their country but are not listed in Annex IV. For example, the UK has had ide (Leuciscus idus) in aquaculture for many years. Ide is non-native to the British Isles but is native to numerous countries of the EU. As such, ide is not listed in Annex IV, but in the UK this non-native species appears to comply with Annex IV criteria. Thus, subject to approval by the competent authority, the UK might consider it appropriate to establish a blanket licence for the entire country that would cover the use of such species in aquaculture.

60. As noted previously, Member States retain the right to regulate species on Annex IV. Thus, new species added to the Annex IV list by other Member States, or those already on the list that are not already farmed in the UK or which might pose a risk under conditions of climate change, can effectively be exempted from Annex IV status as it applies in the UK.

Policy Aim

61. The aim of these measures is to allow the economic growth of the aquaculture sector, while protecting the aquatic environment from the potential damage that might arise from the introduction of alien and locally absent species to the wild, where they might result in adverse biological interaction with indigenous populations.

Options Considered

62. Option 1: 'Do nothing'

    This new EU Regulation is binding in its entirety and directly applicable in all Member States. The UK Government is therefore obliged to implement it. In addition, although we already have reasonably comprehensive and robust provisions in place to regulate the use of certain non-native species in aquaculture, as outlined in the 'Existing Arrangements' section of this IA, such measures are deemed to be rigid and not sufficiently risk based. Hence, it is necessary to intervene to ensure that our native aquatic environment is accorded better protection from invasive non-native species, whilst enabling the industry to diversify and exploit new opportunities, within strict controls. Consequently, the 'do nothing' option is not deemed to be a viable alternative.

63. Option 2: Implementation of Council Regulation 708/2007 concerning the Use Of Alien and Locally Absent Species in Aquaculture

    The general thrust of the Regulation is to provide better protection for native flora and fauna across Europe and a level playing field as regards the controls on aquaculture industries in other Member States. The necessity for intervention is based upon the need to better protect native ecosystems from invasive non-native species, which are difficult and expensive to remove and can cause serious and irreversible damage to the aquatic environment. In addition, there is a need to allow the aquaculture and fish farming sector the ability to utilise and harvest new novel fish species. Intervention would also avoid the risk of expensive infractions for not implementing adequately EU legislation.

64. We do not envisage a great impact on the UK's established aquaculture production businesses following implementation of this regulation. Most of the existing businesses that produce non-native species deal in certain, commonly-farmed salmonids, shellfish, molluscs, crayfishes, algae and plants that are already well established in trade. These species have been exempted from the Regulation and there will not be any requirement for retrospective applications. However, those businesses who wish to expand and deal with new species will be required to complete an application form and risk assessment as appropriate

65. For those species that are not exempt from the Regulation, there will be two types of movements or applications to consider:

[9] Council Regulation 708/2007, Article 2(6) "Movements of alien or locally absent species to be held in closed aquaculture facilities shall not be subject to prior environmental risk assessment except in cases where Member States wish to take appropriate measures."

- Routine Movements for established species[10], or where there is unlikely to be any danger of escape etc. and the risks concerned are judged to be minimal; and
- Non-Routine Movements for novel species about which little might be known about their biology a nd possible impact should it escape into the wild.

66. Since there will be some overlap between the requirements of this Regulation and the need for fish farm authorisation under the Aquatic Animal Health Regulations (AAHR) 2009, we assume that a single administration system will apply for authorising sites under both AAHR and this Regulation.

67. As the Regulation requires that the competent authority issues the permits, it is proposed that Cefas[11], which already acts as the competent authority for the AAHR, will also be the competent authority for the purpose of this Regulation. While new responsibilities under this Regulation will entail additional costs for Cefas (i.e. costs of processing and issuing permits, monitoring and inspecting), there will be scope to limit these where they can be combined with other fish health and animal welfare activities. The Plant Health and Seeds Inspectorate (PHSI) will act as the competent authority where aquatic plants are involved.

68. A diagram setting out the application process that we propose to introduce under the Regulation is provided at Annex 3.

Routine Movements

69. With regard to Routine Movements, Cefas or PHSI would register the application. They would then refer the application to the 'GB Aquaculture Board' (GBAB). This body would act as the advisory committee, and would consist of conservation bodies: Natural England (NE), Countryside Council for Wales (CCW)) and the statutory bodies (Cefas (Lowestoft Laboratory), the EA and Defra – fisheries and plant health). The GBAB would consider the application (most likely by correspondence) and prepare a recommendation.

70. On the basis that GBAB considered the application to be a Routine Movement, Cefas or the PHSI would then decide whether to issue a permit. The process for warm water species farmed in secure, closed aquaculture facilities is expected to be relatively straightforward and only requiring completion of few risk assessment modules (i.e. pathway/facility)[12]. However, if the GBAB considered that the application should be regarded as a Non Routine Movement (see below), then a more comprehensive risk assessment would be necessary covering as many modules as necessary.

71. It is not clear how many routine movements might occur, but this is not expected to be great in number.

Non-Routine Movements

72. As with Routine Movements, Cefas or the Plant Health Inspectorate (where aquatic plants are involved) would register a Non-Routine Movement and refer the application to GBAB for initial comment. Assuming that there were no specific over-arching conservation concerns or policy reasons why the application should not be developed in detail, a comprehensive risk assessment would be required to accompany the application. The applicant would normally commission an expert (e.g. consulting firm) to undertake the risk assessment, though in some cases the assessment of particular modules (e.g. pertaining to the facility) may be carried out by the facility manager/owner. The various risk assessments would include, as necessary, assessments of pathways, facilities, species, non-target infectious agents and socio-economic impacts. On the basis of the risk assessments, the applicant will also be required to submit a contingency plan indicating

[10] Regulation of the movement of species currently listed in Annex IV will slightly differ from that for routine movements. However, regulation will be kept to a minimum and, where the competent authority deem this is appropriate, restrictions will simply be imposed by way of notices and associated conditions. In effect, the permitting process will be alike and thus is being considered as part of the Routine Movements section of the IA. Tighter restrictions (or presumptions against use) might apply for some Annex IV species where these have never previously been farmed here, but requirements for operators intending to move a species to submit an environmental risk assessment will be limited to the movement of any new species that might be added to Annex IV at a later date.

[11] The Fish Health Inspectorate at Cefas (Weymouth laboratory) will act as the designated Competent Authority.

[12] It is expected that these assessments will be carried out by facility managers/ owners themselves as part of the application process for routine movements. Representatives of the Competent Authority (i.e. inspectors) will determine during initial inspection visits whether or not such assessments are fit-for-purpose.

how any risks will be mitigated and to detail the actions that would be taken in the event of an escape of the farmed organism from the facility. Once completed, the application, risk assessment dossier and contingency plan would be submitted to the competent authority. The dossiers would then be subject to scientific review to ensure that they are 'fit for purpose'.

73. It is proposed that the competent authority would engage the Non-Native Risk Analysis Panel (NNRAP) for the scientific review of the applications and risk assessments. The NNRAP is an existing committee of experts who report to the Non-Native Species Secretariat (NNSS), which itself reports to the GB Non-native Species Programme Board [13] (http://www.nonnativespecies.org/02_GB_Coordination/04_Risk_Anaysis%20Panel.cfm).

74. Essentially, NNRAP is a core group of risk assessment experts who undertake peer review of non-native species risk assessments and provide advice on the protocols used to assess non-native species risks. The existing NNRAP operation would, therefore, be used to process and evaluate the applications and risk assessments under the Regulation, and would provide for a robust and well established risk assessment mechanism. It is expected that all applications and associated risk assessments related to novel aquaculture species will be peer-reviewed as a matter of course. This will help ensure that the information submitted has a relevant and scientific grounding. In cases where the NNRAP does not possess the necessary taxonomic expertise, the NNSS employs external reviewers with the required expertise as peer-reviewers, complementing the existing risk assessment expertise of the NNRAP. The same procedure would be employed for aquaculture related assessments and would involve one or more peer reviewers (as required) to ensure that the review process is robust and the risk assessment is fit for purpose. The NNRAP would then review the risk assessment in light of the peer review and provide additional comments on whether it has been appropriately completed, is fit for purpose or requires additional input and/ or modification. It is quite likely that on reviewing the risk assessment, NNRAP will want clarification / additional information in some areas. In such circumstances the risk assessment will be sent back to Cefas/ PHSI, and then to the applicant and their appointed risk assessor, to provide additional details.

75. Following their review of the application dossier, the NNRAP would return the application dossier along with their evaluation and recommendations to the GBAB as to the level of risk posed by the species and proposed new venture. Subsequently, the GBAB would consider this advice and prepare a recommendation (which it is expected would normally follow the NNRAP advice) as to whether the application should be approved or rejected (i.e. low or high risk). It is anticipated that any particular concern (e.g. with respect to specific conservation issues) that GBAB might have in respect of an application would be raised prior to the full risk assessment process being initiated. However, the final recommendation from GBAB would ensure that the process is robust and that any conservation aspect arising from the review is taken into account. The GBAB recommendation would then be sent to either Cefas or PHSI who would finalise the application, inform the applicant of the decision and, where appropriate, issue the permit. Any specific concerns that the competent authority had about an application would be raised at the start of any application process and considered as part of the peer review process. It is thus very unlikely that the competent authority would disagree with any GBAB decision. However, in the event that this occurred, the decision would be subject to further dialogue and discussion to seek a resolution.

76. The number of Non-Routine Movement applications is expected to be low, perhaps only 1 a year. This reflects the current low level of interest in novel species and the fact that some previous ventures (e.g. Barramundi) have not always proved successful.

Costs and Benefits

Costs

Option 1: 'Do nothing'

77. This option would preserve the status quo and, therefore, there would be no additional costs compared to the existing baseline scenario. However, there would be the risk of serious and costly infractions if the European Commission considered that we had not suitably implemented the Council Regulation into UK law.

[13] The current peer-review process for non-native species risk assessments is administered by the Non Native Species Sectretariat (NNSS) in York, with peeer-review undertaken by the NNRAP.

Option 2: Implementation of Council Regulation 708/2007 concerning the Use of Alien and Locally Absent Species in Aquaculture (ASR)

78. Alien species can be valuable to the aquaculture industry. Current interest in new species in the UK is currently low, as a consequence of previous animal health rules. It is therefore, not expected that there will be a high immediate demand for evaluating and approving new non-native species, but that may change if the industry decides to exploit new market opportunities. Costs associated with authorising the use of a new species are expected to vary according to whether the application will be a 'Routine Movement' or a 'Non-Routine Movement' (see below).

79. There will be initial 'one off' costs for central Government for the creation of the application form, for the setting up of a public register of alien species introductions and inspection costs. The application form is currently being drafted and we have been quoted £70 per page. The expectation is that the form will be five pages; therefore the cost for the creation of the form would be £350. The costs for creating a public register of alien species introductions which will be located on the Cefas website has been estimated to be around £10,000.

80. There will be additional, more substantial, costs for Government resulting from the evaluation of completed forms and associated risk assessments once these are submitted and these are set out in detail below.

81. For both Routine and Non-Routine Movements, Cefas or the PHSI (where aquatic plants are involved) would initially register the application.

82. Applicants will seek initial advice on the aquaculture of animal species from Cefas, which advises on the fish health standards required for imports, as well as the need for farm authorisation under the new Aquatic Animal Health Regulations (AAHR). For new aquaculture sites, permission under the ASR would be dealt with at the same time as the AAHR authorisation. It is intended that a single administration system for authorising sites under both the AAHR and the ASR would be put in place. While the new duties will entail additional costs for Cefas (i.e. costs of processing and issuing, monitoring and inspection costs), there will be scope to limit these where they can be combined with existing activities related to fish health and animal welfare.

83. It is anticipated that an initial pre-screening will be possible to assess species likely to be of high risk and hence unsuitable for use in open aquaculture facilities. This would be based on simple policy guidelines and would enable a rapid initial response to the applicant on the likely suitability of a potential application, thus avoiding the need for a risk assessment. This would not exclude the applicant from seeking to progress an application and obtaining a full risk assessment for a species, should they so wish. However, it would help provide guidance on the species for which presumption against approval for use in open aquaculture facilities was likely to apply.

84. Where a species is to be held in a bio-secure environment and there is little prospect of the species (or any non-target organisms) escaping, there will not normally be a requirement for the application of comprehensive risk assessment procedures. However, facility and pathway assessments would, most likely, still be required to confirm that the site and associated fish movements to and from it were indeed 'bio-secure'. It is anticipated that this assessments will be undertaken by the facility owner/ manager as part of the standard procedure for routine movements applications[14].

Routine Movement Applications

85. Routine Movement Applications[15] would not be accompanied by a full risk assessment and so registering and checking the application is likely to be more straightforward than for Non-Routine Movements.

86. The expectation is that 17 applications for Routine Movements will be received each year[16]. It is anticipated that the vast majority of the applications received (15) will be for introductions of alien fish species, whereas the number of plant species likely to require assessment under ASR will be very low (2). The cost to the industry for general enquiries under ASR and/ or assistance in

[14] Please refer to footnote no. 12.
[15] Please refer to footnote no.10.
[16] A Cefas/ PHSI estimate based on enquiries received to date from the industry on the farming of non-native species.

completing the application form is expected to amount to £782, based on 17 queries a year, 1 hour per query at an hourly rate of £46[17] (17 x 1 x £46).

87. It is anticipated that it will take 2 hours for a company to complete an application form for a Routine Movement at a cost of £46 per hour, amounting to £92 per application. The total annual cost to industry for completing Routine Applications would therefore be £1,564 (17 x £92)

88. Initial advice from Cefas and/or PHSI related to enquiries under ASR is expected to amount to 1 hour per application at an hourly rate of £68[18]. Therefore the total annual cost would be £1,156 (17 x £68).

89. On the assumption that each application would take, on average, 2 hours to assess and input at an hourly rate of £68, the cost associated with the assessment of 17 application forms would be £2,312 (2 x 17 x £68).

90. Cefas and/or PHSI would then refer the application to the GBAB. Consideration of Routine Movements is expected to require minimal input from GBAB and Cefas and/or PHSI would identify any that might potentially involve any risk. It is expected that consideration would be by correspondence, input would be minimal and therefore additional costs have not been explicitly quantified.

91. Following agreement from GBAB that the application qualifies to be considered a Routine Movement, Cefas and/PHSI would issue a permit. The time required to issue a permit and the associated administrative work is expected to be 1 hour per application at a cost of £46[19] per hour, so the yearly cost would amount to £782 (17 x £46).

Non-Routine Movement Applications

92. For Non-Routine Movements, where the applicant might be applying to establish a fish farm for a novel species, a detailed risk assessment and contingency plan would be required as part of the application. Consequently, for Non-Routine Movement Applications recording and checking the application is likely to be more complicated than with Routine Movements. The number of applications is expected to be low, perhaps only 1 a year, although there may be rather more provisional enquiries (e.g. 20)[20]. This reflects the current low level of interest in novel species and the fact that some previous ventures (e.g. Barramundi) have not always proved successful. The cost to the industry for initial consultation with the competent authority about new species is expected to amount to £920, based on 20 queries a year, 1 hour per query at an hourly rate of £46 (20 x 1 x £46).

93. Initial advice from Cefas/ PHSI related to ASR enquiries related to new species (Non-Routine) is expected to amount to 1hour per query. Therefore the total annual cost would be £1360 (1 x20 x £68).

94. As with Routine Movements, Cefas/ PHSI would receive, register and assess applications for Non-Routine Movements. It is assumed that this process would take 3 hours, on average. At an hourly rate of £68, the cost associated for one application form would be £204.

95. It would be for the applicant to decide who carried out the risk assessment. However, it is expected that GBAB and/or NNRAP might provide a list of potential risk assessors that Cefas/ PHSI would make available to potential applicants. According to NNRAP, risk assessors are currently paid £1,000 (ex VAT), on average, to undertake a simple species risk assessment. This is based on approximately 1 person for 2 days and is for general species risk assessments and not specific to aquaculture. In the case of aquaculture assessments under ASR, which might include potential non-target organisms, a wider range of assessments will be required. Apart from the species and any related non-target organisms (e.g. infectious agents), risk assessments may include facility, pathway and socio-economic modules. On the basis of the risk assessments, the applicant will also be

[17] Industry hourly full economic cost (FEC), with the salary component representing around 40% to 50% of the total. The overhead component comprises the reminder and is made up of accommodation and the costs of support services (e.g. expert advice).

[18] Cefas Pay Band 6 hourly FEC for 2009/10. The salary component represents around 40% to 50% of the total. The overhead component comprises the reminder and is made up of accommodation and the costs of support services (e.g. HR, finance/contracts, Chief Executives office, IT, library, etc.).

[19] Cefas Pay Band 4 hourly FEC for 2009/ 10. The salary component and overhead component are outlined in the above footnote.

[20] Cefas/ PHSI estimation.

required to submit a contingency plan indicating how any risks will be mitigated and the actions that would be taken in the event of an escape of the organism. It is impossible to provide an accurate cost estimate as this will vary from species to species, but a full risk assessment and contingency plan under the scheme might cost £6,000, based on an assessment conducted by one risk assessor in twelve working days. On the assumption that there would be one application per year, this would also be the annual cost to industry. However, it is expected that when embarking on a new commercial venture with a novel species, most operators would commission some form of risk assessment in any case and therefore this figure represents an upper band estimate of the cost incurred by the industry for a full risk assessment.

96. There are also likely to be some administrative costs associated with the completion of the application for a Non-Routine Movement that may be fairly complex. Assuming this would take 8 hours at an hourly cost of £46, the cost to industry would be £368 (on the basis of one application per year, this is also the annual cost to industry).

97. Following registration, and initial discussion with GBAB, Cefas or the PHSI would pass the application and the risk assessments onto NNRAP for peer review.

98. It is quite likely that, on reviewing the risk assessment, NNRAP will want clarification / additional information in some areas. In such circumstances the risk assessment will be sent back to Cefas/ PHSI, and then the applicant and their appointed risk assessor, to provide additional details. This is likely to happen at least once, but may need to be repeated on a number of occasions, with the potential to extend the application assessment process. Applicants and their appointed risk assessors will therefore be encouraged to provide as detailed responses as possible in submitting the original application.

99. Given these factors and the uncertainty about how detailed the dossier of risk assessments might need to be (e.g. the number of possible infectious agents / non-target organisms), and how much information might be available (affecting the complexity of each assessment), it is impossible to provide an accurate estimate of the likely costs associated with the NNRAP peer review of the risk assessment dossier. For indicative purposes, an average cost might be in the region of £13,000. However, costs might vary from around £10,000 to over £15,000. These costs would comprise:

    - Peer review. It is expected that risk assessment dossiers would be subject to an initial thorough peer-review which would be conducted by up to two peer reviewers. Based on 5 days per peer-review per reviewer at an average daily rate of £500[21], the total costs of having a risk assessment peer-reviewed would amount to £5,000. Full review and due consideration of the risk assessment dossier by the NNRAP panel at their quarterly meetings. It is expected that the NNRAP would thoroughly review the risk assessment dossier in light of the peer-review and subsequently scrutinise it following any requested updates/ revisions. The NNRAP panel has 6 members; based on one day and a half per member to complete all the review tasks related to a risk dossier (full assessment meeting, plus catch-all to cover additional reviews following modifications) and on one day travel at £500 per day, this would equate to costs of £7,500 per dossier. These costs are likely to vary dependent on the complexity of the assessment.
    - Administrative costs for NNRAP Secretariat would be £500, based on 1-2 days per assessment at £250[22] per day).

100. Following their analysis, NNRAP would make a recommendation and return the application and risk assessment evaluation to GBAB. Subsequently, GBAB would consider this advice and prepare a recommendation (which is expected to follow the NNRAP advice) as to whether the application should be approved or rejected (i.e. low or high risk). Specific overarching conservation concerns or policy reasons why the application should not be developed would be identified at the start of the application process. The recommendation would then be sent to Cefas to finalise and inform the applicant. The costs of the GBAB operation is expected to amount to £68, based on 1 hour per application at £68 and 1 application per year. It is anticipated that this cost would be met from existing resources. The estimated cost incurred by Cefas in issuing the permits would amount to £46, based on 1 hour per application at an hourly cost of £46.

[21] This figure is based on the full economic cost of a specialist who would carry out a risk assessment or a peer-review and is based on rates currently charged by Universities, Government Agencies, Consultancies, etc.
[22] NNRAP daily full economic cost.

Cost of Site Inspections/ Monitoring

101. It is anticipated that a farm will need to be inspected once an application under the ASR is made to verify whether the premises are bio-secure and, in fish farm cases, that they have means to prevent the escape of fish. A single inspection visit is estimated to cost £230[23]. Consequently, the total cost for inspecting 18 farms will be £4,140, based on the assumption that 17 applications for Routine movements and one for Non- routine movements would be progressed.

102. Routine inspections and any monitoring of conditions will take place at the time of aquatic animal health compliance visits, and so there will be no additional costs for this aspect of the work. It is anticipated that the same procedure will be used for aquatic plants; hence routine inspections and monitoring will be integrated in existing plant health inspection programmes and no additional costs will be incurred. A summary of the costs incurred by the industry and government for dealing with applications for both Routine and Non-routine movements are provided at Annex 4.

Established Businesses

103. The UK ensured in negotiations that this Regulation would not apply retrospectively, so that those already farming alien species will not be required to go through the application and risk assessment process.

New Businesses/Existing Business introducing New Species

104. New aquaculture ventures and existing businesses who wish to expand and deal with new non-native species will be required to complete an application form and, where necessary, a risk assessment.

105. As mentioned in the previous sections, the main cost for the industry will be the completion and submission of the application form, risk assessment and contingency plan. There may be further costs where permits for Non-Routine Movements require the establishment of quarantine facilities, for example as possible mitigation for risks identified during the risk assessment process. Costs have been estimated in some instances to amount to £500 per tonne, for a 400 tonne production unit so the overall cost would be £200,000[24]. However, this estimate is based on a purpose built building and using an existing building might reduce the costs significantly. For the purposes of this analysis costs are therefore based on the cost of a recirculation system and estimated to be in the region of £300 per tonne for a 400 tonne production unit with an overall cost of £120,000 p.a.[25].

106. It is unclear how much of a deterrent such costs might be for the industry. It may restrict their willingness to diversify and invest in new species. However, the new arrangements will allow the facility for new 'start ups', compared to the previous arrangements. It should also be recognised that the cost of the application process should be small relative to the start up costs for a new aquaculture operation and thus should not deter some sectors of the industry from expanding in this new trade.

107. In order to facilitate the process, we intend to establish that, where a proposed species has a long history of introduction in other Member States, the risk assessment procedures can be substantially reduced, allowing the applicant to concentrate on the characteristics of the proposed introduction site and whether this is fit for purpose. In addition, we anticipate that the potential farming of particularly warm-water species in secure, closed aquaculture facilities would only require minimal consideration and accordingly should be processed fairly quickly, with a reduced cost of delivering a risk assessment.

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[23] This figure is based on a half a day inspection at an hourly rate of £46 (Cefas Pay Band 4) plus mileage.

[24] The ratio between the set up costs and production capacity will increase as less fish is produced. Consequently, the cost of setting up a smaller establishment is estimated in the region of –

- £10,000 to £15,000 for a 5 tonne unit (£2-3,000 per tonne);
- £15,000 to £20,000 for a 10 tonne unit (£1,500-2,000 per tonne);
- £50,000 to £100,000 for a medium size 50 tonne outfit (£1,000-2,000 per tonne).

[25] As mentioned in the 'Non-routine Movements' section of this document, the number of applications for such movements is expected to be extremely low, in the region of one a year. Although it is not possible to anticipate whether all permits will be made subject to the full quarantine requirements of the Regulation, the calculation of the present value of all costs arising from the implementation of the ASR reflects a scenario where they all are.

108. Similarly, species such as ide (Leuciscus idus), which is not listed in Annex IV, but which appears to comply with Annex IV criteria, might come under a 'blanket licence', which would apply to the entire country and would cover all farm holdings that trade in the species.

109. Subject to a generic assessment for ide by GBAB, we might be able to introduce a routine permitting system that should pose the minimum burden possible on the Government and the industry.

110. In conclusion, we believe that the volatile market for novel species is likely to be a more significant factor in the industry's decision to diversify than the application process and associated costs.

Funding

111. It is anticipated that the fish farming company who intend to farm the novel species will arrange and pay for the risk assessment (directly to the specialist assessor), including assessments of pathways, facilities, species, non-target infectious agents, socio-economic impacts, as appropriate, and the costs of any ancillary questions/clarification required during the NNRAP peer-review process.

112. Introductions cannot generally be reversed and the cost of containment or control measures, which is very high, usually falls on the public purse. It is thus important that those contemplating the use of alien species in aquaculture take full account of the risks posed by their projected actions and that those actions should be prevented if the wider risks to native species and the environment are unacceptably high. Hence, the precautionary approach and the related costs (as outlined in previous sections) are justified when balanced with the potential damage that might be caused.

113. There is a lot of uncertainty about both the number of applications that might be received following implementation (although we expect these to be very few), and about the cost of evaluating associated risk assessments which is likely to vary considerably depending on the species concerned. Consequently, the best way forward was considered to initiate a five-year pilot period, during which the Government would fund the peer review of the risk assessment and associated costs of the application, whilst applicants would be responsible for undertaking and financing the initial risk assessment and the contingency plan. Before the end of the pilot period we would conduct a review with a view to possibly introducing charges for permits to cover costs incurred by Government. A key advantage of this option is that it would enable us to ascertain clearly the number of applications and risk assessments, hence allowing the Government to gauge the full extent of the costs involved. This option was also deemed to represents a sensible and proportionate response to the issue of cost recovery under this Regulation.

Benefits

Option 1: 'Do nothing'

114. This option would preserve the status quo and, therefore, there would be no additional benefits compared to the existing baseline scenario.

Option 2: Implementation of Council Regulation 708/2007 concerning the Use of Alien and Locally Absent Species in Aquaculture

115. Council Regulation 708/ 2008 is intended to provide greater protection for the native fauna and flora across Member States and a level playing field as regards the controls on aquaculture industries in these countries. Existing controls on the keeping and release of non-native species for aquaculture in England and Wales, although fairly comprehensive, are rigid and not sufficiently risk based. This Regulation introduces EC wide rules which require Member States to ensure, by means of a rigorous risk assessment process, that aquaculture of non-native species poses no risk to the biodiversity of natural waters or other aquatic environments within the EU. Hence, it largely eliminates the risks posed by aquaculture, by introducing a more flexible system which provides a greater emphasis on risk assessment[26].

[26] Recent harmonisation of fish health rules under European Council Directive 2006/88/EC has potentially 'freed up' more species for import, as most fish species can now be imported without any specific health testing. As a result, importers are now able to import most of the world's temperate fish species into the UK, on the basis only of their clinical freedom from disease. Although interest in farming of novel non-native species under this has so far proved to be fairly low, imports of non-native

116. Continued access to varied and disease free fisheries is vital to 3 million practising anglers. Healthy fisheries are also an important indicator of the state of the rivers. Protecting native species is of key importance. While assigning monetary values to native biodiversity, or the loss of an indigenous species, are problematic, the costs associated with eradicating invasive non-native species can be very high. This perhaps best illustrates the potential major benefits that are likely to result if effective regulatory controls are in place and the introduction of alien species adequately regulated.

