Constitutional and Legislative Affairs Committee

Meeting Venue:
Committee Room 1 - Senedd

Meeting date:
10 October 2011

Meeting time:
14:30

Cynulliad Cenedlaethol Cymru
National Assembly for Wales

For further information please contact:

Steve George
Committee Clerk
029 2089 8242
CLA.Committee@wales.gov.uk

Name
Deputy Committee Clerk
029 2089 **xxxx**
Name@wales.gov.uk

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

CLA44 - The Trade in Animals and Related Products (Wales) Regulations 2011
Negative Procedure. Date made 28 September 2011. Date laid 28 September 2011. Coming into force date 19 October 2011

CLA45 - The Poultry Health Scheme (Fees) (Wales) Regulations 2011
Negative Procedure. Date made 28 September 2011. Date laid 28 September 2011. Coming into force date 19 October 2011

Affirmative Resolution Instruments

None

3. Instruments that raise issues to be reported to the Assembly

under Standing Order 21.2 or 21.3

Negative Resolution Instruments

CLA43 – The Animal By-Products (Enforcement) (No. 2) (Wales) Regulations 2011 (Pages 1 – 64)

Negative Procedure. Date made 27 September 2011. Date laid 28 September 2011. Coming into force date in accordance with regulation 31

Affirmative Resolution Instruments

None

4. Committee Inquiries: Inquiry into the Granting of Powers to Welsh Ministers in UK Laws (Pages 65 – 94)

Papers to Note: Written evidence:

CLA(4)-07-11(p1) – CLA GP5 – Farmers Union of Wales
CLA(4)-07-11(p2) – CLA GP6 – Welsh Refugee Council
CLA(4)-07-11(p3) – CLA GP7 – The Police Federation of England and Wales
CLA(4)-06-11(p4) – Devolution Guidance Note 9

Video Conference with Dr. Paul Cairney, University of Aberdeen (Pages 95 – 97)
CLA(4)-06-11- Paper 2
Dr. Paul Cairney, Senior Lecturer in politics and international relations, University of Aberdeen

5. Date of the next meeting

Paper to note:
CLA(4)-06-11- Report of the meeting 3 October 2011

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

A Committee may resolve to exclude the public from a meeting or any part of a meeting where:
(vi) the Committee is deliberating on the conclusions or recommendations of a report it proposes to publish

7. Consideration of the evidence submitted to Inquiry to date

Transcript
View the meeting transcript.

WELSH STATUTORY INSTRUMENTS

2011 No. 2377(W.250)

ANIMALS, WALES

ANIMAL HEALTH

PUBLIC HEALTH, WALES

The Animal By-Products (Enforcement) (No. 2) (Wales) Regulations 2011

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations enforce, in Wales, Regulation (EC) No. 1069/2009 of the European Parliament and of the Council on laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No. 1774/2002. (OJ No. L 300, 14.11.2009, p 1) ("the EU Control Regulation").

These Regulations also enforce, in Wales, Commission Regulation No. 142/2011 implementing Regulation (EC) No. 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and implementing Council Directive 97/78/EC as regards certain samples and items exempt from veterinary checks at the border under that Directive (OJ No. L 54, 26.02.2011) ("the EU Implementing Regulation").

Under the EU Control Regulation there are obligations on operators in relation to animal by-products, including obligations as to disposal and use, prohibitions on feeding, and placing on the market. In addition, there are requirements for operators, plants and establishments to be registered or approved. The obligations vary according to the categorisation of the material, the higher risk animal by-product is categorised as Category 1 material, next in risk is Category 2 and then Category 3 material. The EU Implementing Regulation supplements the requirements of the EU Control Regulation.

These Regulations provide for the following.

1. The Welsh Ministers are designated as the competent authority and provision is made for varying matters that supplement the basic requirements as set out in column 2 of Schedule 1 to these Regulations, including designation of remote areas and also access in relation to prohibitions on feeding in Article 11 of the EU Control Regulation (Part 2).

2. Procedure and appeals in respect of registration and approval (Part 3).

3. Enforcement of the requirements by providing for offences for breach of the requirements as identified in the Table to Schedule 1 (Part 4). The Table sets out the requirements of the EU Control Regulation and the EU Implementing Regulation as supplemented by the requirements of the EU Implementing Regulation and these Regulations, where applicable. The EU Control Regulation and the EU Implementing Regulation enable the competent authority, the Welsh Ministers, to grant authorisations in respect of such requirements. Such authorisations enable the competent authority to determine whether or not a product is a risk to human or animal health for example. A full list of all the authorisations that are provided for under the requirements will be made available on the Welsh Government website (www.wales.gov.uk). In addition, that website will also make available the authorisations exercised by the Welsh Ministers.

4. Enforcement, by appointing enforcement authorities and making provision for powers of enforcement (Part 5).

5. Consequential provisions (Part 6 and Schedule 2) and revocations and a transitional provision (Part 7). In particular, these Regulations revoke the Animal By-Products (Enforcement) (Wales) Regulations 2011 (S.I. 2011/600 (W.88)).

A regulatory impact assessment of the effect that this instrument will have on the costs of business, and the voluntary sector is available on the Welsh Government website (www.wales.gov.uk).

WELSH STATUTORY INSTRUMENTS

2011 No. 2377(W. 250)

ANIMALS, WALES

ANIMAL HEALTH

PUBLIC HEALTH, WALES

The Animal By-Products (Enforcement) (No. 2) (Wales) Regulations 2011

Made *27 September 2011*

Laid before the National Assembly for Wales *28 September 2011*

Coming into force in accordance with regulation 31

CONTENTS

PART 3

Registration and approval

PART 4

Offences and penalties

PART 5

Enforcement

PART 6

Consequential amendments

PART 7

Revocations, transitional provision and commencement

The Welsh Ministers make the following Regulations in exercise of the powers conferred by section 2(2) of, as read with paragraph 1A of Schedule 2 to, the European Communities Act 1972(**1**).

The Welsh Ministers have been designated for the purposes of section 2(2) of the European Communities Act 1972 in relation to measures in the veterinary and phytosanitary fields for the protection of public health(**2**).

These Regulations make provision for a purpose mentioned in section 2(2) of the European Communities Act 1972 and it appears to the Welsh Ministers that it is expedient for any reference to Commission Regulation (EU) No. 142/2011 (implementing Regulation (EC) No. 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and implementing Council Directive 97/78/EC as regards certain samples and items exempt from veterinary checks at the border under that Directive(**3**)) to be construed as a reference to that instrument as amended from time to time.

PART 1

Introduction

Title, commencement and application

1. These Regulations—

(a) are entitled the Animal By-Products (Enforcement) (No. 2) (Wales) Regulations 2011;

(**1**) 1972 c. 68. Paragraph 1A of Schedule 2 was inserted by section 28 of the Legislative and Regulatory Reform Act 2006 (c. 51).
(**2**) S.I. 2008/1792.
(**3**) OJ No. L 54, 26.02.2011, amended by Council Directive 2010/63/EU (OJ No. L 276, 20.10.2010, p 33).

(b) come into force in accordance with regulation 31; and

(c) apply in relation to Wales.

Interpretation

2.—(1) In these Regulations—

"EU Control Regulation" *("Rheoliad Rheolaeth yr UE")* means Regulation (EC) No. 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No. 1774/2002 (Animal by-products Regulation)(**1**);

"EU Implementing Regulation" *("Rheoliad Gweithredu'r UE")* means Commission Regulation (EU) No. 142/2011 implementing Regulation (EC) No. 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and implementing Council Directive 97/78/EC as regards certain samples and items exempt from veterinary checks at the border under that Directive(**2**) as amended from time to time;

"animal by-product requirement" *("gofyniad sgil-gynhyrchion anifeiliaid")* has the meaning given in regulation 17(2);

"authorised person" *("person awdurdodedig")* means a person authorised under regulation 22;

"competent authority" *("awdurdod cymwys")* has the meaning given in regulation 3;

"enforcement authority" *("awdurdod gorfodi")* means a body exercising functions under regulation 21(1) or (2);

"premises" *("mangre")* includes—

(a) any land, building, shed or pen;

(b) any receptacle or container;

(c) any ship; or

(d) a vehicle of any description;

"ship" *("llong")* includes a hovercraft, submersible craft or any other floating craft but not a vessel which—

(a) permanently rests on or is permanently attached to the seabed; or

(b) is an installation within section 16 of the Energy Act 2008(**3**).