117. By way of illustration, the high costs of eradicating an existing invasive species – topmouth gudgeon – are demonstrated by the following examples:

- Topmouth gudgeon were eradicated from a small infected lake in the Lake District using rotenone in March and April 2005. The capital cost of the rotenone was approximately £6,500. Determination of the total manpower cost was complex as the programme ran over a two year period. During the period of rotenone treatment alone, approximately 70 man-days were required to prepare the water for application and 50 man-days for the actual application. On the basis that 1 man-day costs an average of £260, and then the total cost of manpower just to apply the rotenone was £31,200.
- Topmouth gudgeon were eradicated from another small (<1 ha), infected water in the West Midlands in 2006 and the capital cost alone was in the region of £20,000, with man-power costs estimated at over £20,000. The Environment Agency has borne the cost of such operations to date.
- An economic impact assessment estimated the cost of a national eradication programme for topmouth gudgeon at: ≈£3 million per year initially, decreasing to £2.5 m per year after 10 years, £1.5 m per year after 15 years, and reaching zero at 20 years (assuming successful eradication). This was based on eradication costs only and did not include impacts to local and national economies.

118. Of course, topmouth gudgeon is just one example among many non-native fisheries that pose potential threats. These figures have been used as illustration only and have not been used as the basis for further quantification. It is not appropriate to use the figures for value transfer because:

- The aim of the policy is to reduce the limit the likelihood of the introduction of invasive species. However, it is not possible to quantify the change in probability resulting from the change in policy;
- It is not known if the costs of the eradication of topmouth gudgeon are applicable to the eradication of other potential non-native species;
- The geographical scale of any potential spread of non-native species is unknown.

119. Further guidance on the where value transfer is considered appropriate (or not) can be found at http://defraweb/environment/policy/natural-environ/using/valuation/index.htm

120. Allowing the farming of novel species may also lead to positive socio economic effects and possibly provide a small contribution to food security and maintaining fish stocks.

Competition Assessment

121. It is unlikely that this Regulation will have a major impact on competition within the industry. In the UK, the farming of novel alien species is a fairly specialised area, which only a few will want to consider or have the resources to exploit. The key factor in the decision whether to start up fish farming of a 'novel' non native species is likely to be the volatile nature of the market. Recent expansion of this sector has focussed on high-value, warm-water species reared in secure enclosed facilities, and this is considered to represent the most likely immediate route for further growth. The high cost of funding an application and full risk assessment will constitute a possible deterrent but needs to be viewed against the risk to native species and ecosystems, potential loss of biodiversity and the high costs of ameliorative actions should these prove necessary. It should also be noted that although new aquaculture ventures (or existing businesses that wish to expand and deal with

species for aquaculture will now be subject to Council Regulation (EC) no. 708/2007, which adequately addresses the risk of their establishment in UK waters.

new non-native species) will have to fund the high costs associated with the application process, these trailblazers will then exploit the monetary opportunities that accrue from those ventures.

122. Also, existing sites are not obliged to apply for permits and species farmed in the UK and listed in Annex IV (i.e. such as rainbow trout and common carp) will not be subject to the full rigour of the Regulation, requiring to show only that the proposed site is secure and that the input species come from “a known and trusted source”.

123. The Ornamental Aquatic Trade Association (OATA) have indicated that they are content with the Regulation. It will have a minimal effect on their industry as it does not apply to the keeping of ornamental aquatic animals or plants in pet shops, garden centres, contained garden ponds or aquaria, or in facilities equipped with appropriate effluent treatment systems.

124. Seafish, whose remit is for marine species, are not aware that the industry has any current plans to invest in novel species, but wishes to retain this option for the future. It is their opinion that the industry is successful today because it has been able to extend production into species other than native species. They therefore believe that the industry needs the option to be able to use as broad a range of species as is possible, including novel (and introduced) species if it is to be able to exploit new market opportunities fully in the future. They also feel that the industry, which is made up by many small producers in the main, is already under pressure in complying with ever increasing regulatory mechanisms. Overall, Seafish consider the Regulation to be a hurdle that the majority of UK businesses would find it hard, if not impossible, to get over without financial support although there was no quantified evidence in support of this view. However, we strongly believe that it is paramount that we place rigorous checks on aquaculture to avoid an ecological disaster that cannot be reversed. The burden of proof of minimal risk should rest with operators and should be taken into account in their business plan operations. We do not believe that the short-term costs for funding application forms and associated risk assessments would deter some sectors of the industry, who are presumably investing for the long term, from expanding into this new trade. Also, this Regulation provides a level playing field as regards the controls on aquaculture industries across Europe. Hence, the measures introduced through this Regulation appear essential to control introductions of new alien species and thus accord greater protection to native biodiversity across Europe.

125. The British Trout Association, a UK wide trade association representing an industry responsible for producing and processing some 14,000 tonnes of rainbow trout per annum, have been supportive of moves to assess the environmental risk associated with the introduction of new species and welcomed a precautionary approach to the such introductions. However, they felt strongly that as far as the rainbow trout is concerned, the long history and disbursement of the species in UK, precludes it from being an exotic species. As mentioned previously in this section, species farmed in the UK and listed in Annex IV, such as rainbow trout, will not be made subject to the full rigour of the Regulation, requiring to show only that the proposed site is secure and that the input species come from “a known and trusted source”.

Small Business Assessment

126. While there are a number of small businesses in the aquaculture sector, the economic climate on fish for the table market has been tough and some businesses have ceased trading. The business representatives that we have contacted have indicated that their members would not be very interested in farming novel species. They appear to be focussing on expanding current markets, rather than looking at new species.

127. New ventures and businesses that decide to expand to new species will have to bear the relatively high costs of the application form and the associated risk assessment. However, we anticipate that some risk assessments may be applicable to subsequent applications, and we also anticipate that a routine permitting system (‘blanket licence’) for certain species established in the UK may be introduced as set out in the ‘Exemptions’ section of this document. In addition, where a proposed species has a long history of introduction in other Member States, the risk assessment procedures can be substantially reduced. Consequently, the costs to the industry would reduce significantly.

Annexes

Annex 1 should be used to set out the Post Implementation Review Plan as detailed below. Further annexes may be added to provide further information about non-monetary costs and benefits from Specific Impact Tests, if relevant to an overall understanding of policy options.

Annex 1: Post Implementation Review (PIR) Plan

A PIR should be undertaken, usually three to five years after implementation of the policy, but exceptionally a longer period may be more appropriate. A PIR should examine the extent to which the implemented regulations have achieved their objectives, assess their costs and benefits and identify whether they are having any unintended consequences. Please set out the PIR Plan as detailed below. If there is no plan to do a PIR please provide reasons below.

Basis of the review: [The basis of the review could be statutory (forming part of the legislation), it could be to review existing policy or there could be a political commitment to review];

There is nothing in the EU Regulation to suggest that there will be a review. However, the UK proposal is to pilot an approach for 5 years and then review its impact.

Review objective: [Is it intended as a proportionate check that regulation is operating as expected to tackle the problem of concern?; or as a wider exploration of the policy approach taken?; or as a link from policy objective to outcome?]

Government will hold a review five years after their implementation to consider to what degree these measures have been successful; both how efficient the process is for reaching permitting decisions and the degree to which the industry has accepted the regulation will be assessed.

Review approach and rationale: [e.g. describe here the review approach (in-depth evaluation, scope review of monitoring data, scan of stakeholder views, etc.) and the rationale that made choosing such an approach]

Evaluation of data on number of applications, costs of risk assessments and peer reviews. Collection of stakeholder views on application and permitting process.

Baseline: [The current (baseline) position against which the change introduced by the legislation can be measured]

Measures currently in place to regulate the use of non-native species in aquaculture are rigid and not sufficiently risk based. They cover only a limited number of non-native species and thus do not afford any protection against novel, potentially invasive non-native species. Also, they do not use a robust mechanism for evaluating the risk of invasion and potential to harm the environment that a non-native species may pose.

Success criteria: [Criteria showing achievement of the policy objectives as set out in the final impact assessment; criteria for modifying or replacing the policy if it does not achieve its objectives]

- Risk analysis process is performed in a timely and cost effective manner
- Industry is able to diversify into novel species with low risk to the environment
- The policy is accepted by the industry
- No introduction of novel potentially damaging non-native species are registered

Monitoring information arrangements: [Provide further details of the planned/existing arrangements in place that will allow a systematic collection systematic collection of monitoring information for future policy review]

A public register of alien species introductions will be set up. The database will record information on species and risk assessments undertaken, as well as details of aquaculture facilities and of permits issued. The database will be published on the FHI website - www.**efishbusiness**.co.uk/.

Reasons for not planning a PIR: [If there is no plan to do a PIR please provide reasons here]

N/A

Annex 2: Outcome of Impact Tests not referred to in the Evidence Base

Justice System

The proposal does not create any new criminal sanctions or civil penalties aside from those referenced in the evidence base where relevant.

Sustainable Development

The proposal complies with sustainable development principles in that the primary aim of the New Order is to allow Cefas/ PHSI to effectively protect native flora and fauna for future enjoyment.

Greenhouse Gas Assessment

The proposal will have no significant effect on carbon emissions.

Wider environmental issues

The proposals are designed to protect the biodiversity of England and Wales, both aquatic and land based.

Health & Wellbeing

The proposal will have no significant impact on health, well-being or health inequalities.

Statutory Equality Duties

None of the proposals discriminate against either race, disability or gender. The proposals do not impose any restriction or involve any requirement which a person of a particular racial background, disability or gender would find difficult to comply with. Conditions apply equally to all individuals and businesses involved in the activities covered by the proposal.

Human Rights

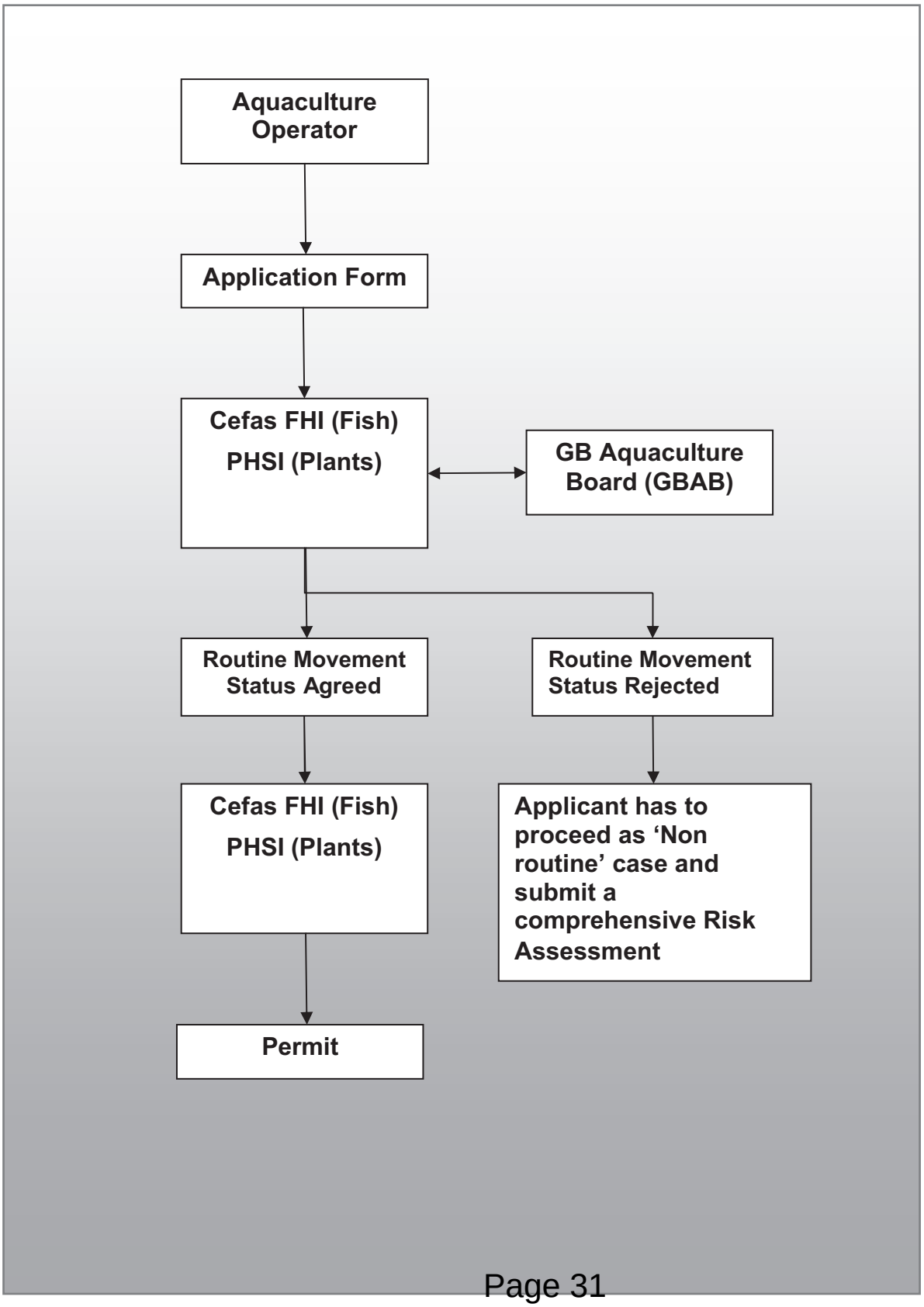
The proposals are consistent with the Human Rights Act 1998.

Rural Proofing

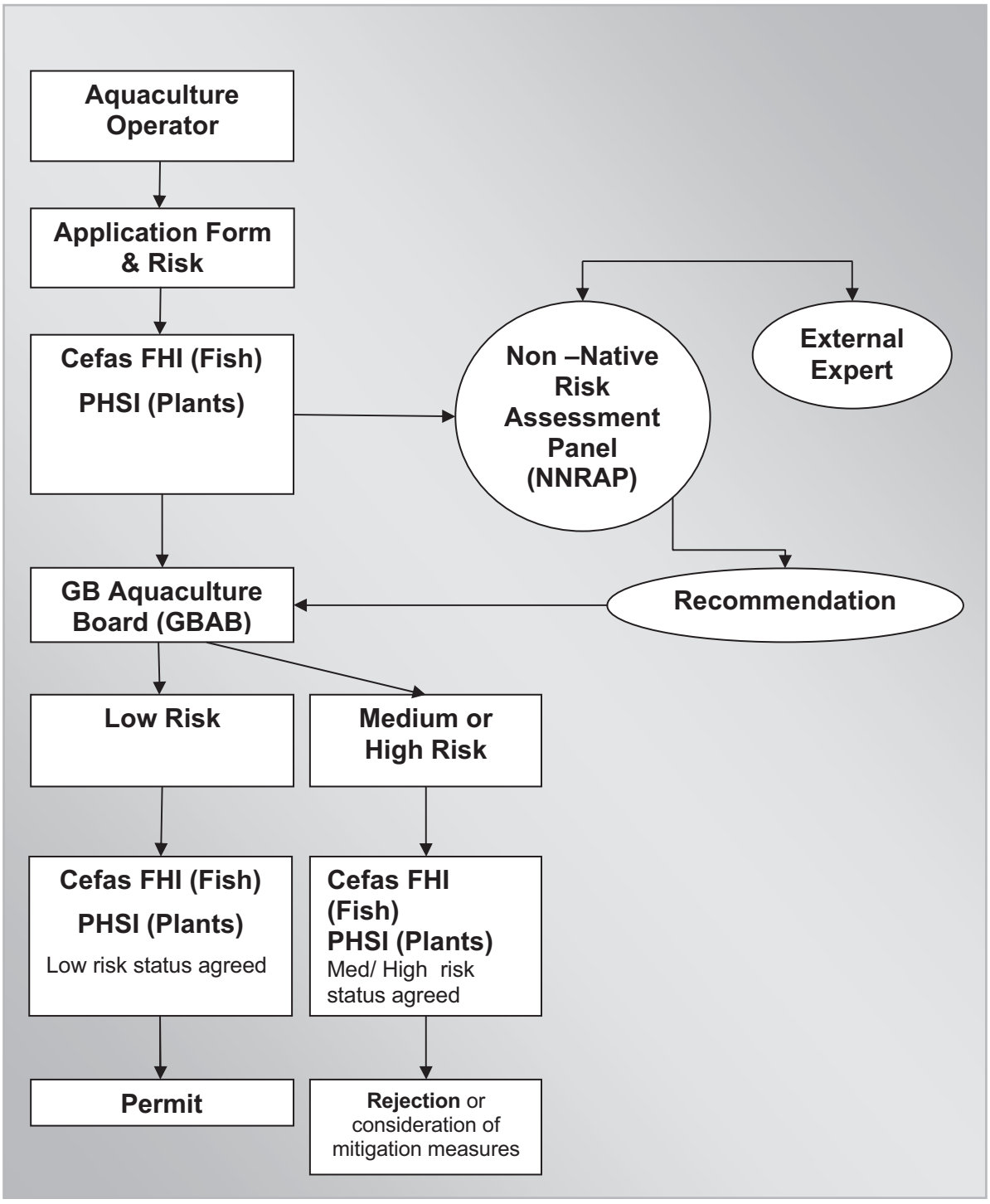
Continued access to varied and disease free fisheries is vital to the 3million practising anglers. The majority of financial benefits that arise from fishing contribute to local communities. As such, the proposals are designed to enhance these benefits and the value of the fisheries to local communities over the long term.

Annex 3 - Application Process under the Alien Species Regulation

Routine Movements



Non Routine Movements



Notes

Cefas (for aquatic animals) and the **Plant Health and Seeds Inspectorate PHSI** (for aquatic plants) will act as the Competent Authorities.

GB Aquaculture Board will act as the Advisory Committee. It will consist of conservation bodies (Natural England, Countryside Council for Wales) and the Statutory Bodies (Cefas (Lowestoft), the Environment Agency and Defra (both fisheries and plant health Divisions)).

The Non –Native Risk Assessment Panel (NNRAP) will act as an independent body tasked with peer-reviewing the Risk Assessments submitted by applicants.

Annex 4 Implementation of EU Regulation concerning use of alien and locally absent species in Aquaculture

Summary of Costs

One-off Costs			
	Cost incurred by	**Estimated cost (£)**	**Comments - Justification**
Design of application form	Govt	£350	£70 per page (form assumed to be 5 pages long- to be confirmed)
Set up of alien species register	Govt	£10,000	Based on the costs of setting up the Register of the Aquaculture Production Business
Annual Costs			
Routine Movements	**Cost incurred by**	**Estimated annual cost (£)**	**Comments - Justification**
Initial advice to applicants	Govt	£1,156	Based on 1 hour per application @£68 per hour and 17 applications per year (Cost per hour based on the full economic charge rate)
Initial consultation with Govt about the ASR	Industry	£782	Based on 1 hour per application @£46 per hour and 17 applications per year (Cost per hour based on the full economic charge rate)
Completion of application forms	Industry	£1,564	Based on 2 hours per application @£46 per hour and 17 applications per year (Cost per hour based on the full economic charge rate)
Registering and preliminary checking of application forms	Govt	£2,312	Based on 2 hours per application @£68 per hour and 17 applications per year(Cost per hour based on the full economic charge rate)
Inspection Costs	Govt	£3,910	Based on a half a day inspection at an hourly rate of £46 (Full economic cost) plus mileage
Final checking and issuing of permits	Govt	£782	Based on 1 hour per application @£46 per hour and 17 applications per year

Annual Costs			
Non-Routine Movements	**Cost incurred by**	**Estimated annual cost (£)**	**Comments - Justification**
Initial advice to applicants (not leading to full application)	Govt	£1,360	Based on 20 queries per year and 1 hour per query @£68 per hour (Cost per hour based on the full economic charge rate)
Initial consultation with Govt about new species	Industry	£920	Based on 20 queries per year and 1 hour per query @£46 per hour (Cost per hour based on the full economic charge rate)
Completion of application forms	Industry	£368	Based on 8 hours per application @£46 per hour and 1 application per year (Cost per hour based on the full economic charge rate)
Registering and preliminary checking of application forms	Govt	£204	Based on 3 hours per application @£68 per hour and 1 application per year (Cost per hour based on the full economic charge rate)
Completion of risk assessment by appointed expert	Industry	£6,000	Average estimate based on need for complex risk assessment dossier from recognised expert. The risk assessment has various modules (e.g. pathway, facility, non-target infectious agents, etc.) and number of modules and complexity of responses is expected to vary widely. Thus, costs will vary, perhaps in the range £2-10k. (Figure based on the full economic charge rate; Figure excludes VAT)
Peer-review of risk assessment and review & subsequent scrutiny by NNRAP	Govt	£13,000	Average estimate based on need for peer review by external risk assessors and review of complex risk assessment dossier by non-native risk assessment panel (NNRAP) (6 members). Costs include peer review by two reviewers, review by NNRAP & subsequent scrutiny and administrative actions by Non-native Species Secretariat, and will inevitably vary, perhaps in the range £10-15k. (Figure based on the full economic charge rate; Figure excludes VAT)
Consideration of NNRAP's advice and issue of recommendation	Govt	£68	Based on 1 hour per application @£68 per hour and 1 application per year
Set up of quarantine facility	Industry	£120,000	This is an estimate of the set up costs for a recirculation system alone based on £300 per tonne for a 400 tonne production unit.
Inspection Costs	Govt	£230	Based on a half a day inspection at an hourly rate of £46 (Full economic cost) plus mileage
Final checking and issuing of permits	Govt	£46	Based on 1 hour per application @£46 per hour and 1 application per year

Summary of estimated average annual costs - Routine and Non-routine Movements			
		Estimated annual cost (£)	**Comments - Justification**
Annual costs for Govt		£23,068	Based on 17 routine and 1 non-routine applications per year and advice on 20 queries from the industry.
Annual costs for Industry (inclusive of quarantine facility)		£129,634	Based on 17 routine and 1 non-routine applications per year and seeking advice on 20 queries from Govt. Assumes average costs for risk assessments and review by NNRAP. Inclusive of set up costs for a quarantine facility.
Annual costs for Industry (exclusive of quarantine facility)		£9,634	Based on 17 routine and 1 non-routine applications per year and seeking advice on 20 queries from Govt. Assumes average costs for risk assessments and review by NNRAP.

2011 No. 2292

AQUACULTURE, ENGLAND AND WALES

The Alien and Locally Absent Species in Aquaculture (England and Wales) Regulations 2011

Made - - - -	*12th September 2011*
Laid before Parliament	*16th September 2011*
Laid before the National Assembly for Wales	*16th September 2011*
Coming into force - -	*10th October 2011*

The Secretary of State and the Welsh Ministers are each designated(**a**) for the purposes of section 2(2) of the European Communities Act 1972(**b**) in relation to the common agricultural policy.

These Regulations make provision for purposes mentioned in that section and it appears to the Secretary of State and the Welsh Ministers that it is expedient for any reference in these Regulations to Annex IV to Council Regulation (EC) No 708/2007(**c**) concerning use of alien and locally absent species in aquaculture to be construed as a reference to that Annex as amended from time to time.

The Secretary of State in relation to England and the Welsh Ministers in relation to Wales make these Regulations under the powers conferred by section 2(2) of, as read with paragraph 1A(**d**) of Schedule 2 to, the European Communities Act 1972.

PART 1

General

Title and commencement

1. These Regulations may be cited as the Alien and Locally Absent Species in Aquaculture (England and Wales) Regulations 2011 and come into force on 10th October 2011.

Extent and application

2.—(1) These Regulations extend to England and Wales.

(**a**) S.I. 1972/1811 and S.I. 2010/2690.
(**b**) 1972 c.68; section 2(2) was amended by section 27(1)(a) of the Legislative and Regulatory Reform Act 2006 (c. 51). The function of the former Minister of Agriculture, Fisheries and Food of making regulations under section 2(2) was transferred to the Secretary of State by the Ministry of Agriculture, Fisheries and Food (Dissolution) Order 2002 (S.I. 2002/794).
(**c**) OJ No L 168, 28.6.2007, p1 as last amended by Regulation (EU) No 304/2011, OJ No L 88, 4.4.2011, p. 1.
(**d**) Paragraph 1A of Schedule 2 was inserted by section 28 of the Legislative and Regulatory Reform Act 2006 (c.51).

(2) Subject to paragraph (3), these Regulations apply in relation to England and Wales.

(3) Regulation 4 applies in relation to England only.

Interpretation

3.—(1) In these Regulations—

"an Annex IV species" means any species listed in Annex IV to Council Regulation 708/2007 as amended from time to time;

"aquaculture facility" includes open and closed aquaculture facilities;

"the competent authority" means, in relation to England, the Secretary of State, and, in relation to Wales, the Welsh Ministers;

"Council Regulation 708/2007" means Council Regulation (EC) No 708/2007 concerning use of alien and locally absent species in aquaculture;

"England" includes the area of sea within the seaward limits of the territorial sea adjacent to England but does not include any part of the Welsh zone or the Scottish zone;

"inspector" means any person authorised by the competent authority to be an inspector for the purposes of these Regulations;

"permit" means a permit issued by the competent authority under Council Regulation 708/2007;

"Wales" has the same meaning as it has by virtue of section 158(1) of the Government of Wales Act 2006(**a**).

(2) In this regulation—

"Scottish zone" has the same meaning as it has by virtue of section 126(1) and (2) of the Scotland Act 1998(**b**);

"Welsh zone" has the same meaning as it has by virtue of section 158(1) of the Government of Wales Act 2006(**c**)

(3) Other expressions used in these Regulations that are also used in Council Regulation 708/2007 have the meaning they bear in that Regulation.

Review

4.—(1) Before the end of each review period, the Secretary of State must—

(a) carry out a review of these Regulations;

(b) set out the conclusions of the review in a report; and

(c) lay the report before Parliament.

(2) In carrying out the review the Secretary of State must, so far as is reasonable, have regard to how Council Regulation 708/2007 is implemented in other member States.

(3) The report must in particular—

(a) set out the objectives intended to be achieved by these Regulations;

(b) assess the extent to which those objectives are achieved; and

(c) assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.

(4) "Review period" means—

(a) the period of 5 years beginning with the day on which these Regulations come into force, and

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(**a**) 2006 c. 32; section 158(1) was amended by the Marine and Coastal Access Act 2009 (c. 23), s.43(1) & (2).
(**b**) 1998 c. 46.
(**c**) The Welsh zone is specified in S.I. 2010/760.

(b) subject to paragraph (5), each successive period of 5 years.

(5) If a report under this regulation is laid before Parliament before the last day of the review period to which it relates, the following review period is to begin with the day on which that report is laid.