(**1**) OJ No. L 300, 14.11.2009, p1.
(**2**) OJ No. L 54, 26.02.2011.
(**3**) 2008 c.32.

(2) Expressions used in these Regulations that are also used in the EU Control Regulation or the EU Implementing Regulation have the same meaning in these Regulations as they have in the EU Control Regulation or in the EU Implementing Regulation.

PART 2

The competent authority and miscellaneous provisions

The competent authority

3. The competent authority for the purposes of the EU Control Regulation and the EU Implementing Regulation is the Welsh Ministers.

Access

4. In relation to a prohibition on feeding in Article 11(1)(a), (b) or (d) (restrictions on use) of the EU Control Regulation, the requirements of regulation 5 apply.

5.—(1) Animal by-products, including catering waste, must not be brought on to any premises if farmed animals would have access to such animal by-products.

(2) Paragraph (1) does not apply to derived products, except for—

(a) products derived from catering waste; or

(b) meat and bone meal derived from Category 2 material and processed animal proteins intended to be used as or in organic fertilisers and soil improvers that do not comply with the requirements of Article 32(1)(d) (placing on the market and use) of the EU Control Regulation.

6. A carcase or part of a carcase of any farmed animal that has not been slaughtered for human consumption must be held, pending consignment or disposal, in such manner as to ensure that any animal or bird will not have access to it.

Use of organic fertilisers and soil improvers

7.—(1) Where organic fertilisers or soil improvers are applied to land, no person may allow pigs to have access to that land or to be fed cut herbage from such land for a period of 60 days beginning with the application of the organic fertiliser or soil improver.

(2) Paragraph (1) does not apply to the following organic fertilisers or soil improvers—

(a) manure;

(b) milk;

(c) milk-based products;

(d) milk-derived products;

(e) colostrum;

(f) colostrum products; or

(g) digestive tract content.

Collection centres

8. A processing plant for Category 2 material which is approved for the purpose of being a collection centre for Category 2 material is authorised as a collection centre.

Remote areas

9. The following areas are remote areas for the purposes of Article 19(1)(b) of the EU Control Regulation (collection, transport and disposal)—

(a) Bardsey;

(b) Caldey;

(c) Ramsey;

(d) Flatholm.

Placing on the market

10. The placing on the market of untreated wool and untreated hair from farms or from establishments or plants is authorised except where they present a risk of any disease communicable through those products to humans or animals.

PART 3

Registration and approval

Procedure for registration of plants and establishments

11. A notification must be made in writing to the competent authority, where it is made—

(a) with a view to registration in accordance with Article 23(1) (registration of operators, establishments or plants) of the EU Control Regulation; or

(b) to inform the authority of changes in accordance with Article 23(2) of that Regulation.

Notifications of competent authority in respect of registration

12. The competent authority must give notice in writing to—

(a) the operator who has notified in accordance with regulation 11, of—

(i) the registration of such an operator; or

(ii) the decision not to register;

(b) a registered operator, of—

(i) a prohibition made under Article 46(2) (prohibition on operations) of the EU Control Regulation;

(ii) a requirement to comply with Article 23(1)(b) or (2) of the EU Control Regulation (information on activities and up-to-date information);

(iii) the amendment of the registration or the ending of the registration where an operator has notified the competent authority of the closure of an establishment in accordance with Article 23(2) (up to date information) of the EU Control Regulation.

Procedure for approval

13. Operators to whom Article 24(1) (approval of establishments or plants) of the EU Control Regulation applies, must apply in writing to the competent authority to be approved, including approval after the grant of temporary approval where Article 33 of the EU Implementing Regulation (re-approval of plants and establishments after the grant of temporary approval) applies.