PART 2

Movements

Permits

5.—(1) A permit—

(a) must be in writing;

(b) must be identifiable by reference to a unique number;

(c) must specify the duration for which it is issued;

(d) must specify the species to which it applies;

(e) must specify the aquaculture facility into which the introduction or translocation may take place;

(f) may be made subject to such further conditions as the competent authority considers appropriate.

(2) Any refusal to issue a permit must—

(a) be notified to the applicant in writing;

(b) give reasons; and

(c) inform the applicant of the right of appeal under regulation 20.

Notifying movement of Annex IV species or locally absent species

6.—(1) This regulation applies in relation to the proposed movement of—

(a) an Annex IV species; or

(b) a locally absent species from within the United Kingdom.

(2) A person proposing to undertake a movement must notify that proposal to the competent authority in writing.

(3) An application for, or to make changes to, an authorisation to operate an aquaculture production business under the Aquatic Animal Health (England and Wales) Regulations 2009(**a**) in respect of an Annex IV species or a locally absent species is a notification for the purposes of paragraph (2).

(4) A person who makes a notification under paragraph (2) must not undertake the proposed movement except in accordance with a notice issued under regulation 7(2)(b) or (3)(b) or regulation 8(2).

(5) This regulation does not apply to subsequent movements notified under paragraph (2) made by the same person to the same location.

Movement of Annex IV species

7.—(1) This regulation applies where the competent authority receives a notification under regulation 6(2) in relation to the proposed movement of an Annex IV species.

(**a**) S.I. 2009/463 to which there are amendments not relevant to these Regulations..

(2) The competent authority must serve written notice on the person proposing to undertake the introduction within 90 days of receiving notification—

(a) prohibiting that movement;

(b) permitting that movement, and any subsequent movement of the same species to the same location, subject to any conditions stated in the notice; or

(c) requiring the person to submit an environmental risk assessment carried out under Article 9(1) of Council Regulation 708/2007.

(3) After considering any environmental risk assessment required under paragraph (2)(c), the competent authority must serve a written notice on the person who submitted it within 90 days of receiving it—

(a) prohibiting the movement; or

(b) permitting the movement, and any subsequent movement of the same species to the same location, subject to any conditions stated in the notice.

(4) A notice served under paragraph (2)(b) or (3)(b) must—

(a) include a number that is unique to that notice;

(b) specify the species to which it applies; and

(c) specify the aquaculture facility into which the movement may take place.

(5) A notice served under paragraph (2)(a) or (b) or (3) must inform the person on whom the notice is served of the right of appeal under regulation 20.

Movement of locally absent species

8.—(1) This regulation applies where the competent authority receives a notification under regulation 6(2) in relation to the proposed movement of a locally absent species from within the United Kingdom.

(2) The competent authority must serve written notice on the person proposing to undertake the movement within 90 days of receiving notification informing them whether for the purposes of Article 2(2) of Council Regulation 708/2007 there are grounds for foreseeing environmental threats due to the proposed translocation.

Environmental risk assessment

9. An environmental risk assessment carried out under Article 9(1) of Council Regulation 708/2007 is produced at the applicant's own expense.

Contingency plan

10.—(1) A contingency plan drawn up under Article 17 of Council Regulation 708/2007 is produced at the applicant's own expense.

(2) A person who fails immediately to implement an approved contingency plan when a contingency event in that plan occurs commits an offence.

Monitoring

11.—(1) This regulation applies where monitoring is required under Article 18 or 22 of Council Regulation 708/2007.

(2) The applicant must submit to the competent authority for written approval a programme detailing how the monitoring will be carried out.

(3) The approved monitoring programme must be carried out, at the applicant's own expense—

(a) by the applicant; or

(b) where the competent authority determines that the applicant does not have the expertise, by a person nominated by the applicant and approved by the competent authority.

PART 3

Enforcement, penalties and appeals

Entry and inspection of land and premises

12.—(1) For the purposes of enforcing these Regulations and Council Regulation 708/2007, an inspector has power, on producing a duly authenticated authorisation if required, to enter any land or premises (except any premises used wholly or mainly as a private dwelling house) at any reasonable hour by giving reasonable notice.

(2) But the requirement to give notice is not necessary—

(a) where reasonable efforts to agree an appointment have failed;

(b) where an inspector has reasonable suspicion of a failure to comply with these Regulations or Council Regulation 708/2007; or

(c) in an emergency.

(3) A justice of the peace may by signed warrant permit an inspector to enter any land or premises, if necessary by reasonable force, if the justice, on sworn information in writing, is satisfied—

(a) that there are reasonable grounds to enter that land or premises for the purpose of enforcing these Regulations and Council Regulation 708/2007; and

(b) that any of the conditions in paragraph (4) are met.

(4) The conditions are—

(a) entry to the premises has been, or is likely to be, refused, and notice of the intention to apply for a warrant has been given to the occupier;

(b) asking for admission to the premises, or giving such a notice, would defeat the object of the entry;

(c) entry is required urgently; or

(d) the premises are unoccupied or the occupier is temporarily absent.

(5) A warrant is valid for three months.

(6) An inspector entering any land or premises may be accompanied by—

(a) any person, equipment or vehicle as the inspector considers necessary for the purposes of this regulation;

(b) any representative of the European Commission acting for the purposes of Council Regulation 708/2007.

(7) An inspector entering any premises which are unoccupied or from which the occupier is temporarily absent must leave them as effectively secured against unauthorised entry as they were before entry.

Search and examination of items on land and premises

13. Subject to regulation 16, where an inspector exercises the power conferred by regulation 12, the inspector may—

(a) search the land or premises for any item, including any aquatic organism or water;

(b) examine anything that is—

(i) on the land or premises;

(ii) attached to or otherwise forms part of the land or premises.

Production of documents

14. Subject to regulation 16, an inspector may require any person—

(a) to produce any document or record that is in that person's possession or control;

(b) to render any such document or record on a computer system into a visible and legible form, including requiring it to be produced in a form in which it may be taken away.

Seizure of items

15.—(1) Subject to regulation 16, where an inspector exercises the powers conferred by regulation 13 or 14 the inspector may—

(a) seize, detain or remove any item that is on the land or premises;

(b) take copies of or extracts from any document or record found on the land or premises.

(2) The power in paragraph (1)(a) includes a power to take samples of any aquatic organism or water.

(3) An inspector to whom any document or record has been produced in accordance with a requirement imposed under regulation 14, may—

(a) seize, detain or remove that document or record;

(b) take copies of or extracts from that document or record.

(4) If, in the opinion of the inspector, it is not for the time being practicable for the inspector to seize and remove any item, the inspector may require any person on the land or premises to secure that the item is not removed or otherwise interfered with until such time as the inspector may seize and remove it.

(5) Any item seized by an inspector may be retained so long as is necessary in the circumstances.

(6) Any aquatic organism seized may be disposed of as the inspector sees fit.

Enforcement powers

16. The powers conferred by regulations 13, 14 and 15 may only be exercised—

(a) for the purpose of determining whether an offence under these Regulations has been committed; or

(b) in relation to an item which an inspector reasonably believes to be evidence of the commission of an offence under these Regulations.

Enforcement notices

17.—(1) The competent authority may serve an enforcement notice on any person whom it considers has failed to comply with Council Regulation 708/2007 or these Regulations.

(2) The competent authority may serve an enforcement notice on an operator where it considers that aquatic organisms present in an aquaculture facility were introduced in contravention of Council Regulation 708/2007 or these Regulations or any condition of a permit or a notice issued under these Regulations.

(3) An enforcement notice must—

(a) be in writing;

(b) state the matters which constitute the failure to comply or contravention;

(c) state what, and by when, the person must do or refrain from doing;

(d) state that there is the right of appeal under regulation 20;

(e) state that the grounds for serving a notice of appeal under regulation 20(2) are those in regulation 21(1); and

(f) state that a notice of appeal must be accompanied by the statement referred to in regulation 21(2).

(4) In particular, an enforcement notice may require the person on whom it is served to—

(a) remove and dispose of the aquatic organisms, at their own expense, in a manner and within the period specified in the notice;

(b) take steps to ensure that the position is, so far as possible, restored to what it would have been prior to the contravention.

(5) If an enforcement notice is not complied with, the competent authority may—

(a) take such steps as it considers necessary (including the removal and disposal of the aquatic organisms)—

(i) to ensure compliance with the requirements of the notice;

(ii) to remedy the consequences of the failure to carry them out; and

(b) recover any costs reasonably incurred in so doing from the person who has failed to comply with the enforcement notice.

(6) The competent authority may remove and dispose of the aquatic organisms without serving an enforcement notice—

(a) in an emergency; and

(b) at the expense of the operator.

(7) In this regulation, "operator" means any person who is responsible for the management of the aquaculture facility.

Recovery of expenses of enforcement

18.—(1) This regulation applies where a court convicts a person of an offence under regulation 22(b) or (d).

(2) The court may (in addition to any other order it may make as to costs or expenses) order the person to reimburse the competent authority for any expenditure which the competent authority has incurred under regulation 17(5) or (6).

Amendment, suspension or revocation of permit or notice

19.—(1) This regulation applies in relation to—

(a) a permit; or

(b) a notice under regulation 7(2)(b) or (3)(b).

(2) The competent authority may—

(a) amend the permit or notice, including any condition of the permit or notice; or

(b) suspend or revoke the permit or notice if satisfied that any condition of the permit or notice or any provision of Council Regulation 708/2007 or these Regulations is contravened.

(3) An amendment under paragraph (2)(a) may be made—

(a) on the initiative of the competent authority; or

(b) on application by the permit or notice holder in such form and containing such information as the competent authority may reasonably require.

(4) An amendment under paragraph (2)(a) or a suspension or revocation under paragraph (2)(b) must be notified in writing to the permit or notice holder.

(5) That notification—

(a) must give reasons for the amendment, suspension or revocation;

(b) must state when the amendment, suspension or revocation comes into effect and, in the case of a suspension, state on what date or event the suspension will cease to have effect;

(c) must inform the person on whom the notice is served of the right of appeal under regulation 20; and

(d) may make provision requiring the disposal of any of the organisms to which the permit or notice relates.

Appeals

20.—(1) Subject to regulation 21, a person may appeal to the competent authority against a notice served under regulations 5(2), 7(2)(a) or (b), 7(3), 8(2), 17(1) or (2) or 19(2).

(2) An appellant may within 21 days beginning with the date on which notification was received by the appellant, serve the competent authority with written notice that the appellant wishes to—

(a) appear before and be heard by an independent person appointed by the competent authority; or

(b) provide written representations to the competent authority.

(3) Where the appellant serves notice under paragraph (2)(a)—

(a) the competent authority must appoint an independent person to hear representations and specify a time limit within which representations to that person must be made;

(b) if the appellant requests, the hearing must be in public;

(c) the person appointed must report to the competent authority; and

(d) if the appellant requests, the competent authority must provide a copy of the appointed person's report to the appellant.

(4) Where the appellant serves notice under paragraph (2)(b)—

(a) the competent authority must appoint an independent person to consider the representations; and

(b) the requirements in paragraph (3)(c) and (d) apply.

(5) The competent authority must serve the appellant with a written notice of its final decision and the reasons for it.

Appeal against an enforcement notice

21.—(1) The only grounds for serving a notice of appeal under regulation 20(2) against an enforcement notice are—

(a) that the steps required by the enforcement notice to be taken have been taken;

(b) that the matters stated in the enforcement notice do not constitute a failure to comply with a requirement specified in regulation 17(1) or the circumstances described in regulation 17(2);

(c) that any requirement of the notice is unnecessary for complying with the matters listed in regulation 17(1) or (2) and should be dispensed with.

(2) A notice under regulation 20 appealing against an enforcement notice must be accompanied by a statement in writing—

(a) specifying the grounds on which the appellant is appealing against the enforcement notice; and

(b) providing such further information as may be appropriate.

Offences

22. A person commits an offence if that person—

(a) makes a statement in an application for a permit knowing or suspecting it to be false;

(b) abandons, releases or allows to escape any aquatic organism, the movement of which took place under a permit or under a notice issued under regulation 7 (movement of an Annex IV species) unless that person can show that all reasonable steps were taken and due diligence exercised to avoid the abandonment, release or escape;

(c) fails to comply with a requirement imposed under regulation 15(5) (seizure of items);

(d) fails to comply with an enforcement notice served under regulation 17(1) or (2) (enforcement notices);

(e) fails to comply with any provision requiring the disposal of aquatic organisms under regulation 19(5)(d) (amendment, suspension or revocation of permit or notice);

(f) fails, without reasonable cause, to give an inspector any assistance or information which the inspector may reasonably require for the purposes of the inspector's functions under these Regulations;

(g) intentionally obstructs an inspector; or

(h) knowingly gives false or misleading information to an inspector.

Penalties

23. A person guilty of an offence under these Regulations is liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum; or

(b) on conviction on indictment, to a fine.

Offences by bodies corporate

24.—(1) If an offence under these Regulations committed by a body corporate is shown—

(a) to have been committed with the consent or connivance of an officer; or

(b) to be attributable to any neglect on the part of an officer,

that officer as well as the body corporate is guilty of the offence and is liable to be proceeded against and punished accordingly.

(2) If the affairs of a body corporate are managed by its members, paragraph (1) applies in relation to the acts and defaults of a member in connection with their functions of management as if that member were a director of the body.

(3) In this regulation "officer", in relation to a body corporate, means a director, member of the committee of management, chief executive, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity.

PART 4

Miscellaneous

Disclosure of information

25. The competent authority may disclose information to the equivalent authority in Scotland or Northern Ireland for the purposes of Council Regulation 708/2007, these Regulations or the equivalent Regulations in Scotland or Northern Ireland.

Service of notices

26.—(1) A notice served under these Regulations may be served on a person by—

(a) delivering it to the person;

(b) leaving it at or sending it by post to the person's proper address; or

(c) sending it by electronic means to an address which that person has specified in accordance with paragraph (4)(a).

(2) Where the person on whom a notice is to be served is a body corporate, the notice is duly served if it is served on the secretary or clerk of that body.

(3) For the purposes of this regulation and section 7 of the Interpretation Act 1978(**a**) (service of documents by post) in its application to this regulation, the proper address of any person on whom a notice is to be served is—

(a) if the person has given an address for service, that address; and

(b) if no address has been given—

(i) in the case of the secretary or clerk of a body corporate, the registered or principal office of that body;

(ii) in any other case, the person's last known address at the time of service.

(4) If the notice is transmitted electronically, it is to be treated as duly served if—

(a) the person upon whom the notice is required or authorised to be served ("the recipient") has indicated to the person serving the notice the recipient's willingness to receive notices transmitted by electronic means and has provided an address suitable for that purpose; and

(b) the notice is sent to the address provided.

Transitional provision

27.—(1) This regulation applies where—

(a) immediately before these Regulations come into force a person holds an ILFA licence granted in relation to the keeping or introduction of non-native fish for use in aquaculture; and

(b) the introduction or keeping is done in accordance with that licence.

(2) On and after the coming into force of these Regulations, an ILFA licence is deemed to be—

(a) a permit; or

(b) where the ILFA licence relates to an Annex IV species, a notice issued under regulation 7(2)(b).

(3) Regulation 6 does not apply to subsequent movements of an Annex IV species introduced or kept under an ILFA licence undertaken by the holder of that licence to the location specified in the licence.

(4) In this regulation, "ILFA licence" means a licence issued under the Import of Live Fish (England and Wales) Act 1980(**b**) in relation to—

(a) live crayfish in accordance with the Prohibition of Keeping of Live Fish (Crayfish) Order 1996(**c**); or

(b) species specified in the Schedule to the Prohibition of Keeping or Release of Live Fish (Specified Species) Order 1998(**d**).

Amendment to the Prohibition of Keeping of Live Fish (Crayfish) Order 1996

28.—(1) Article 2 (prohibition of keeping of crayfish) of the Prohibition of Keeping of Live Fish (Crayfish) Order 1996 is amended as follows.

(2) In paragraph (1), after "Subject to paragraph (2)", insert "and (3)".

(3) After paragraph (2), insert—

"(3) The prohibition in paragraph (1) does not apply in relation to a person who has been—

(**a**) 1978 c.30.
(**b**) 1980 c. 27.
(**c**) S.I. 1996/1104, amended by S.I. 1996/1374.
(**d**) S.I. 1998/2409, amended by S.I. 2003/25 and S.I. 2003/416.

(a) issued with a permit under Council Regulation (EC) No 708/2007 concerning use of alien and locally absent species in aquaculture(**a**) in relation to the introduction of crayfish; or

(b) served with a notice under regulation 7(2)(b) or (3)(b) of the Alien and Locally Absent Species in Aquaculture (England and Wales) Regulations 2011 in relation to the introduction of crayfish.".

Amendment to the Prohibition of Keeping or Release of Live Fish (Specified Species) Order 1998

29. After article 1 of the Prohibition of Keeping or Release of Live Fish (Specified Species) Order 1998, insert—

"Scope

1A. This Order does not apply in relation to a person who has been—

(a) issued with a permit under Council Regulation (EC) No 708/2007 concerning use of alien and locally absent species in aquaculture(**b**) in relation to the introduction of any species specified in the Schedule to this Order; or

(b) served with a notice under regulation 7(2)(b) or (3)(b) of the Alien and Locally Absent Species in Aquaculture (England and Wales) Regulations 2011 in relation to the introduction of any species specified in the Schedule to this Order.".

Richard Benyon
Parliamentary Under Secretary of State
7th September 2011 Department for Environment, Food and Rural Affairs

Alun Davies
12th September 2011Deputy Minister for Agriculture, Food, Fisheries and European Programmes, under authority of the Minister for Business, Enterprise, Technology and Science, one of the Welsh Ministers

EXPLANATORY NOTE

(This note is not part of these Regulations)

These Regulations implement Council Regulation (EC) No 708/2007 (OJ No L 168, 28.6.2007, p.1) concerning use of alien and locally absent species in aquaculture.

Regulation 4 requires the Secretary of State to review the operation and effect of these Regulations and lay a report before Parliament within five years after they come into force and within every five years after that.

Part 2 of the Regulations deals with permits (regulation 5), environmental risk assessments (regulation 9), contingency plans (regulation 10) and monitoring (regulation 11). It also makes provision for the movement of species listed in Annex IV to Council Regulation 708/2007 and locally absent species from within the United Kingdom to be restricted (regulations 6 to 8).

(**a**) O.J. L 168, 28.6.07 p.1 as last amended by Regulation (EU) No 304/2011, OJ No L 88, 4.4.2011, p. 1.
(**b**) OJ No L 168, 28.6.07 p.1 as last amended by Regulation (EU) No 304/2011, OJ No L 88. 4.4.2011. p. 1.

Part 3 gives enforcement powers to inspectors and makes provision for appeals. A person found guilty of an offence under these Regulations is liable on summary conviction to a fine not exceeding the statutory maximum or on conviction on indictment to an unlimited fine (regulation 23).

A full impact assessment has been produced and placed in the library of each House of Parliament. It is available on the Defra website at www.defra.gov.uk. A copy can be obtained from the Welsh Assembly Government, Cathays Park, Cardiff CF10 3NQ.

Constitutional and Legislative Affairs Committee

CLA(4)-06-11

CLA39

Constitutional and Legislative Affairs Committee Draft Report

Title: The Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2011

Procedure: Affirmative

These Regulations make provision as to the arrangements for the appointment of Independent Mental Health Advocates ("IMHAs") including provision as to who may be appointed as an IMHA and persons who may be visited and interviewed by an IMHA for the purposes of providing help to a Welsh qualifying compulsory patient or a Welsh qualifying informal patient.

Technical Scrutiny

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

Merits Scrutiny

Under Standing Order 21.3 (ii) (issues of public policy likely to be of interest of the Assembly) the Assembly is invited to pay special attention to the following instrument.

These Regulations are part of a suite of regulations made by the Welsh Ministers under powers conferred on them by provisions of the Mental Health (Wales) Measure 2010 ("the Measure") or under provisions of the Mental Health Act 1983 ("the Act")as amended by the Measure designed to develop and enhance mental health services in Wales.

These Regulations replace and revoke the Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2008 and are made under the 1983 Act following amendment of that Act by the 2010 Measure.

The amendments to the Act provide for a Wales only extended statutory scheme of mental health advocacy both for patients subject to compulsion under the Act and for those in hospital or a registered establishment informally (i.e. not under compulsion).

These Regulations are made subject to the affirmative procedure and consequently will be debated by the Assembly in Plenary.

Legal Advisers
Constitutional and Legislative Affairs Committee

23 September 2011

Explanatory Memorandum and Regulatory Impact Assessment

The Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2011

Contents

Explanatory Memorandum to the Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2011

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

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2011. I am satisfied that the benefits outweigh any costs.

Lesley Griffiths AM
Minister for Health and Social Services

19 September 2011

PART 1 – EXPLANATORY MEMORANDUM

1. Description

1. The Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2011 ("the Regulations") make provision as to the arrangements for the appointment of Independent Mental Health Advocates ("IMHAs"). They contain provisions about who may be appointed as an IMHA (including requirements about independence), and persons who may be visited and interviewed by an IMHA for the purposes of providing help to a Welsh qualifying patient who has been admitted under section 4 of the Mental Health Act 1983.

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

2. These Regulations revoke and replace the Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2008 [SI 2008/2437 (W.210)], which were made under section 130A of the Mental Health Act 1983 ("the 1983 Act") and sections 12 and 204 of the National Health Service (Wales) Act 2006.

3. These Regulations are the first set of Regulations to be made relating to independent mental health advocacy under the 1983 Act, since that Act was amended by Part 4 of the Mental Health (Wales) Measure 2010 ("the Measure").

4. One of the amendments to the 1983 Act made by the Measure was to provide that the first regulations (alone or with other provisions) to be made under sections 130E(2),130E(4)(b),130E(5)(b), 130F(2)(d), 130G(2)(c) or 130H(1)(b)(ii) of the 1983 Act, are made subject to the approval of the National Assembly for Wales. The regulations made within this statutory instrument are therefore made subject to approval.

5. These Regulations contain provisions to allow for a split commencement date. This split commencement is necessary to reflect the staggered commencement of the two different components of the statutory advocacy scheme:

    a. the scheme for patients subject to compulsory powers will come into force on 3 January 2012;

    b. the scheme for informal or voluntary patients in hospital will come into force on 2 April 2012.

6. It is proposed that these Regulations are made before the commencement of the main provisions in the Mental Health Act 1983 relating to independent mental health advocacy in Wales, which were inserted into that Act by Part 4 of the Measure. However, the powers to make these Regulations have

commenced in accordance with section 55(1) and (2)(b) of the Measure, and all of the remaining provisions relating to independent mental health advocacy in Wales in the Mental Health Act 1983 will be commenced prior to the coming into force date of these Regulations.

3. Legislative background

7. These Regulations may be made in exercise of powers conferred on the Welsh Ministers by sections 130E(2), (3)(a) and (b), (4)(b), (5)(b), (7) and 130H(1)(b) of the Mental Health Act 1983, and also by sections 12, 203 and 204 of the National Health Service (Wales) Act 2006.

8. These Regulations are made subject to the approval of the National Assembly for Wales, as noted previously.

4. Purpose and intended effect of the legislation

9. The 1983 Act governs the compulsory treatment of certain people who have a mental disorder. The 1983 Act was amended by the Mental Health Act 2007, and one of the key amendments was the introduction of independent mental health advocacy.

10. In Wales these new provisions began in November 2008, and from that date there has been a requirement for such services to be available to provide support for 'qualifying patients' who are receiving assessment or treatment under the 1983 Act. Services are provided by independent advocacy providers through contracts with LHBs.

11. The Measure has further amended the 1983 Act, so as to provide for an expanded statutory scheme of independent mental health advocacy, both for patients subject to compulsion under the Mental Health Act 1983, and those in a hospital or a registered establishment informally (i.e. not under compulsion) and who are receiving treatment for, or assessment in relation to, a mental disorder.

12. The expansion of statutory advocacy services to ensure that access is available to the majority of inpatients receiving treatment for mental ill-health, whether subject to compulsion or not, will help to ensure that the rights of this often vulnerable group of patients are safeguarded. Statutory advocacy will assist inpatients in making informed decisions about their care and treatment, and support them in getting their voices heard.

13. These Regulations support the operation of the independent mental health advocacy scheme and the intended policy effect by:

    a. ensuring that LHBs make arrangements for IMHAs to be available to help Welsh qualifying patients;

b. establishing an approval scheme for IMHAs, so that, as is currently the case, IMHAs will be required to satisfy certain appointment requirements before being appointed;

c. providing operational detail of the nature of the independence of IMHAs (ie who the IMHAs must be independent from);

d. providing additional persons (in relation to patients detained under section 4 of the 1983 Act) that the IMHA may visit and interview, over and above those professionally concerned with the patient's medical treatment.

5. Consultation

14. Details of the consultation undertaken are included in the regulatory impact assessment which has been completed for these Regulations, and is set out in Part 2 of this document.

PART 2 – REGULATORY IMPACT ASSESSMENT

6. Options

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

16. The options are:
    - Option 1 – Revoke current Regulations only
    - Option 2 – Revoke the current Regulations and replace with new Regulations

Option 1 – Revoke current Regulations only

17. In 2008 the Welsh Ministers made Regulations regarding independent mental health advocacy in exercise of powers conferred on them by sections 130A of the Mental Health Act 1983, and also by sections 12 and 204 of the National Health Service (Wales) Act 2006.

18. Part 4 of the Measure has amended the 1983 Act so as to expand the existing scheme of advocacy within that Act in relation to Wales. This has been done by separating the elements of the 1983 Act dealing with independent mental health advocacy in Wales from the related elements dealing with arrangements in England. This has required the amendment of certain existing sections of the 1983 Act so that they will apply in relation to England-only, and the addition of a number of new sections that deal solely with arrangements in relation to Wales. Section 130A therefore will only apply in relation to England, and, as such, the powers currently available to the Welsh Ministers will fall away and be replaced by new powers within sections 130E, 130F, 130G and 130H.

19. It is necessary therefore to revoke the Regulations made in 2008.

20. This option proposes only making the necessary revocation of existing Regulations, but not replacing those Regulations with new Regulations. This option would mean the Welsh Ministers are required to make IMHA services available to patients in Wales, without the necessary operational detail (such as appointment and approval arrangements) in place to ensure that trained and experienced advocates are appointed.

21. This option would also fail to realise the operational detail of the nature of independence of advocates from certain persons professionally concerned with the patient's medical treatment, or from persons who request an Independent

Mental Health Advocate for the patient. Finally this option would also mean that the additional persons who may be interviewed by an advocate for the purposes of providing help to a patient who is admitted under section 4 of the Mental health Act 1983 (as set out in Regulation 6 currently) are not included.

Option 2 – Revoke the current Regulations and replace with new Regulations

22. This option proposes that the existing Regulations are revoked (for the reasons outlined above), and replaced with new Regulations.

7. Costs and benefits

Costs and benefits of Option 1 (revoke existing Regulations only)

23. The financial costs for the Welsh Government or Local Health Boards of adopting this option are likely to be no different from those of the preferred option (option 2), as the Welsh Government is committed to providing LHBs with both one-off and also ongoing annual additional funding to support the expanded IMHA scheme in future.