Notification in respect of decisions on approval

14. The competent authority must give notice in writing to—

(a) the applicant for approval, of the—

(i) grant of approval in accordance with Articles 24 (approval) and 44 (procedure for approval) of the EU Control Regulation;

(ii) grant of conditional approval in accordance with Articles 24 and 44 of the EU Control Regulation, or the extension of such approval in accordance with that Article; or

(iii) refusal to grant approval in respect of an initial application or extension;

(b) where conditional approval has been granted in accordance with Articles 24 and 44 of the

EU Control Regulation, the operator of the plant or establishment subject to such approval, of the—

(i) grant of full approval;

(ii) extension of such approval;

(iii) imposition of conditions in accordance with Article 46(1)(c) (suspensions, withdrawals and prohibitions on operators) of the EU Control Regulation;

(iv) suspension of such approval in accordance with Article 46(1)(a) of the EU Control Regulation;

(v) withdrawal of such approval in accordance with Article 46(1)(b) of the EU Control Regulation;

(vi) making of a prohibition in accordance with Article 46(2) of the EU Control Regulation; or

(vii) refusal to extend or grant full approval;

(c) the operator of an approved plant or establishment, of the—

(i) imposition of conditions in accordance with Article 46(1)(c) of the EU Control Regulation (suspension, withdrawal);

(ii) suspension of such approval in accordance with Article 46(1)(a) of the EU Control Regulation;

(iii) making of a prohibition in accordance with Article 46(2) of the EU Control Regulation; or

(iv) withdrawal of such approval in accordance Article 46(1)(b) of the EU Control Regulation.

Reasons for decisions

15.—(1) Where a decision is made by the competent authority and notified in accordance with regulation 12 or regulation 14, the competent authority must give reasons in writing for that decision.

(2) Paragraph (1) does not apply to decisions notified under—

(a) regulation 12(a)(i);

(b) regulation 14(a)(i); or

(c) regulation 14(b)(i) or (ii).

Appeals procedure

16.—(1) Where the competent authority has made a decision to which regulation 15(1) applies, a person may appeal against it by making written representations, within 21 days of the notification of

that decision, to a person appointed for the purpose by the Welsh Ministers.

(2) The competent authority may also make written representations to the appointed person concerning the decision.

(3) The appointed person must then report in writing to the Welsh Ministers.

(4) The Welsh Ministers must give to the applicant written notification of the final determination of the Welsh Ministers and the reasons for it.

PART 4

Offences and penalties

Offences in respect of the EU Control Regulation and the EU Implementing Regulation

17.—(1) A person who fails to comply with an animal by-product requirement commits an offence.

(2) "Animal by-product requirement" *("gofyniad sgil-gynhyrchion anifeiliaid")* means any requirement in Column 2 of Schedule 1 to these Regulations as read with the provisions in Column 3 to that Schedule.

Offence of obstruction

18. It is an offence—

(a) intentionally to obstruct an authorised person;

(b) without reasonable cause, to fail to give to an authorised person any information or assistance or to provide any facilities that such person may reasonably require;

(c) knowingly or recklessly to give false or misleading information to an authorised person; or

(d) to fail to produce a record or document when required to do so by an authorised person.

Corporate, partnership and unincorporated association offences

19.—(1) Where—

(a) an offence under these Regulations has been committed by a body corporate or a partnership or Scottish partnership or other unincorporated association; and

(b) it is proved that the offence was committed with the consent or connivance of, or was attributable to any neglect on the part of, a relevant individual (including an individual purporting to act in the capacity of a relevant individual),

the relevant individual as well as the body corporate, partnership, Scottish partnership or unincorporated association, is guilty of the offence and is liable to be proceeded against and punished accordingly.

(2) In paragraph (1), "relevant individual" *("unigolyn perthnasol")* means—

(a) in relation to a body corporate—

(i) a director, manager, secretary or other similar officer of the body;

(ii) where the affairs of the body are managed by its members, a member;

(b) in relation to a partnership or Scottish partnership, a partner;

(c) in relation to an unincorporated association other than a Scottish partnership, a person who is concerned in the management or control of the association.

(3) Proceedings for an offence under these Regulations alleged to have been committed by a partnership or an unincorporated association may be brought against the partnership or association in the name of the partnership or association.

(4) For the purpose of proceedings in paragraph (3)—

(a) rules of court relating to the service of documents have effect as if the partnership or unincorporated association were a body corporate; and

(b) the following provisions apply as they apply in relation to a body corporate—

(i) section 33 of the Criminal Justice Act 1925(**1**); and

(ii) Schedule 3 to the Magistrates' Courts Act 1980(**2**).

(5) A fine imposed on a partnership or unincorporated association on its conviction of an offence under these Regulations is to be paid out of the funds of the partnership or association.