24. However, it is possible that in the absence of requirements being set out in regulations, the procuring and operation of the service could be subject to a range of differing approaches and practices, resulting in variability in the quality or delivery of IMHA services across Wales.

25. Further, this approach is unlikely to deliver any benefits to service users or the health and social care organisations providing services. On the contrary, it is considered that there would be considerable disadvantages in terms of engagement, effectiveness of service delivery, and patients' rights with this option, as again, local services would be commissioned and delivered according to local arrangements and preferences, rather than requirements set out in regulations.

Costs and benefits of Option 2 (revoke and make new regulations)

26. The costs associated with implementing an expanded form of statutory advocacy under the 1983 Act are set out in the Explanatory Memorandum to the Measure[1]. These Regulations neither expand nor reduce those costs.

27. In summary, the costs associated with independent mental health advocacy services in Wales are:

[1] Available for access at http://www.assemblywales.org/bus-home/bus-legislation/bus-leg-measures/business-legislation-measures-mhs-2.htm or from the Mental Health Legislation Team of the Welsh Assembly Government (see Annex A to this document)

	Cost per annum
Existing funding since services began	£0.6m
Costs for expanding service in relation to patients subject to compulsion	£0.4m
Costs for expanding service in relation to informal or voluntary patients in hospital	£1.0m
Total costs (when fully operational)	**£2.0m**

28. The benefits associated with making these Regulations are that the independent mental health advocacy scheme in Wales will continue to be underpinned by clear and binding legislative requirements that ensure that services are delivered by suitably approved and appropriately qualified independent advocates. The Regulations will also ensure that the service is commissioned and delivered in a way which maintains the independence of the service and clear requirements in relation to the IMHA's powers to visit and interview those concerned with patients' care and treatment.

Summary

29. **Option 2 (revoke and make new regulations)** best meets the Government's objectives.

8. Consultation

30. Welsh Government officials undertook a programme of consultation on the draft regulations relating to independent mental health advocacy. 92 written responses were received from a variety of stakeholders, including advocacy providers, service user representative bodies, NHS organisations, local authorities and professional bodies.

31. A detailed consultation response report has been published on the Welsh Government's website, but the views received and any amendments made to the regulations as a result of the consultation are summarised in the following paragraphs.

General matters

32. Almost all respondents were satisfied that the Explanatory Memorandum and Regulatory Impact Assessment provided them with enough information to understand the purpose and effect of the regulations. All but one agreed with the preferred option set out in the RIA, and a large majority were content that the cost/benefit analysis was appropriate.

Responsibility for the provision of advocacy

33. A majority of respondents were of the view that LHBs should continue to be responsible for making arrangements for independent mental health advocacy in their area, the Welsh Government will therefore not be amending the

regulations in this regard.

Appointment requirements for independent mental health advocates

34. The majority of respondents felt that these requirements were appropriate, however, some stakeholders felt that there should be a more explicit requirement to ensure that advocacy support was culturally and linguistically appropriate for the clientele it served (several respondents felt this was particularly important for individuals whose first language/language of need was Welsh). The Welsh Government has therefore amended regulation 3(4) to add linguistic requirements to those diverse needs that LHBs should take into consideration when ensuring that independent mental health advocates are available to qualifying patients in their area.

Independence requirements for IMHAs

35. A large majority of respondents agreed that the independence requirements in this regulation were appropriate. However, a number of consultees noted that the draft regulations did not include any requirement for the advocacy service , or the advocate themselves, to be independent from the body which commissions the advocacy service, and sought clarification as to whether this meant that in practice, an LHB could appoint its own employees as IMHAs.

36. The Welsh Government agrees that the omission of any requirement for operational independence between the advocacy service provider and the commissioning body was a weakness in the regulations as drafted. An additional provision has therefore been added at regulation 4(1)(c) to make it clear that LHBs may not appoint a member of their own staff as an IMHA.

IMHAs powers to visit and interview

37. All respondents agreed that the IMHA should be able to visit and interview the approved mental health professional or nearest relative who made the application for the admission, and the doctor who provided the medical recommendation under section 4. Many stakeholders also felt that the advocate should have a legal power to visit and interview others including the patient's relatives or 'significant others' (e.g., carers, friends).

38. The Welsh Government's view is that it would not be appropriate to provide IMHAs with the power to compel any person not involved with the medical care of the patient, such as carers or relatives, to be interviewed if they did not wish to be. The Welsh Government is therefore satisfied that the arrangements for those persons whom the IMHA may visit and interview are appropriate and do not require amendment following consultation.

9. Competition assessment

39. Given that independent mental health advocacy services in Wales are delivered (in the main) by third sector organisations, the competition filter was applied to Part 4 of the Mental Health (Wales) Measure in relation to mental health advocacy.

40. The filter test at that time has shown that the amendment of the 1983 Act is unlikely to have a significant detrimental effect on competition within the advocacy sector. These Regulations are required as a result of the changes made to the 1983 Act, and therefore the findings of the competition filter in relation to the Measure also apply here. Further information can be found in the Explanatory Memorandum to the Measure[2].

41. Whilst those organisations which are contracted to provide existing statutory services could be perceived as enjoying an advantageous position in the sector, all current contracts are due for renewal within the next 12 months. LHBs have been issued with revised guidance from the Welsh Government [3] which provides advice on planning, tendering, contracting and service level arrangements in relation to the expansion of statutory services, aimed at ensuring that equitable and transparent processes are employed in the selection, appointment and delivery arrangements for future advocacy provision.

10. Post implementation review

42. Section 48 of the Measure places the Welsh Ministers under a duty to review the operation of the independent mental health advocacy provisions contained in Part 4 of the Measure, and to publish a report of the findings of the review. The report must be published no later than four years after the commencement of the duties contained within section 130E(1) of the 1983 Act (as inserted by section 31 of the Measure).

43. It is intended that the review relating to Part 4, will take account of these Regulations.

44. The report of the review must be placed before the National Assembly for Wales, in accordance with section 48(9) of the Measure.

[2] Available for access at http://www.assemblywales.org/bus-home/bus-legislation/bus-leg-measures/business-legislation-measures-mhs-2.htm or from the Mental Health Legislation Team of the Welsh Assembly Government (see Annex A to this document)
[3] Welsh Assembly Government (2011) *'Delivering the Independent Mental Health Advocacy Service in Wales'*

Annex A – Contact information

For further information in relation to this document, please contact:

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Draft Regulations laid before the National Assembly for Wales under section 143(3DB) of the Mental Health Act 1983, for approval by resolution of the National Assembly for Wales.

DRAFT WELSH STATUTORY INSTRUMENTS

2011 No. (W.)

MENTAL HEALTH, WALES

The Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2011

EXPLANATORY NOTE

(This note is not part of the Regulations)

1. These Regulations contain provisions about arrangements for the appointment of Independent Mental Health Advocates ("IMHAs"). They contain provisions about who may be appointed to act as an IMHA, and persons who may be visited and interviewed by an IMHA for the purpose of providing help to a Welsh qualifying patient who has been admitted under section 4 (admission for assessment in cases of emergency) of the Mental Health Act 1983 ("the Act").

2. Regulation 3 provides—

(a) that Local Health Boards (LHBs) must make arrangements for IMHAs to be available to Welsh qualifying compulsory patients (as defined in section 130(I) of the Act), who are present in the area of the LHB when the independent mental health advocacy service is to be provided. Welsh qualifying compulsory patients are those who are:

(i) liable to be detained (other than under sections 135 and 136 of the Act) in a hospital or registered establishment (regulation 3(1)(a)),

(ii) subject to guardianship or a community treatment order under the Act (regulation 3(1)(b)),

(iii) being considered for a form of treatment which falls under section 57 of the Act (regulation 3(1)(c)), or

(iv) not yet 18 years of age and are being considered for a form of treatment under section 58A of the Act (regulation 3(1)(c));

(b) that LHBs must make arrangements for IMHAs to be available to Welsh qualifying informal patients (as defined in section 130(J) of the Act) who are present in a hospital or registered establishment located within the area of the LHB when the independent mental health advocacy service is to be provided (regulation 3(2));

(c) that LHBs may make arrangements with providers of advocacy services for the provision of IMHAs (regulation 3(3));

(d) when making arrangements for the provision of IMHAs an LHB must have regard, as far as reasonably practicable, to the diverse circumstances of Welsh qualifying compulsory patients and Welsh qualifying informal patients (regulation 3(4));

(e) that any person who is appointed to act as an IMHA must either be approved by the LHB or employed by a provider of advocacy services with which an LHB has made arrangements for the provision of advocacy services (regulation 3(5));

(f) that before approving the appointment of a person as an IMHA, the LHB must be satisfied that he or she meets the appointment requirements provided in regulation 4 and the independence requirements provided in regulation 5 (regulation 3(6));

(g) that an LHB must ensure that any provider of advocacy services with which it makes arrangements for the provision of advocacy services ensures that any person who the provider employs as an IMHA satisfies the appointment requirements provided in regulation 4 and the independence requirements provided in regulation 5 (regulation 3(7)); and

(h) clarification of when a person is employed by a provider of advocacy services (regulation 3(8)).

3. Regulation 4 sets out the appointment requirements that a person must satisfy before he or she may be appointed as an IMHA.

4. Regulation 5 sets out the independence requirements that a person must satisfy before he or she may be appointed as an IMHA.

5. Regulation 6 provides that certain persons who are not professionally concerned with the medical

treatment of a Welsh qualifying compulsory patient admitted under section 4 of the Act may be visited and interviewed by an IMHA for the purpose of providing help to such a patient.

6. Regulation 7 provides for the revocation of the Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2008 (S.I. 2008/2437 (W. 210)).

7. A regulatory impact assessment has been prepared as to the likely costs and benefits of complying with these Regulations. A copy can be obtained from the Mental Health Legislation Team, Department for Health, Social Services and Children, Welsh Government, Cathays Park, Cardiff, CF10 3NQ.

Draft Regulations laid before the National Assembly for Wales under section 143(3DB) of the Mental Health Act 1983, for approval by resolution of the National Assembly for Wales.

DRAFT WELSH STATUTORY INSTRUMENTS

2011 No. (W.)

MENTAL HEALTH, WALES

The Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2011

Made *2011*

Coming into force in accordance with regulation 1(2)

The Welsh Ministers make these Regulations in exercise of the powers conferred by sections 130E(2), (3)(a) and (b), (4)(b), (5)(b), (7) and 130H(1)(b) of the Mental Health Act 1983(**1**) and by sections 12, 203 and 204 of the National Health Service (Wales) Act 2006(**2**).

A draft of this instrument, has been laid before the National Assembly for Wales in accordance with section 143(3DB) of the Mental Health Act 1983, and approved by resolution of the National Assembly for Wales.

Title, commencement and application

1.—(1) The title of these Regulations is the Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2011.

(2) These Regulations come into force—

(a) insofar as they relate to Welsh qualifying informal patients(**3**) on 2 April 2012; and

(**1**) 1983 c.20 sections 130E to 130L were inserted by the Mental Health (Wales) Measure 2010 nawm 7.
(**2**) 2006 c.42.
(**3**) Please see section 130J of the Mental Health Act 1983 for the definition of Welsh qualifying informal patients.

(b) for all other purposes on 3 January 2012.

(3) These Regulations apply in relation to Wales.

Interpretation

2. In these Regulations—

"the Act" *("y Ddeddf")* means the Mental Health Act 1983;

"IMHA" *("EIMA")* means an independent mental health advocate;

"independent mental health advocacy service" *("gwasanaeth eiriolaeth iechyd meddwl annibynnol")* means the service provided to a Welsh qualifying compulsory patient(**1**) or a Welsh qualifying informal patient by a provider of advocacy services; and

"provider of advocacy services" *("darparydd gwasanaethau eiriolaeth")* means a body or person, including a voluntary organisation, that employs persons who may be made available to act as an IMHA.

Arrangements for independent mental health advocates

3.—(1) Subject to directions that may be given by the Welsh Ministers, a Local Health Board must make such arrangements as it considers reasonable to enable IMHAs to be available to act in respect of a Welsh qualifying compulsory patient who—

(a) is liable to be detained in a hospital or registered establishment, whether or not in a hospital or registered establishment located within the area of the Local Health Board, and is present in the area of the Local Health Board at the time when the independent mental health advocacy service is to be provided;

(b) is subject to guardianship under the Act or is a community patient and is present in the area of the Local Health Board at the time when the independent mental health advocacy service is to be provided; or

(c) qualifies under section 130I(3) of the Act and is present in the area of the Local Health Board at the time when the independent mental health advocacy service is to be provided.

(2) Subject to directions that may be given by the Welsh Ministers, a Local Health Board must make such arrangements as it considers reasonable to enable

(**1**) Please see section 130I of the Mental Health Act 1983 for the definition of Welsh qualifying compulsory patients.

IMHAs to be available to act in respect of a Welsh qualifying informal patient who is present in a hospital or registered establishment located within the area of the Local Health Board at the time when the independent mental health advocacy service is to be provided.

(3) In making arrangements under paragraphs (1) and (2) a Local Health Board may make arrangements with a provider of advocacy services.

(4) In making arrangements under paragraphs (1) and (2) a Local Health Board must, as far as reasonably practicable, have regard to the diverse circumstances (including but not limited to the ethnic, linguistic, cultural and demographic needs) of Welsh qualifying compulsory patients and Welsh qualifying informal patients in respect of whom the Local Health Board may exercise those functions.

(5) No person may act as an IMHA unless that person is approved by the Local Health Board or is employed to act as an IMHA by a provider of advocacy services with which a Local Health Board has made arrangements under paragraph (3).

(6) Before approving any person under paragraph (5) a Local Health Board must be satisfied that the person satisfies the appointment requirements in regulation 4 and the independence requirements in regulation 5.

(7) A Local Health Board must ensure that any provider of advocacy services with whom it makes arrangements under paragraph (3) is required, in accordance with the terms of that arrangement, to ensure that any person who—

(a) is employed by that provider of advocacy services; and

(b) is made available to act as an IMHA,

satisfies the appointment requirements in regulation 4 and the independence requirements in regulation 5.

(8) In this regulation a person is employed by the provider of advocacy services if that person is—

(a) employed by the provider of advocacy services under a contract of service; or

(b) engaged by the provider of advocacy services under a contract for services.

Appointment requirements for independent mental health advocates

4.—(1) The appointment requirements referred to in regulation 3(6) and (7) are that a person—

(a) has appropriate experience or training or an appropriate combination of experience and training;

(b) is of integrity and good character; and

(c) is not employed under a contract of service by the Local Health Board for whose area the appointment is made.

(2) In determining whether a person satisfies the appointment requirement in paragraph (1)(a) regard must be had to standards in any Codes of Practice issued by the Welsh Ministers under section 118 (codes of practice) of the Act, and any guidance that may be from time to time issued by the Welsh Ministers.

(3) For the purposes of paragraph (2) standards may include any qualifications that the Welsh Ministers may determine as appropriate.

(4) Before a determination is made for the purposes of paragraph (1)(b) in relation to any person, there must be obtained in respect of that person, an enhanced criminal record certificate issued pursuant to section 113B (enhanced criminal record certificates) of the Police Act 1997(**1**) which includes—

(a) where the person is to provide advocacy services for Welsh qualifying compulsory patients and Welsh qualifying informal patients who have not attained the age of 18, suitability information relating to children (within the meaning of section 113BA of the Police Act 1997); and

(b) where the person is to provide advocacy services for Welsh qualifying compulsory patients and Welsh qualifying informal patients who have attained the age of 18, suitability information relating to vulnerable persons (within the meaning of section 113BB of the Police Act 1997).

Independence requirements for independent mental health advocates

5.—(1) The independence requirements referred to in regulation 3(6) and (7) are that, so far as practicable, a person must be able to act independently of any individual, who—

(a) is professionally concerned with the medical treatment of the Welsh qualifying compulsory patient or the Welsh qualifying informal patient;

(b) requests that person to visit or interview the Welsh qualifying compulsory patient or the Welsh qualifying informal patient.

(2) In the case of a Welsh qualifying compulsory patient who has been admitted for assessment under section 4 (admission for assessment in cases of emergency) of the Act, in addition to the requirements

(**1**) 1997 c.50.

in paragraph (1) a person must be able to act independently of—

(a) the approved mental health professional or nearest relative who made the application for admission in accordance with section 4(2) of the Act; and

(b) the doctor who provided the medical recommendation in accordance with section 4(3) of the Act,

where the persons specified in (a) and (b) are not also professionally concerned with the medical treatment of the Welsh qualifying compulsory patient.

(3) A person is not professionally concerned(**1**) with a Welsh qualifying compulsory patient's medical treatment or a Welsh qualifying informal patient's medical treatment if he or she—

(a) is acting, or has acted on one or more occasions, as an IMHA for the patient in accordance with sections 130F (arrangements under section 130E for welsh qualifying compulsory patients) or 130G (arrangements under section 130E for welsh qualifying informal patients) of the Act; or

(b) is representing or supporting, or has represented or supported, the patient other than in accordance with sections 130F or 130G of the Act, but is not otherwise involved in the patient's treatment.

Persons who may be visited and interviewed by an IMHA for the purpose of providing help to a Welsh qualifying compulsory patient admitted under section 4 (admission for assessment in cases of emergency) of the Act

6. In the case of a Welsh qualifying compulsory patient who has been admitted for assessment under section 4 of the Act, the IMHA may visit and interview—

(a) the approved mental health professional or nearest relative who made the application for admission in accordance with section 4(2) of the Act; and

(b) the doctor who provided the medical recommendation in accordance with section 4(3) of the Act,

where the persons specified in (a) and (b) are not also professionally concerned with the medical treatment of the Welsh qualifying compulsory patient.

(**1**) Please see section 130E(5) of the Act relating to when a person is not to be regarded as being professionally concerned with a patient's medical treatment.

Revocation

7. The Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2008(**1**) are hereby revoked.

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

Date

(**1**) S.I. 2008/2437 (W.210).

Constitutional and Legislative Affairs Committee

CLA(4)-06-11

CLA40

Constitutional and Legislative Affairs Committee Draft Report

Title: The Mental Health (Assessment of Former Users of Secondary Mental Health Services) (Wales) Regulations 2011

Procedure: Affirmative

These Regulations make provision about mental health assessments for former users of secondary mental health services.

Technical Scrutiny

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

Merits Scrutiny

Under Standing Order 21.3(ii) (gives rise to issues of public policy likely to be of interest to the Assembly) the Assembly is invited to pay special attention to the following instrument.

These Regulations are part of a suite of regulations made by the Welsh Ministers under powers conferred on them by provisions of the Mental Health (Wales) Measure 2010 ("the Measure") or under provisions of the Mental Health Act 1983 as amended by the Measure designed to develop and enhance mental health services in Wales.

Under Part 3 of the Measure patients who have been discharged from secondary mental health services but who subsequently believe their mental health to be deteriorating to such a point as to again require specialist intervention may self-refer themselves within a period of three years from discharge ("the discharge period") back to secondary services.

Those eligible will be persons over the age of 18 years who have previously received secondary services. However, individuals who have received and have been discharged from secondary services whilst under the age of 18 years will also be eligible if they reach the age of 18 years during the discharge period.

The provisions contained in part 3 of the Measure introduce a regime unique to Wales.

As these Regulations are subject to the affirmative procedure they will be debated by the Assembly in Plenary.

Legal Advisers
Constitutional and Legislative Affairs Committee

September 2011

Explanatory Memorandum and Regulatory Impact Assessment

The Mental Health (Assessment of Former Users of Secondary Mental Health Services) (Wales) Regulations 2011

Contents

Explanatory Memorandum to the Mental Health (Assessment of Former Users of Secondary Mental Health Services) (Wales) Regulations 2011

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

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Mental Health (Assessment of Former Users of Secondary Mental Health Services) (Wales) Regulations 2011. I am satisfied that the benefits outweigh any costs.

Lesley Griffiths AM
Minister for Health and Social Services

19 September 2011

PART 1 – EXPLANATORY MEMORANDUM

1. Description

1. The Mental Health (Assessment of Former Users of Secondary Mental Health Services) (Wales) Regulations 2011 make provision as to:

    a. the duration of the period of time in which an adult may be eligible for assessment;
    b. the time in which a copy of the assessment report is to be provided to an adult who has had an assessment;
    c. a method for determining the usual residence of an adult in cases where this may be disputed; and
    d. the transitional provisions in respect of persons (adults and those below the age of 18 when discharged who will reach the age of 18 during the relevant discharge period) discharged from secondary mental health services prior to these Regulations coming into force.

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

2. This is the first set of Regulations to be made relating to Part 3 of the Mental Health (Wales) Measure 2010 ("the Measure").

3. These Regulations include transitional provisions, reflecting the eligibility of individuals for assessment, where their discharge from services occurred before the coming into force of Part 3 of the Measure.

4. It is proposed that these Regulations are made before the commencement of the main provisions of Part 3 of the Measure. However, the powers to make these Regulations have commenced in accordance with section 55(1) and (2)(b) of the Measure, and the remaining provisions of Part 3 will be commenced prior to the coming into force date of these Regulations.

5. These Regulations will come into force on 6 June 2012.

3. Legislative background

6. These Regulations may be made in exercise of powers conferred on the Welsh Ministers by sections 23(1)(b), 26(2)(b), 29(1) and 52(2) of the Mental Health (Wales) Measure 2010.

7. These Regulations are made subject to the approval of the National Assembly for Wales.

4. Purpose and intended effect of the legislation

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

9. Discharge from specialist care (such as secondary mental health services) is regarded as a key outcome of the recovery model within mental health, the aim of which is to regain good mental health and achieve a better quality of life for the individual. However, concerns exist that one of the barriers to effective discharge is the possibility that individuals who may be relapsing may encounter long delays in attempting to re-access the service if this is once more required at a future time. To prevent this possibility, practitioners may on occasions retain clients on operational lists within secondary services who might otherwise be discharged as their condition has improved to such a point as to no longer require the direct support of those services.

10. Retention of the client, albeit with understandable motives, fails to realise the importance of discharge for the individual within the recovery model. It can also lead to a significant number of 'open-cases' within services, with resulting adverse impact on operational capacity.

11. This policy therefore aims to encourage safe and effective discharge, by providing adults with a mechanism to swiftly re-access services should these be required again at a later stage.

12. Where an adult makes such a request, an assessment of whether that adult stands in need of secondary mental health services must be undertaken by the relevant mental health partners (the local authority and the LHB).

13. Eligible persons will be those aged 18 and over who have previously received treatment within secondary services for a mental disorder and who have since been discharged from those services. The entitlement to seek an assessment will not be indefinite, but rather governed by a 'relevant discharge period' within which such a request must be made. The duration of this period is set out in these Regulations made under this Measure, and is set at three years from the date of discharge. Individuals who have received and been discharged from secondary mental health services whilst below the age of 18, are also eligible for reassessment if they reach the age of 18 during the relevant discharge period (provided that they meet all the other eligibility criteria).

14. The statutory duty to provide an assessment falls on both the LHB and local authority for the area within which the adult requesting the assessment usually

resides. These Regulations provide a method for determining usual residence in cases where this may be disputed.

15. Where an assessment identifies that certain further services are required for an adult, and one of the local mental health partners would be the responsible authority in relation to any such service, that partner will decide whether the provision of that service is called for. Such services may be provided directly by the mental health partners or by the service partners making arrangements for the delivery of services by another provider. Referrals to other appropriate services (including housing and welfare services) will also be made where a partner is not the responsible service provider. A report on the outcome of the assessment must be prepared, and these Regulations require a copy of that report is provided to the assessed adult no later than 10 working days after the conclusion of the assessment.

5. Consultation

16. Details of the consultation undertaken are included in the regulatory impact assessment which has been completed for these Regulations, and is set out in Part 2 of this document.

PART 2 – REGULATORY IMPACT ASSESSMENT

6. Options

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

18. The options are:

- Option 1 - Do nothing
- Option 2 - Deliver the policy objectives through the Regulations

Option 1 – Do nothing

19. This option proposes not making the Regulations.

20. Failing to make regulations in respect of the relevant discharge period (under section 23(1)(b)) and the period of time in which a copy of the report to the assessed adult is to be provided (under section 26(2)(b)), would leave a regulatory lacuna. Further, it would mean the requirements of section 23 and 26 are not met.

21. In relation to determination of usual residence, it is possible to consider an option of not making regulations. This would mean LHBs and local authorities are left without a clear process across Wales for determining usual residence, which could lead to unacceptable variations in practice and adults unable to effectively exercise their rights to request an assessment.

22. Not making regulations would significantly undermine the operation and intention of Part 3 of the Measure.

Option 2 – Make Regulations

23. This option proposes making the Regulations. Given that these Regulations are central to the operation of Part 3 of the Measure, there are limited risks associated with making them.

24. Where risks could, possibly, arise relates to the detail of the regulations (for example, whether three years is an appropriate relevant discharge period), rather than the making of the regulations themselves.

7. Costs and benefits

Costs and benefits of Option 1 (do nothing)

25. There are potentially costs to LHBs and local authorities in not making regulations, which arise from the potential to have varying arrangements for determining usual residence. Such variation may leave organisations exposed to legal challenge, if such variations place eligible adults at disadvantage (including being unable to effectively exercise their rights under Part 3 of the Measure).

26. There are no discernable benefits in not making the Regulations.

Costs and benefits of Option 2 (make regulations)

27. It is not anticipated that any significant costs would be incurred by local authorities or LHBs from Part 3 of the Measure in respect of secondary mental health assessments. These Regulations do not create additional financial burdens.

28. Whilst it is imperative that record keeping systems are in place which will ensure that the entitlement to, and outcome of, assessments are recorded and communicated as appropriate to other health or local authority partners (ie, the patient's GP, housing or welfare services) it is not anticipated that health services or local authorities would require any additional administrative or ICT capacity to achieve this. Existing patient record systems could be updated to include additional information relating to an entitlement to future assessment, or to update records to include the details of any subsequent assessments which are requested and/or undertaken.

29. It is possible that on occasions adults may request an assessment in an area other than that where they are usually resident, in which case LHBs and local authorities would be required to employ existing patient record management/transfer systems or protocols.

30. The benefits associated with making these Regulations are:

    a. setting the duration of the relevant discharge period, which enables Part 3 to operate effectively;
    b. ensuring the assessed adult receives a copy of the report of the assessment within a timely manner, which will enable them to make further decisions about their future care and treatment; and
    c. ensuring there is a consistent and simple system of determining usual residence which applies across all of Wales.

Summary

31. **Option 2 (make regulations)** best meets the Government's objectives.

8. Consultation

32. Welsh Government officials undertook a programme of consultation on the draft regulations relating to Part 3 of the Measure. Over 90 comprehensive and detailed written responses were received from a variety of stakeholders, including service user representative bodies, NHS organisations, local authorities and professional bodies.

33. A detailed consultation response report has been published on the Welsh Government's website, but the views received and any amendments made to the regulations as a result of the consultation are summarised in the following paragraphs.

General matters

34. All consultees agreed that the regulations should be made, and a large majority were satisfied that the cost/benefit analysis contained in the RIA was appropriate.

Term of relevant discharge period

35. Opinion was divided as to whether three years was an appropriate length of time, however there was no consensus amongst consultees as to what might be a more appropriate period. On balance, therefore, the Welsh Government considers it appropriate to retain the three year relevant discharge period, but will consider the emerging evidence on the period of time between discharge and request for assessment as part of the review of the operation of Part 3 of the Measure that will take place under section 48 of the Measure.

Ending the relevant discharge period

36. The majority of respondents were content that there should be no other events or circumstances which would end the relevant discharge period. The Welsh Government has therefore not made any amendments to the regulations in this regard.

Provision of a copy of the assessment report

37. Many respondents considered that ten working days was an appropriate period, but that emphasis should be given in guidance to the fact that this was a maximum period rather than 'default' delivery timescale. Having taken account of the views expressed, the regulations will continue to specify the ten working day maximum period for provision of the assessment report.

Usual residence

38. The consultation sought views as to whether the method of dispute resolution was appropriate. A number of respondents felt that the regulation as drafted was complicated and difficult to understand. Given these concerns, the regulation has been amended with the aim of making the arrangements clearer and easier to follow in the event that such a dispute should arise.

Transitional provisions

39. Whilst a clear majority of stakeholders agreed that adults discharged from services before the commencement of the regulations should have some form of eligibility, a number felt that the arrangements set out in the regulation as drafted were overly complicated. The wording of the regulation has therefore been simplified and the periods of eligibility made more straightforward.

9 Competition assessment

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

10 Post implementation review

41. Section 48 of the Measure places the Welsh Ministers under a duty to the review the operation of Measure, and to publish a report of the findings of the review. The report must be published no later than four years after the commencement of the principal provisions of Part 3 of the Measure.

42. It is intended that the review relating to Part 3, will take account of these Regulations.

43. The report of the review must be placed before the National Assembly for Wales, in accordance with section 48(9) of the Measure.

Annex A – Contact information

For further information in relation to this document, please contact:

Mental Health Legislation Team
Welsh Government
Cathays Park
Cardiff
CF10 3NQ

Telephone: 029 2082 3294

Email: mentalhealthlegislation@wales.gsi.gov.uk

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

DRAFT WELSH STATUTORY INSTRUMENTS

2011 No. (W.)

MENTAL HEALTH, WALES

The Mental Health (Assessment of Former Users of Secondary Mental Health Services) (Wales) Regulations 2011

EXPLANATORY NOTE

(This note is not part of the Regulations)

1. These Regulations contain provisions about mental health assessments for former users of secondary mental health services.

2. Regulation 3 provides that the term of the relevant discharge period during which an adult is eligible for a mental health assessment following discharge from secondary mental health services is three years. Where an adult was discharged from secondary mental health services before the coming into force date of these Regulations, the term of any relevant discharge period for that adult is as provided in regulation 6.

3. Regulation 4 provides for a copy of the assessment report to be provided no later than ten working days following the completion of an adult's mental health assessment.

4. Regulation 5 provides for the determination of an adult's usual residence for the purposes of Part 3 (assessments of former users of secondary mental health services) of the Mental Health (Wales) Measure 2010, where there is a question about whether an adult's usual residence is situated within a particular local authority area.

5. Regulation 6 makes transitional provision relating to the relevant discharge period for an adult who has been discharged from secondary mental health services within two years prior to the coming into force date of these Regulations.

6. A regulatory impact assessment has been prepared as to the likely costs and benefits of complying with these Regulations. A copy can be obtained from the Mental Health Legislation Team, Department for Health, Social Services and Children, Welsh Government, Cathays Park, Cardiff, CF10 3NQ.

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

DRAFT WELSH STATUTORY INSTRUMENTS

2011 No. (W.)

MENTAL HEALTH, WALES

The Mental Health (Assessment of Former Users of Secondary Mental Health Services) (Wales) Regulations 2011

Made	*2011*
Coming into force	*6 June 2012*

The Welsh Ministers make these Regulations in exercise of the powers conferred by sections 23(1)(b), 26(2)(b), 29(1) and 52(2) of the Mental Health (Wales) Measure 2010(**1**).

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

Title, commencement and application

1.—(1) The title of these Regulations is the Mental Health (Assessment of Former Users of Secondary Mental Health Services) (Wales) Regulations 2011 and they come into force on 6 June 2012.

(2) These Regulations apply in relation to Wales.

Interpretation

2. In these Regulations—

"adult" ("*oedolyn*") means a person aged eighteen years or above who is entitled to a mental health

(**1**) 2010 nawm 7.

assessment under section 22 (entitlement to assessment) of the Measure;

"assessment report" ("*adroddiad o'r asesiad*") means a single report in writing which records whether a mental health assessment has identified any services which might improve or prevent a deterioration in the mental health of an adult in accordance with section 25 (purpose of assessment) of the Measure;

"the Measure" ("*y Mesur*") means the Mental Health (Wales) Measure 2010;

"mental health assessment" ("*asesiad iechyd meddwl*") means an analysis of an adult's mental health for the purposes provided in section 25 of the Measure;

"relevant discharge period" ("*cyfnod rhyddhau perthnasol*") means the period within which an adult may request that a mental health assessment is carried out following discharge from secondary mental health services; and

"working day" ("*diwrnod gwaith*") means any day except Saturday, Sunday, Christmas Day, Good Friday or a bank holiday in England and Wales under the Banking and Financial Dealings Act 1971(**1**).

Relevant discharge period

3.—(1) The relevant discharge period begins on the date on which an adult is discharged from secondary mental health services and ends upon the expiry of a period of three years from that date.

(2) But if an adult was discharged from secondary mental health services prior to the date of the coming into force of these Regulations, the relevant discharge period for that adult is as provided in regulation 6.

Provision of assessment report

4.—(1) A copy of an assessment report is to be provided to an adult who has had a mental health assessment no later than ten working days following the completion of the assessment.

(2) For the purposes of this regulation, the copy of the assessment report is provided on the day when it is—

(a) delivered by hand to an adult; or

(b) sent by prepaid post addressed to an adult at that adult's usual or last known residence.

(**1**) 1971 c. 80.

Determination of usual residence

5.—(1) Where for the purposes of Part 3 (assessments of former users of secondary mental health services) of the Measure there is a question as to whether an adult's usual residence lies within a local authority area ("local authority area A"), then the local authority for local authority area A ("local authority A") is responsible for determining within which local authority area that adult usually resides in accordance with paragraph (2).

(2) For the purposes of making a determination as provided in paragraph (1)—

(a) an adult is to be deemed as usually resident at the address given by that adult to local authority A as being the address at which he or she usually resides;

(b) where an adult gives no such address that adult is to be deemed as usually resident at the address which he or she gives to local authority A as being his or her most recent address;

(c) where an adult's usual residence cannot be determined under sub-paragraphs (a) or (b) above, that adult is to be deemed as usually resident in the area in which he or she is present.

(3) Until such time as a determination of an adult's usual residence is made under paragraph (1), that adult is deemed to be usually resident within local authority area A.

(4) But where the local mental health partners for another local authority area ("local authority area B") agree to act as the local mental health partners for an adult, then that adult is deemed to be usually resident within local authority area B.

Transitional provisions relating to the relevant discharge period

6. Where an adult has been discharged from secondary mental health services within two years prior to the date of the coming into force of these Regulations the relevant discharge period for that adult is the period of time beginning on the coming into force date of these Regulations and ending on the expiry of three years from that adult's date of discharge.

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

Date

CLA GP1

Constitutional and Legislative Affairs Committee

Inquiry into the Granting of Powers to Welsh Ministers in UK Laws

Response from Dylan Rees

Dear sir,

I was watching your video on youtube about more powers to the Welsh assembly which I also saw on Walesonline, I sent it to two of my friends who is a member of Conservative Future, and another is a Labour supporter and wanted to know their opinions and to share both our opinions and suggestions to you, We all agreed that if Wales is to be given more law making powers, then full law making powers similar and equal to Northern Ireland and Scotland must be given, we would like to see the british government in Westminster focusing more on internal british affairs where the Welsh government work more on all internal Welsh affairs such as: Welsh law and justice, policing,energy powers such as working on renewable resources etc. Welsh culture media and broadcasting,powers on nearly all tax and benefits, Welsh business and economy, We would like to see Wales becoming more federal within the union similar to the US states, we dont feel that Wales has been given the full law making powers for our government on the "calman cymru" report... the Welsh Labour govt. asked for energy powers to be transefered to Cardiff, which we also think should have been passed, we would like to have seen more effort being done to give Wales proper full law making powers, it is us the people of Wales who voted for it there for we believe that we should be given proper full law making powers.

One of my friend pointed out that a federal Wales could be economically and democratically better for the UK in a 21st Century government, with Wales given powers to trade more without to much meddling about in Westminster,Cardiff should be more involved in Welsh affairs, and also talked about something similar to devolution max which John Major pointed out for Scotland....or would this have to go in another referendum? I think both Westminster and Cardiff government can work together if law making powers are shared Westminster focus on us as a union and Cardiff works on Wales as a UK federal constituency.

Many thanks for reading, and I hope that you can help give a fair full law making powers to the assembly.

Kindest regards,

Dylan

CLA GP2

Constitutional and Legislative Affairs Committee

Inquiry into the Granting of Powers to Welsh Ministers in UK Laws

Response from Dr Paul Cairney

Inquiry into the Granting of Powers to Welsh Ministers in UK Laws
Paul Cairney, Senior Lecturer and Head of Department, Politics and International Relations, University of Aberdeen paul.cairney@abdn.ac.uk
Legislative Consent Motions: A Brief Summary of the Scottish Experience
The Inquiry highlights a key distinction in this field:

1. Between Legislative Consent Motions (LCMs or 'Sewel motions') that allow Westminster to legislate on behalf of the devolved assembly, and LCMs that also delegate powers to devolved government ministers (I tried, in vain, to dub them 'reverse-Sewel motions').

There are two further distinctions worthy of discussion when we compare Wales to Scotland:

2. The LCM process *before* and *after* the Scottish Parliament Procedure Committee's 2005 inquiry.
3. Consideration of an LCM, granting powers to devolved government ministers, *before* and *after* it has been passed.

1. Sewel and Reverse-Sewel motions

The Sewel motion process quickly became rather controversial in Scotland, with many opposition political parties (generally nationalist, beginning with the SNP from 1999-2003, then the Greens and Scottish Socialist part from 2003-7) often opposed in principle to their use and likely to express concern about their overuse. Much was made of the idea (articulated by Lord Sewel when responsible for guiding the Scotland Bill through the Lords) that the 'UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature'. This was taken to mean that the process would not happen much at all, prompting commentators to remark on the fact that almost as many Sewel motions were passed as Acts of the Scottish Parliament (also giving the impression that Scotland was handing back powers to Westminster in some way). This was not a convincing argument, given the innocuous nature of many of the motions and the fact that they often referred to very small parts of larger bills. There were more convincing arguments about 'political cowardice', when controversial issues were referred to Westminster, but these proved to be unusual cases (most notably on issues regarding sexuality, the age of consent and civil partnerships).
From 2007 there was an SNP effect, with the Scottish Government more likely to seek ways to legislate in the Scottish Parliament rather than propose a Sewel motion. However, the change was small and it rarely provoked tensions with the UK Government. The SNP used Sewel motions for the sake of expediency and passed 8.5 per year from 2007-11 compared to 9.5 from 1999-2007. Thus, several opposition MSPs pointed out the irony of the SNP using a procedure it had so often opposed in principle, prompting Communities and Sport Minister Stewart Maxwell

to make a remark which could have been said by any Labour/Liberal Democrat minister from 1999-2007:

It is suggested that the LCM impacts on the Scottish Parliament's legislative competence or is tantamount to our handing back powers to Westminster. Let me be clear: only through changes to the reservations in the Scotland Act 1998 can powers be handed back to Westminster or the legislative competence of our Parliament altered. Individual motions, such as the one that we are discussing, represent no more than a one-off agreement by the Scottish Parliament for Westminster to legislate on our behalf on a specific aspect of a devolved matter (Scottish Parliament Official Report 19.3.08 c.7106-7).

The SNP were less likely (in opposition, and perhaps also in government) to be opposed to 'reverse-Sewel' motions, giving powers to Scottish ministers, largely because the 'giving powers back to Westminster argument' was reversed. Notably, few commentators were worried about the lack of parliamentary scrutiny involved, prompting Cairney and Keating (2004) to argue:

> On the face of it, these motions may seem attractive to devolutionists, since they devolve more responsibility from Westminster. However, the powers are generally conferred on Scottish ministers rather than the Scottish Parliament. They may therefore increase the use of secondary legislation and further tax the Subordinate Legislation Committee ... This is a particularly significant issue, since the usual rules do not seem to apply. Normally, when legislation is processed through the Scottish Parliament, the Subordinate Legislation Committee presses for any new ministerial powers to regulate or produce statutory instruments to be subject to formal scrutiny (for example to be subject to an affirmative resolution in the Scottish Parliament). However, in the case of Sewel motions the legislation is not considered in the same way and Scottish parliamentary committees do not have the opportunity to amend the legislation. Of course, ministers often stress during Sewel discussion that they will consult before regulating, but informal assurances do not carry the same weight as formal obligations and a democratic deficit may eventually be apparent.

In practice, several aspects of devolved and reserved issues may be covered by one motion, since a piece of UK legislation will often cover devolved ground and then leave the implementation to devolved government ministers. Indeed, we might *expect* this combination of outcomes, based on a desire by executives to allow Westminster to legislate for pragmatic reasons (for expediency or policy uniformity; to close loopholes; to deal with entangled responsibilities; to address UK bodies operating in devolved areas) and to address the (generally misleading) idea that power is being given back to Westminster. Consequently, the practice often satisfies devolution sensibilities perhaps at the expense of parliamentary involvement. This lack of parliamentary involvement, in legislative consent and wider public policy issues, is a general feature in Scottish and UK politics.

2. The LCM process before and after the Scottish Parliament Procedure Committee's 2005 inquiry

The Procedures Committee's review did not criticise, or call for an end to, the Sewel process (a key recommendation was to call them 'legislative consent motions'). Rather, it recommended a more systematic consideration of each motion in the relevant committee. Subsequently, the convention arose in which the relevant minister would appear before a committee to explain the need for the LCM. This generally involves one (or more) evidence-gathering session, followed by the (generally unused) opportunity to vote on the motion in committee, followed by the (generally unused) opportunity to debate and vote on the motion in plenary. The

outcomes can be tracked either on the Scottish Government website[1] or the Devolution Monitoring reports[2] which, more often than not, summarise the motion and end with 'There was no debate or vote in plenary'. This outcome reflects the generally-innocuous nature of the matters under consideration. It reminds us of the argument, often pursued by UK Government ministers, that Sewel motions have been used so regularly because UK departments have been sensitive to the charge that they are legislating without devolved parliament consent – causing a large number of small policy issues to receive disproportionate attention.

3. Consideration of an LCM, granting powers to devolved government ministers, before and after it has been passed.

In general, the scrutiny of those motions ends after they have been passed. There is little post-legislative scrutiny of Scottish Parliament or UK legislation. A key exception regards the new Scotland Bill which takes forward recommendations (most of which can be found in the Calman Commission report) to extend devolution in a small number of areas and reform, to some extent, the Scottish Parliament's control over income tax. In this unusual case, the Scottish Parliament passed a motion giving *conditional* consent. It asked the UK Government to reconsider some issues (regarding, for example, how to address a shortfall in income related to income tax volatility and the limits to Scottish ministerial borrowing) and return an amended Scotland Bill to the Scottish Parliament for further approval via a second Sewel motion (the second motion would have been expected later this year, but the size of the SNP win now complicates that process).

The Use of Ministerial Powers

As far as I know there has been no systematic study of the use of these powers by Scottish ministers. Such a study would be difficult because the LCM process merely reinforces a process of delegating powers to ministers that operated long before devolution in 1999 (such as the 'executive devolution' granted to Scottish ministers, allowing them to decide if new nuclear power stations can be built in Scotland) and continues when legislation is passed by the Scottish Parliament. Scottish Parliament legislation is often amended at stage 2 or stage 3 to make sure that the powers are only used following a *positive* resolution by the Scottish Parliament, rather than allowable unless there is a *negative* resolution. While this seems significant, it also seems to be part of a game between executive and legislature, in which both benefit from the change (the Scottish Government 'throws it a bone' and the Scottish Parliament looks like it has amended the legislation effectively). There is very limited scrutiny of this process, for the following reasons:

1. The Scottish Parliament only has the resources to analyse a very small proportion of subordinate legislation in any great depth or to perform the occasional inquiry incorporating post-legislative scrutiny.
2. Subordinate Legislation Committee membership is rarely cherished or sought by MSPs.
3. It is rare for the Scottish Parliament to assert itself in relation to the Scottish Government, either because the government has a majority (1999-2007, 2011 onwards) or because the parties rarely form a united front during periods of minority government (2007-11) or engage at that level of policy detail.

Overall, this is a process (like most others) dominated by executives, with minimal parliamentary involvement beyond the formal process of consent.

[1] http://www.scotland.gov.uk/About/Sewel

[2] http://www.ucl.ac.uk/constitution-unit/research/research-archive/archive-projects/devolution-monitoring06-09

CLA GP3

Constitutional and Legislative Affairs Committee

Inquiry into the Granting of Powers to Welsh Ministers in UK Laws

Response from Daniel Greenberg

SUBMISSION

TO THE CONSTITUTIONAL AND LEGISLATIVE AFFAIRS COMMITTEE

OF THE NATIONAL ASSEMBLY FOR WALES

INQUIRY INTO THE GRANTING OF POWERS

TO WELSH MINISTERS IN UK LAW

31st August 2011

Daniel Greenberg
Parliamentary Counsel, BLP

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SUBMISSION OF DANIEL GREENBERG[1]

1 SUMMARY

1.1 Devolution has significantly increased the complexity of the statute book, making it harder for the citizen to piece together a text of the law as it applies to his or her circumstances.

1.2 The recent acquisition by the National Assembly of enhanced legislative powers may suggest both a need and an opportunity for rationalisation of the existing processes.

1.3 One aspect of this may be a move for powers to be conferred on Welsh Ministers by legislation of the National Assembly wherever possible.

1.4 But where that is not possible, the National Assembly may still wish to have a formal voice in respect of the nature and extent of powers to be conferred on Welsh Ministers by Westminster legislation, whether or not the substance of the relevant area of law is devolved.

1.5 This could be achieved by building on the existing National Assembly's Standing Order 30 process so as to establish a formal consultative process between Cardiff and Westminster where it is proposed that a Westminster Bill should confer powers directly on Welsh Ministers.

2 BACKGROUND

2.1 The arrangements for devolution are already contributing to the factors making the statute book almost impossibly complicated for citizens to follow.

2.2 In particular, the emergence of an increasing number of "parallel texts", as UK-wide legislation is variously amended with differing degrees of extent, is making it increasingly difficult to establish a clear picture of the legislative text in relation to each jurisdiction.

2.3 The expansion of the National Assembly for Wales' powers as a result of the positive result of the referendum on its Act-making powers offers various opportunities for rationalisation and consolidation. The National Assembly may consider this an opportunity to consider generally whether the process of legislating is as streamlined as possible, with a view to making the result simpler and easier to use.

2.4 In particular, the National Assembly may feel that it is consistent with the increase in its legislative competence to ensure that powers to be exercised by Welsh Ministers are conferred by legislation of the National Assembly wherever possible.

2.5 It is inevitable, however, that Westminster legislation will continue to need to confer powers on Welsh Ministers in some contexts and circumstances.

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[1] Parliamentary Counsel (UK) 1991-2010; Parliamentary Counsel, Berwin Leighton Paisner LLP, 2010->; Editor, *Craies on Legislation*, 2004, 2008, (2012); Editor, *Stroud's Judicial Dictionary*, 2000, 2006, (2012); General Editor, *Jowitt's Dictionary of English Law*, 2010; General Editor, *Annotated Statutes, Westlaw UK*, 2008->. This submission represents my personal views and not the views of BLP or any other organisation.

2.6 In some circumstances the National Assembly will in practice be required[2] to consent to the conferring of powers on the Welsh Ministers by Westminster legislation. As discussed below, however, this will not always be the case.

2.7 In all circumstances, however, the National Assembly may wish to have a formal opportunity to express views about the form in which, and the extent to which, powers are conferred. In particular, the National Assembly may consider this an important method of—

(a) ensuring as consistent an approach as possible to the delegation of powers, with the aim of enhancing the overall clarity and simplicity of the statute book, and

(b) exercising some degree of control or influence over the extent to which powers are conferred on Welsh Ministers other than by the National Assembly.

3 THE MEMORANDUM OF UNDERSTANDING

3.1 The Inter-governmental Memorandum of Understanding as revised on 8th June 2011 reserves to the Westminster Parliament "authority to legislate on any issue, whether devolved or not"[3].

3.2 There is a distinction to be drawn, which the Memorandum does not address, between the substantive policy of Westminster legislation and the mechanisms by which it is to be given effect. The question of conferring powers on Welsh Ministers concerns the latter issue.

3.3 Westminster legislation could purport to confer powers on Welsh Ministers either in relation to devolved or non-devolved areas of law. The Memorandum would give the National Assembly a presumption of involvement in the former case, but not the latter.

3.4 In all cases, however, the National Assembly may wish to have a voice in respect of the arrangements for powers to be conferred on Welsh Ministers.

4 STANDING ORDER 30

4.1 The paper *Provisions about Welsh Ministers in UK Acts*[4] describes the arrangements under Standing Order 30 (Notification in relation to UK Parliament Bills).

4.2 The essential deficiency of these arrangements, however, is that they are confined to consideration within the National Assembly, and give the National Assembly no kind of voice within the Westminster Parliament on the issues under consideration.

4.3 In essence, the arrangements are a dialogue within Cardiff, rather than a dialogue between Cardiff and Westminster.

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[2] As a matter of convention in accordance with the Memorandum of Understanding - but not as a matter of law or Parliamentary procedure.

[3] Paragraph 14.

[4] Prepared in August 2011 by the National Assembly for Wales' Research Service for the Constitutional and Legal Affairs Committee's inquiry.

4.4 That gives the National Assembly an opportunity to make representations to the Welsh Government about, in effect, the representations that it makes to the UK Government. It does not enable the views of the National Assembly to be communicated directly to Parliament.

4.5 Of course, the National Assembly cannot, by its Standing Orders or otherwise, compel the Westminster Parliament to talk or listen to the National Assembly. But while the Standing Order 30 arrangements continue to be entirely unilateral there must be a limit to their effectiveness as a means of communicating the National Assembly's concerns and interests to those responsible for passing Westminster legislation.

5 A NEW PROCEDURE FOR DISCUSSION BETWEEN WESTMINSTER AND CARDIFF?

5.1 In order to address the problem described in sections 3 and 4 above, the National Assembly may wish to consider encouraging the establishment of new arrangements within Whitehall and Westminster that would, in effect, ensure that the National Assembly has an opportunity formally to influence the process where it is proposed to confer powers directly on Welsh Ministers.

5.2 In essence, both the UK Government and Parliament could be encouraged to establish arrangements that build on the existing Standing Order 30 procedure, and enable its results to be considered by the Westminster Parliament.

5.3 This would be in accordance with the aim set out in paragraph 4 of the Memorandum of Understanding "to allow administrations to make representations to each other in sufficient time for those representations to be fully considered".

5.4 The new arrangements could lead to the strengthening of the effect of the Standing Order 30 arrangements in their present form. By adding a new dimension to the dialogue - between the National Assembly and Parliament - the Welsh government would approach Standing Order 30 in the knowledge that it was one part of a discussion that could be expanded, and referred to, by Westminster Parliamentarians with interest in Welsh affairs as the Bill proceeded through Parliament.

5.5 Key features of the arrangements might include, for example—

(a) a requirement for the Minister in Charge of any Bill that conferred powers directly on the Welsh Ministers to submit a memorandum to the National Assembly before the Second Reading of the Bill in its first House[5];

(b) consideration of the memorandum in the National Assembly, possibly in Committee and with the possibility of hearing evidence from Welsh Government or Westminster officials;

(c) the option for the National Assembly to agree a response, possibly by taking note of a Committee report, which would be transmitted to the Minister in Charge of the Bill and laid by him or her before Parliament[6].

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[5] In a case where the powers had been requested by the Welsh Government, the UK Government's memorandum could either adopt or attach a memorandum produced by Welsh Ministers.

[6] As a result of which it would become a public document, and could be included in the documents relating to the Bill made available on Parliament's website.

5.6 This would be separate from the consent mechanism discussed in paragraph 14 of the Memorandum of Understanding. In particular, this would be an opportunity to influence, not a requirement for consent.

5.7 It would be possible, although not essential, for the new arrangements to be partly accommodated within the arrangements for the Welsh Grand Committee in the House of Commons[7].

5.8 It would also be possible, although again not essential, for the arrangements to be established as an addition to the Memorandum of Understanding.

5.9 The proposed arrangements would have some similarities with the arrangements according to which Bills are scrutinised by the House of Lords Select Committee on Delegated Powers and Regulatory Reform. In particular, that Committee receives a memorandum from the Minister in Charge of each Bill and makes a report to the House, generally before the Committee Stage[8]. The Committee also makes supplementary reports relating to significant amendments where time allows.

5.10 The proposed arrangements would not require legislation[9]. They would involve a new process within Government Departments that could be instigated entirely informally. The Parliamentary side of the arrangements might be achieved through changes to the Standing Orders; but it could probably also be achieved entirely informally.

6 CONCLUSION

6.1 Arrangements along the lines adumbrated in section 5 could be established quickly and with little or no formality.

6.2 The aim of the arrangements would be to ensure that the National Assembly always had an opportunity to influence proposals to confer functions on Welsh Ministers.

6.3 This would include, but would not be limited to, an opportunity to express a view as to whether each proposal to confer powers directly was appropriate, or could better be achieved by legislation of the National Assembly.

DANIEL GREENBERG

31st August 2011

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[7] House of Commons Standing Orders, SO 102-108.

[8] The Companion to the Standing Orders in the House of Lords says (para.7.33): "The committee aims to report before the committee stage begins, though the House is under no obligation to delay proceedings if the committee has not reported by that time."

[9] In particular, the use of the Command Paper procedure allows documents to be laid before Parliament without any legislative requirement.

DEVOLUTION GUIDANCE NOTE 9: POST-DEVOLUTION PRIMARY LEGISLATION AFFECTING WALES

SUMMARY

- **The Government of Wales Act 2006 ("the 2006 Act") creates, from May 2007, a separate legislature, the National Assembly for Wales, and executive, the Welsh Assembly Government. The Act provides for a procedure for Parliament to confer legislative competence on the National Assembly for Wales by Order in Council. This will allow it to pass legislation, known as Assembly Measures, which can do anything an Act of Parliament can do within the general constraints set out in the Act, and within the scope of the particular legislative competence granted. Devolution Guidance Note [16] sets out the procedure for conferring legislative competence on the National Assembly for Wales by Order in Council.**

- **The White Paper 'Better Governance for Wales' set out the policy that *"The Government intends for the future to draft Parliamentary Bills in a way which gives the Assembly wider and more permissive powers to determine the detail of how the provisions should be implemented in Wales"*, which remains the case. This note includes guidance on changing the Assembly's legislative competence by 'framework' provisions in Parliamentary Bills.**

- **The Memorandum of Understanding between the UK Government and the Devolved Administrations (MoU) says: *"The United Kingdom Government retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government."***

- **This Convention applies when, under normal circumstances, Parliamentary Bills make provision specifically on matters within the areas where the National Assembly for Wales has legislative competence or the Welsh Ministers have functions. It does not apply when Bills deal with such matters only incidentally to, or consequentially upon, provision made in relation to a non-devolved matter. In these circumstances, the Welsh Assembly Government and Wales Office should nevertheless be consulted .**

- **The Convention relates to Bills being put before Parliament, but Departments should approach the Welsh Assembly Government on the same basis for Bills being published in draft, even though there is no formal requirement to do so. It should be followed for Private Member's Bills to be supported by the UK Government.**

- **The Secretary of State for Wales has overall responsibility for Welsh specific provisions in the UK Government's legislative programme, and is a member of the Legislative Programme Committee to represent Welsh interests.**

Introduction

1} The UK Parliament retains its sovereignty and right to legislate on any matter after devolution. However, the establishment of devolved institutions in Scotland and Wales has created, under the Scotland Act 1998 and the Government of Wales Act 2006, delegated bodies with the power to promote legislation with the force of Acts of the UK Parliament. In order to respect the competence of those bodies under a sovereign Parliament, the UK Government has committed in the Memorandum of Understanding between it and the devolved institutions, not normally ask Parliament to legislate within the competence of those bodies without the agreement of those bodies. The implementation of the Government of Wales Act 2006 therefore places new responsibilities upon Whitehall Departments to consult the Welsh Assembly Government, to obtain the agreement of the Welsh Ministers in certain circumstances and to only proceed with certain provisions in Parliamentary Bills if the National Assembly for Wales agrees to their inclusion. For description of the key elements of the Government of Wales Act 2006 see annex 2.

2} This note sets out guidance for Whitehall Departments on arrangements for managing new legislation affecting the responsibilities of either the National Assembly for Wales or the Welsh Assembly Government. It sets out the expectations of the Cabinet Committee on the Legislative Programme (LP) in giving effect to this policy and how to manage it to ensure smooth running of the UK Government's legislative programme. LP expects devolution issues to be resolved by the time a Bill is brought before the Committee prior to its introduction into Parliament.

3} This note is not concerned with the process by which the Welsh Assembly Government is consulted about policy. Arrangements for this are set out in the MoU, the agreement on Common Working Arrangements (**Devolution Guidance Note 1**) and the bilateral concordats between Whitehall Departments and the Welsh Assembly Government.

4} The UK Government has agreed with the Welsh Assembly Government that they will normally consult each other from an early stage on the development of relevant legislative proposals, in confidence where necessary (**see Devolution Guidance Note 1 *Common Working Arrangements*, which should be read separately, in particular paragraphs 30-35).** Departments should make clear when information is being passed in confidence.

5} This note does not extend to legislation which deals with emergencies or is similarly exceptional.

6} Guidance on the role of the Secretary of State for Wales, including in relation to primary legislation, is given in Devolution Guidance Note 4 ***The Role of the Secretary of State for Wales.*** The Secretary of State has overall responsibility for Welsh provisions in the UK Government's legislative programme, as well as for constitutional and devolution policy as it applies to Wales. The Secretary of State for Wales is a member of LP and represents Welsh interests in this respect, regardless of which Department may be sponsoring any particular piece of legislation. Accordingly, the Wales Office needs to be involved at all stages in legislation relating to Wales. Section 33

of the Government of Wales Act 2006 places a duty on the Secretary of State for Wales to consult the National Assembly for Wales after the beginning of each Parliamentary Session on the UK Government's legislative programme and on non-programme Bills agreed for introduction subsequently (unless there are considerations relating to the Bill which make such consultation inappropriate). The consultation must include a personal attendance by the Secretary of State for Wales at Assembly proceedings, and provides an opportunity for the Assembly to consider the content of individual Bills, in addition to the UK Government's choice of priorities.

General

7} In general:

- The MoU indicates that there will be consultation with the Welsh Assembly Government on policy proposals affecting devolved matters whether or not they involve legislative change.
- Where the possibility of particular legislation has not been publicly announced, information going to the Welsh Assembly Government should be passed in confidence. The Welsh Assembly Government will not circulate or allude to Bill material without the consent of the lead Whitehall Department. Additional guidance on confidentiality is given in paragraph 11 of the MoU agreed between the UK Government and the devolved administrations. It is for the administration providing the information to stipulate restrictions on usage. Where such restrictions constrain wider consultation by the Welsh Assembly Government, the duty of confidentiality might extend to other bodies to be consulted, subject to the agreement of the sponsoring Department.
- When primary legislation is prepared by Whitehall Departments, consideration should be given to what arrangements may be required for Wales. The 2006 Act provides for the Assembly's legislative competence to build up incrementally over time, so in many cases, and particularly in the early years, the Assembly will not have the legislative competence to make its own provision for Wales. It is therefore important for Departments to consult the Wales Office and Welsh Assembly Government about all relevant proposals for primary legislation, so that suitable vehicles can be identified. This is particularly important during the bidding stages, to inform the bid from the Secretary of State for Wales for forthcoming programmes.
- Whitehall Departments will in practice deal with the Welsh Assembly Government. Departments should approach the Welsh Assembly Government to gain the consent of the National Assembly for Wales to legislation when appropriate. It will be for the Welsh Assembly Government to indicate the view of the National Assembly for Wales when appropriate and to take whatever steps are required to ascertain that view. Departments should also liaise closely with the Wales Office.
- Whether the consent of the National Assembly for Wales on the one hand, or the Welsh Assembly Government on the other, is needed depends on the nature of the provision in question. The UK

Government's commitments are set out fully at paragraph 17 of this note. Departments should consult the Welsh Assembly Government and the Wales Office on changes in devolved areas of law which are incidental to or consequential on provisions made for non-devolved purposes; the consent of the Assembly is not needed in these circumstances.

- Departmental legal advisers or the Wales Office should be consulted if you are in any doubt about whether a proposal relates to a devolved matter. On some occasions there may be a different opinion about whether devolved matters are affected, and it is always advisable to consult your Departmental legal advisers, as well as the Wales Office and the Welsh Assembly Government, about these issues at an early stage in developing proposals for legislation.

Legislative planning

8} From May 2007, the legislative competence of the National Assembly for Wales will be much more limited in scope than the executive functions of the Welsh Ministers[1]. This is a direct consequence of the unique nature of the Welsh devolution settlement.

9} The National Assembly now has powers to pass Measures in relation to certain education matters and NHS redress. The 2006 Act also confers the power to pass Measures in relation to the operation of the Assembly itself. However as more matters are added to fields within schedule 5, there will be an increasing number of areas where legislation in relation to Wales could be passed either by Parliament or by the Assembly. In such cases the normal expectation is that the Assembly would legislate in relation to Wales. It is however possible that the Welsh Assembly Government will wish to take the opportunity to include provisions in a relevant Parliamentary Bill, rather than promoting a separate Assembly Measure. Such provisions should be included in a Bill at introduction in the UK Parliament.

10} In considering proposals for primary legislation from 2007-08 onwards, therefore, Departments will need to consider whether anything that is proposed for inclusion in a Bill would in fact be within the legislative competence of the Assembly, or would have a negative effect on that competence. This should emerge clearly from early consultation with the Welsh Assembly Government and the Wales Office. It will also be possible at all times to see what the Assembly's legislative competence covers, since it will be defined by the latest version of Schedule 5. This will be available on the Wales Office website (www.walesoffice.gov.uk) and Welsh Assembly Government (new.wales.gov.uk).

[1] Except where otherwise indicated, references to the Welsh Ministers should be taken as including reference to the First Minister and Counsel General, where they have functions conferred on them individually.

11} The arrangements set out below recognise that the Welsh Ministers' functions will for some time to come extend into areas outside the Assembly's legislative competence. Under the 2006 Act, the Assembly can seek legislative competence in those areas where Welsh Ministers exercise functions, and the arrangements set out below reflect that aspect of the Welsh devolution settlement.

12} There may however be some limited areas where the Welsh Ministers exercise functions, which remain the responsibility of the UK Government, for Wales as well as for England, in relation to which the Assembly could not seek legislative competence. The 2006 Act has flexibility to allow new fields to be added to Schedule 5, either by a UK Bill or by an Order in Council, and the Assembly could then seek legislative competence in relation to those fields in the same way as for the existing fields. As noted at paragraph 3.26 of the Better Governance for Wales White Paper, however, this flexibility would not extend to:

> *"those subjects which remain the responsibility of Whitehall Departments for Wales as well as for England. Like Scotland, these would include Fiscal and Monetary Policy, Immigration and Nationality and Social Security. Also excluded would be fields where the Scottish Executive, and the Secretary of State for Scotland before devolution, have functions but the Assembly does not, such as civil and criminal law, the administration of justice, police and the prison service."*

13} Provisions relating to such areas will remain a matter for the UK Government, regardless of whether a Welsh Minister exercises functions within them or not. Accordingly, the consent of Welsh Ministers to changes to their functions within such areas is not required, although they should be consulted. Departments should always consult Wales Office lawyers for a legal view on whether provisions fall into this category if there is any doubt.

14} By the same token, there will still be many areas where the Assembly does not have legislative competence and where the Welsh Assembly Government will want to seek enabling powers in the UK Government's legislative programme. These could either confer executive functions on the Welsh Ministers, or be 'framework' powers conferring legislative competence on the National Assembly for Wales, or both. There could also be provisions directly implementing a Welsh Assembly Government policy in Wales' although these are now less likely. These could be contained in Wales specific legislation, or in other appropriate Parliamentary Bills. Proposals for the inclusion of provisions in Parliamentary Bills from the Welsh Assembly Government need to be copied to the Wales Office from the outset, and the Wales Office will remain responsible for bidding for Welsh provisions in Bills in forthcoming legislative programmes. In the case of executive functions, or

detailed policy implementation through legislation, the inclusion of such provisions will be agreed in the normal way.

15} For 'framework' powers in Bills, it is important to recognise that they will confer legislative competence on the Assembly by amending Schedule 5 to the 2006 Act, in exactly the same way as Orders in Council conferring such legislative competence under the 2006 Act. Such provisions are consistent with UK Government policy set out in the second bullet point of the summary. As with proposed Orders in Council, the UK Government will need to agree the appropriateness of conferring such legislative competence, and in particular its scope and limits. Accordingly the letter to the relevant Cabinet committee seeking policy clearance for the Bill will need an explicit section on Welsh provisions headed **"Framework Powers for Wales – Scope and Limits and Exceptions".** Framework powers will have to fit within the scope of the legislative vehicle, and it would not be appropriate for the scope of a Bill to be widened simply to accommodate the scope of a proposed framework power. Exceptions are common place and care needs to be exercised to ensure that the legislative competence being conferred does not exceed the executive functions Welsh Ministers already have. When seeking policy clearance for a framework power in a Bill, to assist UK Government Ministers in forming a view as to the appropriateness of the National Assembly for Wales having the power the bid needs to be accompanied by an explanatory memorandum giving a clear description of the purpose for which the power is being sought.

16} As proposed Orders in Council will require policy agreement with all relevant Whitehall Departments, so will framework powers in Bills. The Wales Office has overall responsibility for managing this process for the UK Government. If Departments who are sponsoring Bills which will include a Welsh framework clause would prefer, the Wales Office will ensure that consistent policy agreement is secured. Because such provisions will not contain the legislative detail to deliver Welsh Assembly Government policy a template explanatory memorandum for such provisions has been agreed with the Welsh Assembly Government, which mirrors the explanatory memoranda which will accompany the Orders in Council. Once again, the Wales Office can manage or advise on the production of required supplementary information in the proper format.

17} The Welsh Ministers and the Assembly have executive and legislative competence respectively in certain areas. It therefore follows from the commitment made by the UK Government in the MOU that it will not normally seek to legislate in relation to those matters without the agreement of the devolved institutions. For the purposes of the Welsh devolution settlement Parliamentary Bills can include provisions in relation to Wales for a range of purposes. The different purposes are described here, together with the agreements that will normally be required in each different case:

- *Provisions that modify, impose, confer, remove, or otherwise affect functions of Welsh Ministers.* The consent of the Welsh Ministers should be obtained, through normal consultation between the UK and Welsh Assembly Government, by the time a Bill is considered by LP. **There is an exception to this** which is described in detail in paragraph 12 and 13 above, relating to areas where Welsh Ministers exercise

functions, but which lie outside the areas where legislative competence could be conferred on the National Assembly. In these circumstances, Welsh Ministers should be consulted but consent is not required.

- *Provisions that add to the legislative competence of the Assembly* The consent of the Welsh Ministers should be obtained, through normal consultation between UK and Welsh Assembly Governments by the time a Bill is considered by LP. The consent of the National Assembly for Wales is not required.
- *Provisions that have a negative effect on the legislative competence of the Assembly or which is on matters within the legislative competence of the Assembly*:

  The Welsh Ministers will need to obtain the consent of the Assembly. By the time a Bill is considered by LP agreement must be reached with Welsh Ministers to promote the relevant motion in the National Assembly for Wales as soon as possible after introduction. In the event that the motion was not passed in the National Assembly, the UK Government would, subject to collective agreement being secured, need to table an appropriate amendment removing the relevant provisions before the Bill reaches its final stage in the House of introduction. The Welsh Ministers will need to have regard to these timing requirements in tabling their motion. The same will apply if any significant amendments are made to the relevant provisions during a Bill's passage. The Wales Office will work with the Welsh Assembly Government to facilitate any consents required.
- *Provisions within the Assembly's legislative competence which are purely supplementary, consequential, incidental, transitional, transitory or saving provisions relating to provisions on non devolved matters.* The Welsh Ministers should be consulted, but consent is not required. Departments should consult the Wales Office for a view on whether provisions fall into this category.
- *These consent requirements also apply where UK Ministers have the power to amend primary legislation by Order[2] and it is proposed to make an Order which would have any of the effects set out in the four bullet points above.* Constraints and restrictions are not normally placed on the scope of order making powers in the primary legislation which is conferring those powers, nor may it be possible to assess in advance when Orders made under such powers would fall within the ambit of this guidance note. Therefore, when UK Ministers are proposing to make such an Order, they will be expected to have regard to ensuring that the policy commitments set out here are observed in those Orders as they would be in primary legislation. Where a Bill would confer wide-ranging powers on UK Ministers to amend primary legislation by Order, Departments should pay particular attention to how those provisions would interact with the functions of Welsh Ministers and the legislative competence of the National Assembly.

[2] In this paragraph, "order" includes any type of subordinate legislation.

18} The series of consents described above applies in normal circumstances. It does not apply in relation to emergency legislation or legislation that is otherwise exceptional.

Preparation of Bills and Submission to LP

19} LP Committee expects all devolution issues to have been resolved by the time the Committee considers whether the Bill should be introduced. This means that, if provisions require the agreement of the Welsh Ministers, agreement with the Welsh Ministers has been reached, and that, in instances where the agreement of the National Assembly for Wales is required, that the Welsh Ministers have agreed to promote the relevant motion in the Assembly. Papers for LP must contain a statement to that effect. In addition papers to LP should:

- Briefly state the effect of the Bill in Wales and whether matters are within devolved competence or matters for UK Ministers or the UK Parliament.
- Briefly identify all agreements and consultations that may be required, both with the Welsh Ministers and the National Assembly for Wales, and within the UK Government, and confirm that they have been secured. The Secretary of State for Wales will be asked to confirm this at LP, so it is essential that the Wales Office is fully involved in the process of reaching these agreements.

20} There should, in addition to any earlier policy discussions, also be consultation with the Welsh Assembly Government as part of the process of formulating instructions to Parliamentary Counsel where these touch on the Welsh Ministers' or Assembly's responsibilities, so that their interests are understood from the outset and any dispute resolution process undertaken in good time.

21} An arrangement that has proved effective in the past is for Welsh Assembly Government lawyers to provide a draft of instructions for the lead Whitehall Department and the Wales Office to approve and then pass on to Parliamentary Counsel. In some cases, it may be appropriate for Parliamentary Counsel to take instructions direct from the Welsh Assembly Government lawyers; but this should be done only where it is the most effective way of operating and the lead Whitehall Departments and their Ministers agree to this arrangement. Instructions sent directly to Parliamentary Counsel in this way still require the active assent of the UK Government - instructions going directly from WAG lawyers to Parliamentary Counsel Office must always begin with a statement that they have been cleared with the Wales Office and lead Department, who will seek on each occasion to take a unified HMG view, rather than requiring two separate departmental clearance procedures, but with the proviso that instructions are always copied to those Departments. Each separate instruction will require such a statement, and subsequent rounds of instructions will also need to be authorised, particularly where those revisions change policy, or include new policies. Framework clauses will continue to require Wales Office authorisation and clearance.

22} Where Departments are sponsoring Bills which act as vehicles for Welsh provisions requested by the Welsh Assembly Government, Welsh Assembly Government support will be essential in order to ensure the smooth passage of the Bill, in relation to the Welsh specific provisions. It is recommended that a standard Service Level Agreement be put in place as soon as clearance to include the Welsh provisions in the Bill is obtained. The Wales Office has overall responsibility for the mechanics of the Welsh devolution settlement so can manage this on behalf of sponsor Departments, if they prefer.

23} Consultation with the Welsh Assembly Government can be facilitated if Departments ensure that Bill material accurately distinguishes between the Welsh Ministers and the National Assembly for Wales . Annex 1 to this note lists some of the main aspects of this. While this is not prescriptive, and is no substitute for detailed discussions, it should ensure that such discussions can focus on any substantive sticking points and are not dominated by relatively minor and technical matters.

Bills Published for Pre-Legislative Scrutiny and Private Members Bills

24} The procedures described above should also be followed for Bills being published in draft. The same procedures should be followed for a Private Member's Bill, if the UK Government intends to support it.

During the passage of legislation

25} During the passage of legislation, the Welsh Assembly Government will provide full support to UK Ministers, as required and on request. If the UK Government proposes to amend a Bill or to accept an amendment, similar arrangements will apply if the amendment falls within devolved competence. Departments should approach the Welsh Assembly Government and Wales Office about such amendments. The Welsh Assembly Government can be expected to recognise the exigencies of the legislative timetables, for example when forced to consider accepting amendments at short notice. All amendments require at least LP clearance. Amendments that change policy or contain new policy will also require policy clearance. If the Welsh Assembly Government is unable to agree how to proceed with the Amendment in the time required the UK Government will be obliged to proceed to meet legislative deadlines, and will act accordingly.

26} Provided that the arrangements set out here have been observed, Ministers resisting non-Government amendments which fall within devolved competence, or Welsh specific provisions within Bills, will be defending provisions which have already obtained the consent of the National Assembly for Wales or Welsh Ministers.

ANNEX 1

Referring to the National Assembly for Wales and the Welsh Assembly Government in primary legislation

I. The following checklist aims to cover some largely technical points in referring to the Assembly and Welsh Assembly Government in UK Government Bills. It is neither exhaustive nor prescriptive. However, it should serve as a useful aide-mémoire for Departments and should minimise the need for discussions with Welsh Assembly Government officials to be dominated by relatively minor issues such as these.

Nomenclature

II. Parliamentary Counsel will judge the most suitable way of referring to the National Assembly for Wales, or the Welsh Assembly Government, in a Bill, for example by their formal titles, or by a short title such as "the National Assembly", “the Assembly Government”. However, the term "Welsh Assembly" is always to be avoided.

III. The Government of Wales Act 2006 contains a definition of "Wales", which includes the sea around Wales to a distance of 12 nautical miles. Where a Bill confers functions on the Welsh Ministers or confers legislative competence on the Assembly which could be exercised in relation to the sea or to maritime activities, it should thus normally use the definition of Wales in section 158 of the Government of Wales Act 2006.

Functions in a Bill

IV. Executive functions should normally be conferred on “the Welsh Ministers”, as the collective term for the First Minister and Welsh Ministers (the Cabinet of the Welsh Assembly Government). It is also possible for functions to be conferred exclusively on the First Minister or on the Counsel General, but this will only be in circumstances where there is a particular reason for doing so. They should not be conferred on “the Welsh Assembly Government”.

V. Commencement provisions in a Bill (i.e. the means by which it comes into force) should normally apply on equal terms to England and Wales, and to UK Ministers and the Welsh Ministers. Again, proposed departures from these two presumptions should be discussed at an early stage in the pre-legislative process.

VI. While it remains possible to confer functions on the Welsh Ministers by means of a Transfer of Functions Order under section 58 of the Government of Wales Act 2006, newly created Ministerial functions should normally be conferred directly on the Welsh Ministers by primary legislation. To do otherwise can increase the amount of Parliamentary time needed (by requiring Parliament to consider the Order as well as the Bill) and potentially misleads as to the UK Government's intentions (since

Parliament will assume the functions are not being conferred on the Welsh Ministers).

Statutory procedures

VII. The procedures for the Welsh Ministers to make subordinate legislation will be similar to those applying to UK Ministers, with the Assembly in a similar position to Parliament with respect to powers to approve or annul statutory instruments. Bills conferring subordinate legislation powers on the Welsh Ministers will need to be clear whether they are to be subject to affirmative, negative or no procedure in the Assembly. Welsh Assembly Government lawyers can advise as to drafting precedents.

VIII. A Bill should not normally subject the actions of the Welsh Ministers to UK Ministerial consent or approval (or vice versa), apart from certain functions which require the consent of HM Treasury. Exceptions to this should be explored as early as possible in the pre-legislative process.

IX. Where there is a requirement for UK Ministers to consult the Welsh Ministers before acting (or vice versa), this should normally be included in legislation rather than in a concordat.

New public bodies

X. The Welsh Assembly Government should be consulted at the earliest possible stage over any proposals to create new public bodies relating to its functions in Wales, since it may wish to adopt a different solution to suit Welsh circumstances. In such cases, depending on the timescales involved, it may be more appropriate to consider provision to grant the Assembly the legislative competence which would enable the Welsh Ministers to bring forward their own legislative proposals for consideration by the Assembly.

Where the Welsh Ministers will be wholly or partly responsible for public bodies and offices, these should have statutory titles in Welsh and English (e.g. "There is to be a body corporate called [title of body in English] or, in Welsh [title of body in Welsh]". Welsh Assembly Government officials will be able to advise on a suitable Welsh title.

XI. A new public office should only disqualify its holder from membership of the Assembly where that would cause an unavoidable conflict of interest with the Assembly's responsibilities. Disqualification from membership of the House of Commons does not always give rise to disqualification from the Assembly. Disqualification should generally be left to an Order in Council under section12(1)(b) of the Government of Wales Act 1998 (or, for elections after May 2007, under section 16 (1) (b) of the Government of Wales Act 2006).

XII. New public bodies which fall solely under the Welsh Ministers' control should normally be subject to their general powers to reform public bodies in Wales (Government of Wales Act 1998, section 28 and Schedule 4,)

these powers will remain in force and become powers of the Welsh Ministers by virtue of the transitional provisions in the Government of Wales Act 2006). A Bill should also normally provide for records of such a body to be Welsh public records (Government of Wales Act 2006, sections 146 and 148).

XIV. Where the Welsh Ministers are to be wholly responsible for a new body, they should have the power to determine the form of that body's accounts, subject to Treasury consent.

XV. Bills should provide that the Auditor General for Wales ("AGW"), and not the Comptroller and Auditor General, is to be responsible for auditing the accounts of any body which reports solely to the Welsh Ministers or to the National Assembly for Wales.

XVI. Where the AGW audits a body's accounts, s/he should also have the power to conduct "value for money" examinations into that body.

Consultations and Statements of Policy

XVII. Much primary legislation for Wales will continue to be included in England and Wales Bills, although it may well contain distinctive Welsh provisions. To avoid misunderstanding on the part of readers, therefore, any consultation document, White Paper, or other statement of policy relating to legislation should make it clear whether the legislation will contain powers for the Assembly to pass its own Measures in relation to Wales.

XVIII. Wording should be agreed with the Wales Office and Welsh Assembly Government officials on a case by case basis, but the essence of the statement in relation to Wales might be:
"we intend to ask Parliament to grant the National Assembly for Wales legislative competence over a number of matters within the field of [eg: local government]. This will allow the Assembly to pass Measures appropriate to the situation in Wales."

XIX. In general, the inclusion of a brief statement of this kind will not require that the document be published jointly with either the Welsh Assembly Government or the Wales Office. Whether a Welsh language version is required will be a matter for the lead Whitehall Department to consider in line with the requirements of its own Welsh language Scheme.

Contact details

XX. If you have any queries, please contact:

• Head of Legislation and Strategic Policy Branch, Wales Office: 029 20 898048

• Deputy Director of the Wales Office: 029 20 898483

Ministry of Justice (Last updated – June 2007)

ANNEX 2

This annex provides a brief explanation of the component parts of the Government of Wales Act 2006, how they interrelate to confer enhanced legislative competence on the National Assembly for Wales, and how it can be exercised.

1. Schedule 5

Schedule 5 of the Government of Wales Act 2006 will define the scope of the Assembly's legislative competence, within areas where the Welsh Ministers exercise executive functions. Schedule 5 categorises the existing areas of policy responsibility devolved to the Welsh Assembly Government into 20 broad areas. These areas, called Fields, include subjects such as Housing, Education & Training and the Welsh Language.

These Fields will be populated with Matters either by Orders in Council made under Part 3 of GOWA 06 or through framework power provisions in UK Bills. (see below) The Matters will define the legislative competence for the Assembly to make legislation, similar to Acts of Parliament. Matters can only be added if they relate to one or more of the Fields.

Part 2 of Schedule 5 sets out some general restrictions on the Assembly's legislative competence while Part 3 of Schedule 5 sets out exceptions to those restrictions. These provisions mean that the Assembly will not be able to modify functions of Ministers of the Crown (ie non-devolved functions) without the consent of the Secretary of State, even if they lie within the scope of a matter over which it has legislative competence. This means that, where there are isolated Minister of the Crown functions within subjects which are generally "devolved", the protection of those functions need not be expressed by a specific reservation.

2. Framework powers

Framework powers are one of two legislative vehicles which insert Matters conferring legislative competence into the Fields in Schedule 5 of the Government of Wales Act. The concept of Framework Powers was set out in the Better Governance for Wales White paper in 2005. Framework Powers were included in two UK Acts prior to the full implementation of GOWA 2006. These were NHS Redress Act 2006 and the Education and Inspections Act 2006. They continue to be a valid way for the Welsh Assembly Government to seek legislative competence when appropriate legislative vehicles are available.

Framework Powers take the form of Wales Only clauses in Government Bills. They give the Assembly "wider and more permissive powers to determine the detail of how the provisions should be implemented in Wales". That detail will be contained in Assembly Measures and any subordinate legislation made under them.

3. Orders in Council
Orders in Council are the second of the legislative vehicles which insert Matters confirming legislative competence into the Fields in Schedule 5 of the Government of Wales Act.

The Welsh Assembly Government will normally seek to agree the terms of the Order in Council with the UK Government at two stages: before pre-legislative scrutiny stage in both the Assembly and in Parliament; and before the final (unamendable) draft Order is laid before Parliament for approval.

Devolution Guidance Note 16 will set cover this process.

4. **Assembly Measures**
Assembly Measures are a new category of legislation that will be made by the National Assembly without reference to Parliament. Once legislative competence has been transferred to the Assembly for a particular Matter under one of the Fields in Schedule 5, the Welsh Assembly Government will be able to bring draft Measures, which can amend existing Acts and make new provisions, before the National Assembly for Wales. The National Assembly's arrangements for scrutinising and approving Assembly Measures will be a matter for the Assembly itself and are set out in its Standing Orders, subject to minimum requirements set out in the Act.

5. Schedule 7
Schedule 7 will define the primary legislative competence of the National Assembly for Wales in the event of a successful referendum to that effect. If a subject is not listed, it will not be within the Assembly's legislative competence. The Schedule also contains general restrictions and exceptions to those restrictions. In particular, the Assembly will not be able to legislate so as to modify any Minister of the Crown function without the consent of the Secretary of State. This means that, where there are isolated Minister of the Crown functions within subjects which are generally "devolved", the protection of those functions need not be expressed by a specific reservation.

6. **Assembly Acts**
Following a successful referendum, when Schedule 7 comes into force, the Assembly will be able to pass Assembly Acts on anything within the scope of the legislative competence set out in Schedule 7, subject to the restrictions in that Schedule, and in the Government of Wales Act.

Canolfan Llywodraethiant Cymru
Wales Governance Centre

David Lambert, Marie Navarro, Manon Gorge,
Legal Members of the Wales Governance Centre, Cardiff University.

- **Introduction – Consideration of the Committee's general principle.**

1. The letter from the Constitutional and Legislative Affairs Committee inviting submissions to this inquiry states that in making its recommendations that the Committee 'will be guided by the general principle that powers should only be granted to Welsh Ministers in devolved areas with the informed consent of the National Assembly which should be able to exercise appropriate scrutiny over the process concerned.' For the reasons set out in this submission, we support the first part of this general principle.

2. We consider that an Act of Parliament which makes provision in relation to Wales which is within the legislative competence of the Assembly or which has a negative impact on its legislative competence has the same effect as an Order in Council made under section 109 of GOWA 2006. Such an Order in Council which affects Schedule 7 to GOWA 2006, by amending the legislative competence of the Assembly cannot normally, be made without the consent of the Assembly under section 109 (4) of the Act

> s.109(4) of GOWA 2006 provides that 'No recommendation is to be made to Her Majesty in Council to make an Order in Council under this section unless a draft of the statutory instrument containing the Order in Council—(a)has been laid before, and approved by a resolution of, each House of Parliament, and (b) except where the Order in Council is the first of which a draft has been laid under paragraph (a), has been laid before, and approved by a resolution of, the Assembly.'

3. It is therefore perfectly acceptable that if it is proposed that a UK Bill would affect the legislative competence of the Assembly, then the Assembly should be given the opportunity of deciding whether or not to consent to such provisions.

4. However, we have reservations about the apparent wide statement in the second part of the Committee's principle that the National Assembly 'should be able to exercise appropriate scrutiny over the process concerned.' This would seem to imply that it would be for the Assembly alone and not the UK Parliament to decide what should be the procedure for the making of subordinate legislation. We believe that the procedure for scrutinising the powers of the Welsh Ministers should be included on the face of the UK Bill and therefore decided by Parliament. In devolved areas such procedure could then be changed by a Welsh Act. Our argument is detailed below.

We now turn to each specific item which the Committee would like views about.

- **The extent of the current National Assembly scrutiny of delegated powers given to Ministers through provisions in UK Acts**

5. The procedure for giving consent to powers proposed to be given to Welsh Ministers through provisions in UK Bills is set out in the Assembly's Standing Order 29. It reflects the first part of the principle set out in the Committee's letter that 'powers should only be granted to Welsh Ministers in devolved areas with the informed consent of the national Assembly.' Standing Order 29.6 provides that 'the government must table a motion ('a legislative consent motion') which must seek the Assembly's agreement to the inclusion of a relevant provision in a relevant Bill.' The Assembly's Standing Order 30 provides for the Assembly to be notified of provisions in UK Bills which make provision in relation to Wales '(i) which has a significant impact on the functions of the Welsh Ministers or of the Counsel General; or (ii) which has an impact on the legislative competence of the Assembly (apart from incidental, consequential, transitional, transitory, supplementary or savings provisions).' A member of the government must just lay a written statement which must summarise the policy objectives of the Bill; specify the extent to which the Bill makes (or would make) relevant provision; and explain whether it is considered appropriate for that provision to be made and for it to be made by means of the Bill.'

6. Rule 9B of the Scottish Parliament Rules makes no such distinction. A Legislative Consent Motion is required for a Bill 'under consideration in the UK Parliament which makes provision […] applying to Scotland for any purpose within the legislative competence of the Parliament, or which alters that legislative competence or the executive competence of the Scottish Ministers.'

7. Paragraph 17 of the current DGN 9 relating to Welsh devolution gives no explanation as to why it is considered that Assembly Legislative Consent Motions should be limited to provisions in UK Bills that have a negative effect on the competence of the Assembly or which relate to matters within the legislative competence of the Assembly. Equally no explanation is given in the equivalent DGN 10 about the Scottish devolution as to why such motions in the Scottish Parliament cover much wider provisions in UK Bills.

8. Legislative devolution in Wales was considerably more limited under the initial provisions of Part 3 of and Schedule 5 to GOWA 2006 (there being no powers at all in some Fields and limited competencies in other Fields). Legislative devolution continues to be limited by the nature of the provisions of Schedule 7. Subject to some quite considerable exceptions in both Parts 1 and 2 of the Schedule, the Assembly can only exercise those legislative powers which are listed under the 20 Subjects. In this context of limited competence given to Wales, there are strong arguments for considering that any provisions in UK Bills which do not affect the powers which the UK Parliament has agreed should be within the Assembly's competence should continue to be matters solely for the UK Parliament to decide without the prior consent of the Assembly.

9. We need to consider whether the principle should continue to be that, unlike Scotland, the Assembly should not be administratively permitted to give any form of consent to provisions or decisions which are outside its competence especially now Part 4 is in force.

10. In coming to our conclusion that the Assembly should not be permitted to give consent to provisions or decisions which are outside its competence, we have first considered possible reasons for and against allowing the Assembly not only to debate but to decide whether to consent to UK legislation which give powers to the Welsh Ministers in non-devolved matters.

11. The reasons for recommending that the situation in the Assembly should be the same as in the Scottish Parliament include:

A. The Scottish Government explains in its Key Facts sheet published in May 2008, about the Sewel Convention that the reason for the extent of the operation of the convention covering both devolved and non-devolved competences is that:

(a) it is 'open and transparent, and fully reflects the Scottish Government's accountability to Parliament,' and

(b) 'the use of a Legislative Consent Motion normally has no bearing whatever on the boundaries of reserved and devolved matters as set out in the Scotland Act.'[1]

B. In exactly the same way that the Scottish Government is accountable to the Scottish Parliament, the Welsh Ministers are accountable to the Assembly for the exercise of their powers. The National Assembly for Wales' documentation states that 'the National Assembly for Wales is the democratically elected body that represents the interests of Wales and its people [...] and holds the Welsh Government to account.' The Annual Report and statement of accounts of the National Assembly for Wales for 2010-2011 gives examples of Committees which consider matters outside the Assembly's legislative powers because these are matters affecting Wales.[2]

C. The Speaker of the House of Commons does not permit questions relating to the exercise of the powers of Welsh Ministers (however derived) to be put to Central UK Government Ministers for answer, it then can only be for the Assembly to put such questions in relation to both devolved and non-devolved matters.

D. The peculiarity of the present position is shown in Explanatory Memoranda which accompany UK Bills proposing to give powers to Welsh Ministers which are outside the Assembly's legislative competence. An example is the current Localism Bill which on its first reading at the beginning of this year sets out the circumstances in the Bill where the National Assembly is or is not required to give a Legislative Consent Motion. The circumstances seem random depending on whether the particular provisions in particular clauses of the Bill fall within the competence of the Assembly or not. An example is the Explanatory Note which accompanied the introduction of the Decentralisation and Localism Bill: Wales[3] which states that a Legislative Consent Motion is required for certain provisions of the Bill because they relate to matters in Wales within the legislative competence of the Assembly. Other provisions do not require such a consent motion as they confer additional legislative competence on the Assembly.

E. Professor Alan Page, a leading Scottish Devolution academic in giving evidence to a House of Lords Select Committee considered that it was 'artificial to have separate procedures for these different types of provisions, particularly as they often featured in the same legislation. (paragraph 93 of the Scottish Procedures Committee Report on The Sewel Convention 2005)

11. The reasons against extending the Assembly's ability to pass Legislative Competence Motions in non-devolved areas include:

A. in a debate in the House of Lords on Sewel Procedures, Lord Sewel stated that a Sewel Motion 'as originally formulated was focused purely on legislation affecting the devolved areas.' While it was necessary to have a mechanism for securing the Scottish Parliament's consent where this was not the case and instead, the

[1] The Scottish Government, The Sewel Convention: Key Features May 2008 www.scotland.gov.uk/About/Sewel/KeyFacts
[2] The National Assembly for Wales, The year in review annual report and statement of accounts 2010-11
[33] www.rtpi.org.uk/item/4347/23/5/3

competence of Ministers or the Parliament itself were being altered, that process should have a different name – 'call it something else but do not call it a Sewel motion.' Lord Sewel uses the Gambling Bill, then going through Parliament, as an example of provisions giving Scottish Ministers powers which were not within the Scottish Parliament's legislative competence. Nevertheless, these provisions were subject to a Sewel Motion. This is because in the Key Facts sheet produced by the Scottish Government about the Sewel Convention, it is stated that the Convention is 'additionally taken to refer to matters will although reserved affect the breadth of the devolved institutions' powers i.e. the legislative competence of the Scottish Parliament or the executive competence of the Scottish Ministers. However he said that the result was 'that the public debate became couched in terms that assumed gambling was a devolved mater, and confusion arose.' (para 91 of the Scottish Procedures Committee Report on the Sewel Convention 2005)

B. In the same House of Lords debate, other Members commented that 'Sewel is getting a bad name because it is being used to do things that it was not originally envisaged it would do.' It was considered that there was a 'need to consider separate procedures for modifying or extending the powers of the Scottish ministers.' (para 92 of the Scottish Procedures Committee Report on the Sewel Convention 2005)

C. There might alsobe a capacity problem if the Assembly considered Legislative Consent Motions for all provisions in UK Bills whether or not they effected the legislative competence of the Assembly. Schedule 7 to GOWA 2006 has considerable exceptions in some subjects to the legislative competence of the Assembly. Additionally there are overall exceptions in Part 2 of Schedule 7 relating to pre-referendum functions of Central Government Ministers in Wales. The combined effect of these exceptions is to place certain powers in UK Bills outside the legislative competence of the Assembly. With 45 backbench Assembly Members to consider current Legislative Consent Motions as well as a possible considerable increase in such numbers if all powers in UK Bills were the subject of a motion, would we think might put a strain on the capacity of the members. This is particularly so because in our submission we recommend that all Legislative Consent Motions should first go to committees before being considered in Plenary.

12. On balance we consider that the criticism of Lord Sewel and other members of the House of Lords that a distinction should be made between provisions in UK Bills which affect the legislative competence of the Scottish Parliament and provisions which are outside this competence is justified. We do not see any reason why the Assembly should be able to consent to such provisions. That is not to say that they should be prevented from debating the provisions as we detail below. This points to continuing the distinction made in the Assembly Standing Orders between the requirement of a Legislative Consent Motion in the circumstances set out in Standing Order 29 and the absence of such a motion in Standing 30. However we consider that some enhanced involvement of the Assembly is justifiable as shown in our consideration of the extent to which there is robust scrutiny.

- **The extent of the current National Assembly scrutiny of delegated powers given to Welsh Ministers through statutory mechanisms other then UK Acts of Parliament**

13. With regard to other statutory mechanisms enabling the National Assembly to scrutinise delegated powers given to Welsh Ministers other than in Acts of Parliament.

14. In relation to Orders in Council amending Schedule 7 under section 109 of GOWA 2006 the Assembly has first to approve the Order.

15. As regards Transfer of Functions Orders transferring powers of Central Government Ministers to Welsh Ministers, section 58 of GOWA 2006 requires that an Order in Council making the transfer gives no role to the Assembly only to the Welsh Ministers.

16. Powers of the Welsh Ministers under section 59(6) of GOWA 2006 to designate functions relating to the European Community by Order under section 2(2) of the European Communities Act 1972 is subject to annulment by the Assembly.

17. In relation to Transfer of Functions Orders we cannot understand why it is the Welsh Ministers and not the Assembly who are involved in the consent. When both in relation to section 109 Orders in Council and Designation Orders under section 59 of the Act involve the Assembly. While some Transfer of Functions Orders can give powers to Welsh Ministers which are outside the legislative functions of the Assembly, so can Designation Orders under the European Communities Act 1972, the latter are always subject to annulment by the Assembly, but not Transfer of Functions Order.

18. We suggest that the procedure in section 58(4) is amended so that TFOs are subject to at least negative resolution procedure but preferably affirmative resolution procedure because of the procedure in section 109.

- **The Extent to which the National Assembly is able to exercise robust scrutiny of such processes through its Standing Orders**

19. Under the Assembly's Standing Order 30, the Assembly is given no part to play at all in relation to UK Bills making provisions which come within the remit of the Standing Order. While we do not consider that Assembly Legislative Consent Motions should be extended to such provisions, we do not think that this principle should exclude any involvement whatsoever by the Assembly as regards such consideration. We would suggest that while the principle enshrined in Standing Order 30 can continue to be justified, particular aspects could be amended.

19. Paragraph 22 of the current Memorandum of Understanding of June 2011 between the UK Government and the devolved administrations states that 'The devolved administrations agree to provide the UK Government with any factual information and expert opinion available to them relevant to non-devolved matters.'

20. So that the devolved administrations are more fully informed to enable them to provide such information, paragraph 16 of the Memorandum emphasises that 'the devolved legislatures will be entitled to debate non-devolved matters but the devolved executives will encourage each devolved legislature to bear in mind the responsibility of the UK Parliament in these matters.'

21. To enable a fully informed debate to take place in the Assembly, we consider that Standing Order 30 could be amended so that the Assembly, as part of such debate, would be able to consider UK Bill proposals which come within Standing Order 30. To achieve this, the Welsh Ministers should be required to lay before the Assembly all the information which they are required to under Standing Order 29. However the basic provisions of Standing Order 30 would continue in that there would continue to be no requirement for formal Legislative Consent Motions.

22. At present under the Standing Order there is no requirement for the Assembly to debate the written statement laid by the Welsh Ministers setting out the reasons for the powers in the UK Bill. We consider that the Assembly should be required to request consideration of the written

statement by an Assembly Committee together with the subsequent consideration of the Committee's report in Plenary – basically what happens in Standing Order 29 except that the debate would not be in the form of a Legislative Consent Motion. Such a change in procedure would ensure that consideration had been given by the Assembly and that it was aware of such provision.

23. In relation to Standing Order 29 we consider that, as with the procedure for Legislative Consent Motions under Standing Order 9B in the Scottish Parliament, the Business Committee should be required to refer the Legislative Consent Memorandum of the Welsh Ministers to a Committee or Committees for consideration and only after such consideration, should the Assembly be entitled to decide whether to consent to such a motion or not.

24. Such a committee before reporting to the Assembly would liaise with relevant committees in the House of Lords and House of Commons in particular the Delegated Powers and Regulatory Reform Committee of the House of Lords which as our previous evidence[4] has shown regularly analyses and comments upon and seeks to set out principles relating to the extent of the delegated powers of Ministers in UK Bills.

25. Additionally Rule 9B.3(6) provides that the Scottish Parliament's Subordinate Legislation Committee shall consider provisions in UK Bills conferring on Scottish Ministers powers to make subordinate legislation, 'in any case where the Bill that is the subject of the memorandum contains provisions conferring on the Scottish Ministers powers to make subordinate legislation, the Subordinate Legislation Committee shall consider and may report to the lead committee on those provisions.' We consider that the Constitutional and Legislative Affairs Committee of the Assembly should likewise be involved in the scrutiny in Wales.

26. Our reason for advocating a Committee stage is that it seems that apart from possibly one occasion when a Committee considered a Legislative Consent Memorandum that being the Constitutional and Legislative Affairs Committee which only spent a short time discussing the motion, the Assembly has only spent very little time in plenary session debating whether a motion should or should consent should be given. One example being the Legislative Consent Motion in respect of the Education Bill where the Presiding Officer said in Plenary on Thursday 1 March 2011 'as there is no speakers on this item, I take it that there is no objection. Therefore, I declare, in accordance with Standing Order No. 7.35, that the motion is agreed.' We are of the opinion that it is difficult for the Assembly without the report received by a Committee to decide particularly in such a short time provisions which may be complex and far reaching in a UK Bill giving powers to Welsh Ministers.

27. Our research has found that Committees in the Scottish Parliament invite evidence from the public, have sessions where the public appear and give thoughtful and reasoned consideration to the provisions in the Bill. Only after this stage is completed does the matter transfer to the plenary Scottish Parliament. See for example the Equal Opportunities Committee debate on the legislative consent memorandum (LCM (S3) 20.2) on the Equality Bill 2010 where the Committee took evidence from the Minister for Housing and Communities and considered written evidence from a number of stakeholders, and sought clarification 'on a range of issues' and sought 'further information from the Scottish Government' on several provisions. Only after raising these concerns and further debate did they recommend that the draft motion set out in the legislative consent memorandum be agreed by Parliament.

[4] Constitutional Affairs Committee, Inquiry into the Drafting of Welsh Government Measures: Lessons from the first three years, February 2011

28. Under Assembly Standing Order 29.2 (i) any UK Bill that requires a Legislative Consent Motion must be the subject of a government memorandum 'normally no later than two weeks after introduction' to the first House of Parliament.

29. During the Scottish Procedures Committee consideration of the Sewel Convention, witnesses stressed the importance of 'an 'early warning system' to enable the time required for scrutiny to be factored into committee's forward work programmes.' (para 61 Scottish Procedures Committee Report on the Sewel Convention 2005) It was apparent that some Committees did not hear about a Sewel motion until they were asked to decide whether they could consider it. It was felt that the UK Government should be able to provide advance information about the likely timetable for a Bill.. It is especially important that Sewel motions are flagged up well in advance of the passage of the Bills through Parliament. For example the Justice 2 Committee wanted to 'have an opportunity to scrutinise forthcoming UK Bills when they are put out to consultation, which would allow the committee to take a more proactive role at an earlier stage of the development of legislation.' Another suggestion was for MSPs to be sent consultation documents on any Bill considered appropriate for a Sewel motion, so that their objections and suggestions could be taken into account at the drafting stage of the Bill to encourage a 'consensual approach' (para 63 Scottish Procedures Committee Report on the Sewel Convention 2005).

30. We would therefore recommend that Standing Order 29.2 should be amended to require Welsh Ministers to lay a memorandum as soon as it has been agreed between the Welsh Ministers and Whitehall that a proposed UK Bill should give powers to the Welsh Ministers which in any way affects the legislative competence of the Assembly.

- **The relevance of the UK Government's Devolution Guidance Notes in the light of recent Welsh constitutional development**

24. Overall we do not think that for the purpose of this enquiry there should be any substantial changes to be made to DGN 9 and in particular paragraph 17 which sets out the circumstances when the consent of the Assembly is required to provisions in a UK Bill giving powers to the Welsh Ministers.

25. However in the case of the Scottish Parliament, Rule 9B.1 (Consent in relation to UK Parliament Bills) requires a Legislative Consent Motion in relation to any UK Bill which proposes to alter the legislative competence of the Scottish Parliament. The second bullet point of paragraph 17 of DGN 9 does not recommend that the Assembly's consent should be given in such circumstances. It only foresees that the consent of the Welsh Ministers should be obtained. We see no reason for there to be such distinction. This is different to proposals in UK Bills which do not affect the legislative competence of the Assembly and for reasons which we have already given, we consider that the Assembly's consent would continue not to be required. A provision *adding* to the competence of the Assembly is something that the Assembly should at least be informed about and be able to debate by means of deciding whether or not to consent to. This would parallel the provision contained in the DGN 9 in relation to Bill provisions having a negative effect on the competence of the Assembly and also it would parallel the procedure whereby the Assembly has to consent before an Order in Council under section 109 amends Schedule 7.

26. All the above points should also apply to the subordinate legislation made by Ministers affecting the Assembly's competence already contained in UK Acts as is referred to in the DGN 9 paragraph 17.

- **The procedures for Legislative Consent Motions compared to the position in the other devolved legislatures**

27. For the reasons stated above we consider that compared to the position in the Scottish Parliament the procedures for the Legislative Consent Motions in the National Assembly continue to be acceptable because we would support the two different procedures set out in Standing Orders 29 and 30 depending on the nature of the provisions in UK Bills.

28. Currently there are no formalised procedures in the NI Assembly with regards to Legislative Consent Motions. However the 'Outline of Assembly Procedures on Legislative Consent Motions' Guidance Note provides that the relevant NI Minister will notify the Speaker and the Chairperson of the relevant Assembly Committee of the intention of the UK Government to legislate on devolved matters as soon as they are aware of the proposals[5]. The Committee will then explore the proposals of the UK Bill. Once the Minister has gained the Committee's support, the Minister will lodge a Legislative Consent Motion for plenary debate.

29. The Northern Ireland Assembly Committee on Procedures recognised in September 2009 that 'the current procedures had been developed over time to meet circumstances. While they were adequate for purpose, there was potential to not only provide new and clearer guidance, but also to introduce processes which may encourage others to take a more active role.'[6] The Committee recommended 'the introduction of Standing Orders to provide clarity and transparency on the procedures for legislative consent motions.'[7] It is suggested that there would be a procedure (committee consultation and debate in plenary) when the UK Bills effects a devolved area, when the provisions alter the legislative competence of the Assembly or where the provisions alter the executive functions of NI Ministers[8].

30. In October 2011 the Northern Ireland Committee on Procedures is expected to consider a draft Standing Order on Legislative Motions to formalise their present procedures which follows the Scottish model as was recommended by the Committee on Procedures.

- **Any other matters relevant to the Inquiry**

29. In the introduction to our evidence we stated that we have reservations about the apparent wide statement in the second part of the Committee's principle that the National Assembly 'should be able to exercise appropriate scrutiny over the process concerned.' This would seem to imply that it would be for the Assembly alone and not the UK Parliament to decide what should be the procedure for the making of subordinate legislation under powers given to Welsh Ministers in UK Acts. This was suggested by Lord Rowlands in a debate on the Public Bodies Bill which is report on pages 9 and 10 of the Assembly Research Service Paper which accompanies the call for evidence. This would mean that there would be no prescribed procedure set out in the UK Act itself but only a general power permitting the Assembly to decide the procedure. We are not aware of any precedent in any Act whereby the decision as to the procedure for making subordinate legislation is delegated to another body.

30. Part of the remit of the House of Lords Committee on Delegated Powers and Regulatory Reform is to consider and advise Parliament on the adequacy of the procedures in a Bill for controlling the exercise of delegated powers. We submitted evidence to a previous inquiry of

[5] Outline of Assembly Procedures on Legislative Consent Motions Guidance Note, p.3, para.1
[6] Northern Ireland Committee on Procedures, Inquiry into Legislative Consent Motions Report 34/08/09R September 2009 para 1
[7] Recommendation 1
[8] Northern Ireland Assembly Committee on Procedure Inquiry into Legislative Consent Motions Report 34/08/09R September 2009 para 9

the then Constitutional Affairs Committee of the Assembly (Inquiry into the Drafting of Welsh Government Measures: Lessons from them first three years) and in our submission we drew the Committee's attention to the principles which the House of Lords Committee apply to advising on the adequacy of delegated legislation procedures in Bills which depend on the nature and extent of the Ministerial powers. To do so the Committee has to assess the procedures which are set out in the particular Bill.

31. An example of such consideration is given on page 10 of the Assembly Research Services Paper which accompanies your Committee's current call for evidence. In this example, the House of Lords Committee on Delegated Powers is considering the adequacy of the procedure set out in the Public Bodies Bill to which the Welsh Ministers would be subject in exercising major powers given to them under the Bill. Given the extent of the powers, the Committee do not think that the procedure is sufficiently robust. The Committee would not have been able to make such assessment if, under the Bill, decisions on the procedure had been left entirely to the Assembly's discretion. This would be unacceptable to the Committee.

32. Annex 1 paragraph VII to DGN 9 supports the convention that UK Bills set out the procedure for the making of subordinate legislation by Welsh Ministers on the face of the legislation " Bills conferring subordinate legislation powers on the Welsh Ministers will need to be clear whether they are to be subject to affirmative, negative or no procedure in the Assembly." The paragraph makes no mention of the Assembly being able to decide the procedure. This implies that it is for Parliament in the exercise of its sovereignty to decide in all cases the appropriate procedure, irrespective of whether or not the particular powers to be given to the Welsh Ministers are within the legislative powers of the Assembly.

33. Paragraph VII also explains that the principles to be applied to the procedure relating to the subordinate legislative powers of Welsh Ministers in Bills 'will be similar to those applying to UK Ministers with the Assembly in a similar position to Parliament with respect to powers to approve or annul statutory instruments.' We agree with this paragraph. Parliament, having decided to give powers in a Bill which are usually similar in their extent both to central government Ministers and to Welsh Ministers should be able to decide upon the procedure to which the exercise of those powers are to be subject, both as regards central government Ministers and Welsh Ministers. If those powers relate to matters that are within the legislative competence of the Assembly, the Assembly can then change the procedure to which they are subject by a subsequent Assembly Act.

34. As a final but most important consideration we are of the view that there must be a mechanism for the Assembly to have continuing links with relevant Select Committees both in the Lords and in the Commons. At present there does not seem to be a mechanism for Parliament to receive the views of the Assembly and to consider them. While we do not believe that Parliament would allow Assembly Committees to present joint reports with Parliamentary Committees, committees of both legislatures could work on a consultation basis. This could be the subject of an informal agreement.

35. Finally Mr Alan Trench in the seminar he gave in the Pierhead on 1st July 2011 considers that the Sewel Motion procedure should be made a part of Parliament's Standing Orders. At present there is no machinery for Parliament to control the decision of the executive, either in Whitehall or in Cardiff as to whether provisions in a UK Bill should be subject to a Legislative Consent Motion. By placing such requirements in Parliamentary Standing Orders, Parliament would have to be satisfied that there were proper grounds for excluding the necessity for such provision in each case where it seems that provision may be required.

CLA GP4

Constitutional and Legislative Affairs Committee

Inquiry into the Granting of Powers to Welsh Ministers in UK Laws

Response from Cardiff Law School Covering Letter

This evidence is submitted by Marie Navarro, Manon George and David Lambert who are members of Cardiff Law School and of the Wales Governance Centre. It is submitted in response to a general invitation made by the Constitutional and Legislative Affairs Committee in gtheir letter of 2nd August

The evidence is submitted as individuals and not on behalf of the Law School or the Wales Governance Centre.

David Lambert is the co -ordinator of the presentation of the evidence.

Cynulliad Cenedlaethol Cymru
National Assembly for Wales

Constitutional and Legislative Affairs Committee

Report: CLA(4)-05-11: 19 September 2011

The Committee reports to the Assembly as follows:

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

Negative Resolution Instruments

CLA18 - The Poultrymeat (Wales) Regulations 2011
Procedure: Negative.
Date made: 12 July 2011.
Date laid: 13 July 2011.
Coming into force date: 15 August 2011

CLA21 - The Extraction Solvents in Food (Amendment) (Wales) Regulations 2011
Procedure: Negative.
Date made: 25 July 2011
Date laid: 25 July 2011.
Coming into force date: 15 August 2011

CLA22 - The Housing (Purchase of Equitable Interests) (Wales) Regulations 2011
Procedure: Negative.
Date made: 26 July 2011
Date laid: 27 July 2011.
Coming into force date: 19 August 2011

CLA23 - The Housing (Service Charge Loans) (Amendment) (Wales) Regulations 2011
Procedure: Negative.
Date made: 26 July 2011
Date laid: 27 July 2011.
Coming into force date: 19 August 2011

CLA24 - The National Curriculum (Amendments to the Key Stage 2 and Key Stage 3 Assessment Arrangements) (Wales) Order 2011
Procedure: Negative.
Date made: 29 July 2011

Date laid: 3 August 2011.
Coming into force date: 1 September 2011

CLA25 - The School Governors' Annual Reports (Wales) Regulations 2011
Procedure: Negative.
Date made: 29 July 2011
Date laid: 3 August 2011.
Coming into force date: 1 September 2011

CLA26 - The National Health Service (Travelling Expenses and Remission of Charges) (Wales) (Amendment) (No.2) Regulations 2011
Procedure: Negative.
Date made: 31 July 2011
Date laid: 4 August 2011.
Coming into force date: in accordance with regulation 1.

CLA27 - The Pupil Information (Wales) Regulations 2011
Procedure: Negative.
Date made: 29 July 2011
Date laid: 4 August 2011.
Coming into force date: 1 September 2011

CLA28 - The Head Teacher's Report to Parents and Adult Pupils (Wales) Regulations 2011
Procedure: Negative.
Date made: 29 July 2011
Date laid: 4 August 2011.
Coming into force date: 1 September 2011

CLA29 - The School Information (Wales) Regulations 2011
Procedure: Negative.
Date made: 29 July 2011
Date laid: 4 August 2011.
Coming into force date: 1 September 2011

CLA30 - The School Performance and Absence Targets (Wales) Regulations 2011
Procedure: Negative.
Date made: 29 July 2011
Date laid: 4 August 2011.
Coming into force date: 1 September 2011

CLA33 - The School Performance Information (Wales) Regulations 2011
Procedure: Negative.
Date made: 3 August 2011
Date laid: 8 August 2011.

Coming into force date: 1 September 2011

CLA34 - The Education (Student Fees, Awards and Support) (Wales) Regulations 2011
Procedure: Negative.
Date made: 9 August 2011
Date laid: 10 August 2011.
Coming into force date: 31 August 2011

CLA35 - The Cockles and Mussels (Specified Area) (Wales) Order 2011
Procedure: Negative.
Date made: 10 August 2011
Date laid: 11 August 2011.
Coming into force date: 1 September 2011

Instruments that raise reporting issues under Standing Order 21.2 or 21.3

Negative Resolution Instruments

The Committee agreed reports under S.O.21.2 and S.O.21.3 on the following statutory instruments, which are attached as Annexes 1-7.

CLA17 - The National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) (Amendment) Regulations 2011
Procedure: Negative.
Date made: 11 July 2011.
Date laid: 12 July 2011.
Coming into force date: 3 August 2011

The Committee also agreed to write to the Minister to ask whether she was satisfied that the delay in bringing into force of Part 7 of the principal Regulations was adequate to allow for detailed operational arrangements to be agreed with NHS bodies elsewhere in the UK.

CLA19 - The Head Teachers' Qualifications and Registration (Wales) (Amendment) Regulations 2011
Procedure: Negative.
Date made: 15 July 2011
Date laid: 19 July 2011
Coming into force date: 1 September 2011

The Committee also agreed to write to the Minister to ask him to clarify the timescale and location of the pilot of the National Professional Qualification for Headship (NPQH), that the Regulations facilitate and whether there was any intention to keep the Assembly informed of the outcome of the trial.

CLA20 - The Beef and Pig Carcase Classification (Wales) Regulations 2011
Procedure: Negative.
Date made: 21 July 2011
Date laid: 25 July 2011.
Coming into force date: 1 September 2011

The Committee also agreed to write to the Deputy Minister in respect of these regulations to ask him to clarify the timescale for bringing forward amending regulations to correct the technical reporting point in respect of Regulation 2(1).

CLA31 - The National Curriculum (Assessment Arrangements on Entry to the Foundation Phase) (Wales) Order 2011
Procedure: Negative.
Date made: 29 July 2011
Date laid: 4 August 2011.
Coming into force date: in accordance with article 1(2).

The Committee agreed to write to the Minister to ask whether he had any intention to use the powers under article 5 of this Order (and of CLA32) and, if the power was used in future, whether the Minister would keep Assembly Members informed through publishing a written statement.

CLA32 - The National Curriculum (End of Foundation Phase Assessment Arrangements and Revocation of the First Key Stage Assessment Arrangements) (Wales) Order 2011
Procedure: Negative.
Date made: 29 July 2011
Date laid: 5 August 2011.
Coming into force date: 1 September 2011

In addition to the common issues in relation to both CLA31 and CLA32, the Committee agreed to write to the Minister to clarify whether the Order required assessments to be carried out during the summer term.

CLA36 - The Wildlife and Countryside Act 1981 (Variation of Schedules 5 and 8) (England and Wales) Order 2011
Procedure: Negative.
Date made: 11 August 2011.
Date laid: 22 August 2011.
Coming into force date: 1 October 2011

CLA37 - The Single Use Carrier Bags Charge (Wales) (Amendment) Regulations 2011
Procedure: Negative.
Date made: 2 September 2011.

Date laid: 7 September 2011.
Coming into force date: 1 October 2011

The Committee agreed to write to the Minister expressing some concern that the Regulations were laid very close to coming into force date for what is such a significant new policy.

Other Business

Committee Correspondence

CLA5 - The Right of a Child to Make a Disability Discrimination Claim (Schools) (Wales) Order 2011

The Committee noted the Minister's response to the Chair's letter dated 4 July 2011 on the merits of the Right of a Child to Make a Disability Discrimination Claim (Schools) (Wales) Order 2011.

CA581 - The Waste (Miscellaneous Provisions) (Wales) Regulations 2011

The Committee noted the First Minister's positive response to the Chair's letter of 4 July 2011 in respect of guidance to be used in deciding the scrutiny route for subordinate legislation.

CSI1 - The Water Industry (Schemes for Adoption of Private Sewers) Regulations 2011

The Committee noted the Minister's response to the Chair's letter dated 21 July 2011 on the merits and technical reporting points of The Water Industry (Schemes for Adoption of Private Sewers) Regulations 2011, and that there appeared to be a translation error in the Welsh version of his letter.

Statutory Instruments laid before or during the dissolution of the Third Assembly: Social Charges Regulations

The Committee noted the First Minister's response to the Chair's letter expressing concerns that legislation implementing very significant changes should not be laid at a time that frustrated proper scrutiny by the Assembly.

The Committee also agreed to thank Mr Ian Medlicott for his views, on behalf of the Association of Council Secretaries and Solicitors, expressing concern at the number of education related instruments that had been laid over the summer to come into force before the end of the summer recess.

CLA10 - The Environmental Permitting (England and Wales) (Amendment) Regulations 2011

The Committee noted the Minister's response to the Chair's letter regarding the merits of The Environmental Permitting (England and Wales) (Amendment) Regulations 2011.

Letter from the Presiding Officer to the Chair: Committee Portfolios and Responsibilities in the 4th Assembly

The Committee noted a letter from the Presiding Officer about the intention to review the operation of the new committee system in the Assembly. The Committee agreed that the scrutiny of European matters should be considered in any review.

Letter from the Chair of the Commission on a Bill of Rights, Sir Leigh Lewis, to the Chair of the Constitutional and Legislative Affairs Committee, David Melding

The Committee considered a letter from the Chair of the Commission on a Bill of Rights, Sir Leigh Lewis. Committee Members agreed that an informal meeting with Commission would be useful.

David Melding AM
Chair, Constitutional and Legislative Affairs Committee

19 September 2011

Annex 1

Constitutional and Legislative Affairs Committee

(CLA(4)-05-11)

CLA17

Constitutional and Legislative Affairs Committee Report

Title: The National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) (Amendment) Regulations 2011

Procedure: Negative

These Regulations amend the National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011 ("the principal Regulations").
Regulation 2(1) delays the coming into force of Part 7 of the principal Regulations from 1 October 2011 to 1 April 2012. Part 7 of the principal Regulations deals with how redress is to be provided where an NHS Trust in Wales or a Local Health Board in Wales enters into an arrangement for the provision of health services with an NHS body in England, Scotland or Northern Ireland.

Technical Scrutiny

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

Merits Scrutiny

The Committee makes the following report to the Assembly under Standing Order 21.3(ii) that these regulations are of political or legal importance and give rise to issues of public policy likely to be of interest to the Assembly.

Background

The *NHS Redress (Wales) Measure 2008* was the first Assembly Measure to be passed by the Assembly. The Measure enables Welsh Ministers to make Regulations, which allow for redress to be provided in circumstances where there is a qualifying liability in tort in relation to the provision of qualifying services. Redress may encompass apologies, explanations, action plans, remedial treatment and, if appropriate, financial compensation.

The first set of regulations made by Welsh Ministers under this Measure was *The National Health Service (Concerns, Complaints and*

Redress Arrangements) (Wales) Regulations 2011 ("the principal regulations") which were laid by the then Minister for Health and Social Services, Edwina Hart AM, on 7 February 2011.

The objective of the principal regulations is to make it easier for patients to raise concerns if they are dissatisfied or if things go wrong with their NHS care. They also aim to ensure that the NHS approach to such situations is more consistent and results in a fairer outcome for patients and staff.

In 2007, the then Subordinate Legislation Committee took evidence and reported on the Measure. The Committee recommended **a strong level of scrutiny for Regulations made under the Measure and that there should be widespread consultation on the Regulations**.

The principal regulations were considered by the Constitutional Affairs Committee of the third Assembly on 17 February 2011. That Committee produced a merits report on the principal regulations and made the following comments:

> *"We have considered the current Regulations in relation to the issues raised above, particularly whether the Regulations have been subject to adequate consultation and whether the Regulations as presented adequately reflect issues raised during consultation …*
>
> *While we believe that the general concerns about 'Framework' Measures remain valid (and while we note the considerable amount of time that has elapsed since the Measure was passed), we are content that consultation in respect of these draft Regulations has in our view been thorough, inclusive and responsive to concerns during it."*

The principal regulations were subject to the affirmative procedure and were approved by the Assembly in plenary on 8 March 2011. They came into force on 1 April 2011, except for provisions in Part 7 of the regulations which were initially due to come into force on 1 October 2011.

The National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) (Amendment) Regulations 2011 ("the amending regulations") were tabled by the Minister for Health and Social Services, Lesley Griffiths AM, on 12 July 2011.

The objective of the amending regulations is to delay the coming into force of Part 7 of the principal Regulations, which deal with cross-border arrangements, from 1 October 2011 to 1 April 2012.

This is deemed necessary by the Welsh Government to allow for the detailed operational arrangements to be agreed between Welsh and other UK NHS bodies. According to the accompanying Explanatory Memorandum:

> *"The reason for this change is to allow more time for this work to be completed since the initial assessment that a coming into force date of 1 October 2011 would be sufficient time to agree these amendments, is not now achievable."*

An additional amendment is made to regulation 52(5) of the principal regulations to reflect the new coming into force date for Part 7 of the Regulations and makes it clear that the cross border arrangements outlined in Part 7 will not apply to services provided by English NHS bodies, Scottish NHS bodies or Northern Irish NHS bodies on behalf of Welsh NHS bodies before 1 April 2012.

Consideration by the Constitutional and Legislative Affairs Committee

While we agree with the Constitutional Affairs Committee of the third Assembly that the principal regulations adequately reflect issues raised during consultation, the introduction of the amending regulations suggest that there may have been insufficient consultation with NHS bodies in other parts of the UK in relation to cross-border issues.

David Melding AM
Chair, Constitutional and Legislative Affairs Committee

19 September 2011

Annex 2

Constitutional and Legislative Affairs Committee

(CLA(4)-05-11)

CLA19

Constitutional and Legislative Affairs Committee Report

Title: The Head Teachers' Qualifications and Registration (Wales) (Amendment) Regulations 2011

Procedure: Negative

These Regulations amend the Head Teachers' Qualifications and Registration (Wales) Regulations 2005 by altering the definition of "The National Professional Qualification for Headship in Wales" (NPHQ) in regulation 3(2) of those regulations. The requirements of the NPHQ will change from completion of a course of training approved by the Welsh Ministers to the fulfilment of certain standards approved by the Welsh Ministers.

Technical Scrutiny

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

Merits Scrutiny

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

These regulations come on the back of an Estyn report on the NPQH and the Welsh Government's own research. The Estyn report found the qualification ineffective and that:

- the supply of NPQH holders far exceeds the demand for headteachers in Wales;
- the current selection process does not necessarily identify the most suitable people for headship; and
- the content of the programme needs to be revised.

Teaching unions have been quoted in the *Times Educational Supplement* as welcoming the overhaul in the NPQH, but they expressed concerns that the supply of heads could be damaged if there is no immediate replacement, and concerns about funding for leadership training. In response the Welsh Government said that funding for NPQH was not being withdrawn and the current cohort of

candidates will complete their programme. A pilot for the revised NPQH began earlier this year.

David Melding AM
Chair, Constitutional and Legislative Affairs Committee

19 September 2011

Annex 3

Constitutional and Legislative Affairs Committee

(CLA(4)-05-11)

CLA20

Constitutional and Legislative Affairs Committee Report

Title: The Beef and Pig Carcase Classification (Wales) Regulations 2011

Procedure: Negative

These Regulations:-

- revoke and replace the (i) Beef Carcase (Classification) Regulations 1991 (SI 1991 No.2242) and (ii) Pig Carcase (Grading Regulations 1994 (SI 1994 No. 2155 as amended) in relation to Wales; and
- enforce EU provisions on beef and pig carcase classification and associated price reporting where applicable as contained in EU legislation – Council Regulation (EC) No. 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products and Commission Regulation (EC) No. 1249/2008 laying down detailed rules on the implementation of the Community scales for the classification of beef, pig and sheep carcases and the reporting of prices thereof.

Technical Scrutiny

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

1. Regulation 4 (c) – the regulation purports to revoke the Beef Carcase (Classification) (Amendment) (Wales) Regulations 1994. The Regulations do not exist. Reference to the footnote suggest that it is the Beef Carcase (Classification) (Amendment) Regulations 1994 that are to be revoked in relation to Wales. **(Standing Order 21.2 (vi) –that its drafting appears to be defective or it fails to fulfil statutory requirements)**

2. Regulation 2 (1) and regulation 26- regulation 26 provides that any person who either fails to comply with any requirement or contravenes any prohibition contained in a European pig provision is guilty of an offence. Whilst “European pig provision” is defined in regulation 2 (1) in the English text of the

regulations, there is no definition of “European pig provision” in the Welsh text.(**Standing Order 21.2 (vii) – that there appear to be inconsistencies between the meaning of its English and Welsh texts; and Standing Order 21.2 (vi) –that its drafting appears to be defective or it fails to fulfil statutory requirements)**

Merits Scrutiny

No points are identified for reporting under Standing Order 21.3 in respect of this instrument:

David Melding AM
Chair, Constitutional and Legislative Affairs Committee

19 September 2011

The Government has responded as follows:

The Beef and Pig Carcase Classification (Wales) Regulations 2011

" TECHNICAL REPORTING POINT NO. 1: Regulation 4 (c) - The text "(Wales)" in the title of the regulations is a typographical error. The footnote to the regulations explains that the instrument referred to is the Beef Carcase (Classfication) (Amendment) Regulations 1994, S.I. 1994/2853. S.I. 1994/2853 applied in relation to Great Britain. There were never any separate equivalent regulations which applied only to Wales. Regulation 4(c) revokes S.I. 1994/2853 in relation to Wales in line with the Welsh Ministers' powers to do so.
Furthermore, and in so far as its application to Wales, regulation 4(a) revokes the principal Beef Carcase (Classification) Regulations 1991: S.I. 1991/2242. Regulation 4(a) revokes S.I. 1991/2242 as amended. So regulation 4 (c) is arguably unnecessary as there is strictly speaking no need to revoke S.I. 1994/2853.
It is proposed to correct the typographical error upon publication. Namely to remove the reference to "(Wales)" in regulation 4 (c). Correction on publication is deemed to suffice for the reasons given.
TECHNICAL REPORTING POINT NO. 2: Regulations 2(1) & 26 - It is accepted that there should be a definition of "European pig provision" in the Welsh text of the regulations. This correction will be made, by way of an amendment to the regulations, as soon as possible.
PUBLICATION POINTS: The points raised as being suitable for correction upon publication will also be actioned."

Annex 4

Constitutional and Legislative Affairs Committee

(CLA(4)-05-11)

CLA31

Constitutional and Legislative Affairs Committee Report

Title: The National Curriculum (Assessment Arrangements on Entry to the Foundation Phase) (Wales) Order 2011

Procedure: Negative

Under section 108(2)(b)(iii) of the Education Act 2002 the Welsh Ministers may specify, by order, such assessment arrangements as they consider appropriate for the foundation phase. This Order sets out those arrangements.

Technical Scrutiny

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

Merits Scrutiny

The Assembly is invited to pay special attention under Standing Order 21.3(ii) in respect of this instrument - (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.

Article 5 contains the following unusual provision –
"The Welsh Ministers may make such provision giving full effect to or otherwise supplementing the provisions of this Order (other than provision conferring or imposing functions as mentioned in section 108(6) of the 2002 Act) as appears to them to be expedient."

The enabling power is section 108(11) of the Education Act 2002 which reads as follows-
"An order under subsection (2)(b)(iii) or (3)(c) may authorise the making of such provisions giving full effect to or otherwise supplementing the provisions made by the order (other than provision conferring or imposing functions as mentioned in subsection (6) or (7)) as appear to the Welsh Ministers to be expedient; and **any provisions made under such an order shall, on being published as specified in the order, have effect for the purposes of this Part as if made by the order."**

Thus Welsh Ministers will be able to make further provision to give full effect to or supplement the provisions of the current Order without having to make an amending order that would be subject to Assembly scrutiny. Nevertheless, it is a power that has been used on a number of occasions by the Assembly (to which the power was originally granted) and by Welsh Ministers (to whom the power was transferred following the Government of Wales Act 2006.

This is not an unusual or unexpected use of the power in section 108(11), which would be reported under Standing Order 21.2(ii), but a power that is itself unusual, and therefore of importance.

David Melding AM
Chair, Constitutional and Legislative Affairs Committee

19 September 2011

Annex 5

Constitutional and Legislative Affairs Committee

(CLA(4)-05-11)

CLA32

Constitutional and Legislative Affairs Committee Report

Title: The National Curriculum (End of Foundation Phase Assessment Arrangements and Revocation of the First Key Stage Assessment Arrangements) (Wales) Order 2011

Procedure: Negative

Under section 108(2)(b)(iii) of the Education Act 2002 the Welsh Ministers may specify by order, such assessment arrangements as they consider appropriate for the foundation phase. This Order provides for pupils to be assessed in the final year of the foundation phase by a teacher, and sets out the purpose of such assessments.

Technical Scrutiny

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

Merits Scrutiny

The Assembly is invited to pay special attention under Standing Order 21.3(ii) in respect of this instrument - (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.

Article 5 contains the following unusual provision –
"The Welsh Ministers may make such provision giving full effect to or otherwise supplementing the provisions of this Order (other than provision conferring or imposing functions as mentioned in section 108(6) of the 2002 Act) as appears to them to be expedient."

The enabling power is section 108(11) of the Education Act 2002 which reads as follows-
"An order under subsection (2)(b)(iii) or (3)(c) may authorise the making of such provisions giving full effect to or otherwise supplementing the provisions made by the order (other than provision conferring or imposing functions as mentioned in subsection (6) or (7)) as appear to the Welsh Ministers to be expedient; and **any provisions made under such an order shall, on being published as specified in**

the order, have effect for the purposes of this Part as if made by the order."

Thus Welsh Ministers will be able to make further provision to give full effect to or supplement the provisions of the current Order without having to make an amending order that would be subject to Assembly scrutiny. Nevertheless, it is a power that has been used on a number of occasions by the Assembly (to which the power was originally granted) and by Welsh Ministers (to whom the power was transferred following the Government of Wales Act 2006.

This is not an unusual or unexpected use of the power in section 108(11), which would be reported under Standing Order 21.2(ii), but a power that is itself unusual, and therefore of importance.

David Melding AM
Chair, Constitutional and Legislative Affairs Committee

19 September 2011

Annex 6

Constitutional and Legislative Affairs Committee

(CLA(4)-05-11)

CLA36

Constitutional and Legislative Affairs Committee Report

Title: The Wildlife and Countryside Act 1981 (Variation of Schedules 5 and 8) (England and Wales) Order 2011

Procedure: **Negative**

This draft Order will apply to both England and Wales.

This Order deals with the protection of specified plants and animals under the Wildlife and Countryside Act 1981 ("the Act"). The Order adds four new animals to Schedule 5 of the Act and removes two existing entries from protection. The Order also extends protection afforded to two animals and decreases the level of protection afforded to two animals. The Order also adds two new plant entries to Schedule 8 and removes four existing plant entries. Schedule 5 lists animals protected under section 9 of the Act. Schedule 8 lists plants protected under section 13 of the Act.

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

1. These Regulations have not been made bilingually.

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

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

1. This Order could have been made in Wales by Welsh Ministers and therefore bilingually.

[21.3((ii) that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly].

David Melding AM
Chair, Constitutional and Legislative Affairs Committee

19 September 2011

Government's response

The Government has responded as follows:

The Wildlife and Countryside Act 1981 (Variation of Schedules 5 and 8) (England and Wales) Order 2011

Technical Response

This composite Order amends Schedules 5 and 8 of the Wildlife and Countryside Act 1981.The Order adds four new animals to Schedule 5 and removes two existing entries from protection. The Order also extends the protection to two animals and decreases the level of protection afforded to two animals. The Order also adds two new plant entries to Schedule 8 and removes 4 existing plant entries. Schedule 5 lists animals protected under section 9 of the Wildlife and Countryside Act and Schedule 8 lists plants protected under section 13 of the Wildlife and Countryside Act.

Merits Response

The composite Order was made following representations by the GB conservation bodies through the Joint Nature Conservation Committee. This Order applies to England and Wales and accordingly, it is not considered reasonably practicable for this Instrument to be made bilingually."

Annex 7

Constitutional and Legislative Affairs Committee

(CLA(4)-05-11)

CLA37

Constitutional and Legislative Affairs Committee Report

Title: The Single Use Carrier Bags Charge (Wales) (Amendment) Regulations 2011

Procedure: Negative

These Regulations amend the Single Use Carrier Bags Charge (Wales) Regulations 2010. They are made under the Climate Change Act 2008 and come into force on 1 October 2011.

The 2010 Regulations require sellers to charge a minimum price for singe use carrier bags. They impose record keeping and reporting requirements on sellers, appoint local authorities to administer the charging scheme and confer civil sanctioning powers on local authorities to enforce the Regulations.

The principal amendments made to the 2010 Regulations by these Regulations are summarised in the Explanatory Note that introduces the Regulations.

Technical Scrutiny

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

Merits Scrutiny

Background

The 2010 Regulations were considered by the third Assembly's Constitutional Affairs Committee on 17 November 2010. The Committee agreed to report on the Merits of the Regulations and a copy of that report is attached as an Annexe. The Report, which was not unduly critical of the regulations, drew attention to the following points among others:

- that the regulations were the first time in the UK that powers under the Climate Change Act 2008 were being used to require charges for carrier bags and the first time Civil Sanction Powers were being granted to local authorities in Wales;

- that the powers under which the regulations were being made were granted directly to Welsh Ministers and had not previously been scrutinised in the Assembly; and
- that there were a range of detailed concerns about how the regulations would work in practice and how they would impact on, in particular, small retailers.

Procedure

The original Regulations were made under the affirmative procedure and were debated and approved in Plenary on 29 November. This was because the enabling legislation requires the affirmative procedure to be used where the powers:

- are being used for the first time;
- impose new civil sanctions;
- increase or change the basis for determining monetary penalties; or
- amend primary legislation.

None of these factors apply to these amending regulations, which are, therefore, being made under the negative resolution procedure.

Specific Issues

Impact on Small and Medium-sized Enterprises (SMEs)

These regulations address one of the points reported by the Constitutional Affairs Committee in 2010. SMEs were concerned about the impact of the requirement to maintain records and provide them on request to any member of the public. The amending regulations now remove the reporting requirements for businesses with less than 10 full-time equivalent staff.

Costs

The regulations also appear to address another issue reported by the Constitutional Affairs Committee; whether costs incurred in the lead up to the regulations coming into force can be deducted from the income received from charging. The amending regulations now clarify that 'set up' costs count as 'reasonable costs' for the first reporting year and can be deducted.

Timing

These regulations come into effect in 12 days' time on 1 October 2011, which is the date on which charging for carrier bags also comes into effect. However, we understand that the Welsh Government has kept those with an interest in the amending regulations informed of

the possibility of these changes, which should therefore be expected by them.

In the light of the foregoing, the Committee agreed that the amendment regulations raise issues of public policy likely to be of interest to the Assembly. The Committee agreed to draw the draft Order and Regulations to the attention of the Assembly through a report under Standing Order 21.3(ii).

David Melding AM
Chair, Constitutional and Legislative Affairs Committee

19 September 2011