(**1**) 1925 c. 86. Subsections (1), (2) and (5) of section 33 were repealed by the Magistrates' Courts Act 1952 (c. 55), section 132 and Schedule 6; subsection (3) was amended by the Courts Act 1971 (c. 23), section 56(1) and Schedule 8, Part 2, paragraph 19; subsection (4) was partially repealed by the Courts Act 2003 (c. 39), section 109(1) and (3), Schedule 8, paragraph 71 and Schedule 10.

(**2**) 1980 c. 43. Paragraph 2(a) was amended by the Criminal Procedure and Investigations Act 1996 (c. 25), section 47, Schedule 1, paragraph 13; paragraph 5 was repealed by the Criminal Justice Act 1991 (c. 53), sections 25(2) and 101(2) and Schedule 13.

Penalties

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

(a) on summary conviction, to a fine not exceeding the statutory maximum or to imprisonment for a term not exceeding three months or both; or

(b) on conviction on indictment, to a fine or to imprisonment for a term not exceeding two years, or both.

PART 5

Enforcement

Enforcement authority

21.—(1) These Regulations are enforced by—

(a) the local authority;

(b) the port health authority in relation to a port health district constituted by order under section 2(3) of the Public Health (Control of Disease) Act 1984(**1**), or

(c) the Welsh Ministers in relation to a food hygiene establishment.

(2) Paragraphs (1)(a) and (b) do not apply where the Welsh Ministers direct that the enforcement duty is to be exercised in relation to cases of a particular description or any particular case by the Welsh Ministers.

(3) In paragraph (1)(a) "local authority" *("awdurdod lleol")* means in relation to an area the county or county borough council for that area.

(4) In paragraph (1)(b) "port health authority" *("awdurdod iechyd porthladd")* means the port health authority for that district.

(5) In paragraph (1)(c), "food hygiene establishment" *("sefydliad hylendid bwyd")* means an establishment referred to in regulation 5(2) of the Food Hygiene (Wales) Regulations 2006(**2**) in respect of which the Food Standards Agency has enforcement functions under those Regulations.

Authorised person

22. An enforcement authority may authorise in writing such persons as the authority considers appropriate to act for the purpose of enforcing these Regulations.

(**1**) 1984 c. 22.
(**2**) S.I. 2006/31 (W.5).

Powers of entry and additional powers

23.—(1) An authorised person may, on production of that person's authority if so required—

(a) enter and inspect premises (except a dwelling-house) at all reasonable hours;

(b) take such other persons and any equipment or materials as necessary;

(c) make such examination or investigation as necessary;

(d) direct that the premises, or part of them, are left undisturbed (whether generally or in particular respects) for so long as is reasonably necessary for the purpose of any examination or investigation under sub-paragraph (c);

(e) take such measurements and photographs and make such recordings as are considered necessary for the purpose of any examination or investigation under sub-paragraph (c);

(f) in the case of any article or substance found in or on the premises—

(i) take samples;

(ii) test or subject it to any process, where it appears that it has caused or is likely to cause harm to human health or to the health of animals or plants;

(iii) take possession of it and retain it for so long as is necessary—

(aa) to examine it and to exercise the power within paragraph (ii);

(bb) to ensure that it is not tampered with before examination of it is completed; and

(cc) to ensure that it is available for use as evidence in any proceedings for an offence under these Regulations;

(g) require the production of, or where the information is recorded in computerised form the furnishing of extracts from, any records which it is necessary to see for the purposes of any examination or investigation under sub-paragraph (c) and to inspect and take copies of, or of any entry in, the records;

(h) require any person to afford such facilities and assistance with respect to any matters or things within that person's control or in relation to which that person has responsibilities as are necessary to enable the authorised person to exercise any of the powers conferred by this regulation; or

(i) mark any animal or animal by-product as the authorised person considers necessary.

(2) Where an authorised person proposes to exercise the power in paragraph (1)(f)(ii), the authorised person must—

(a) if so requested by a person who at the time is present and has responsibilities in relation to those premises, cause anything which is to be done by virtue of that power to be done in that person's presence;

(b) consult such persons as appear to the authorised person appropriate for the purpose of ascertaining what dangers, if any, there may be in doing anything which is proposed under that power.

(3) Where an authorised person in respect of the power in paragraph (1)(f)(iii)—

(a) proposes to exercise that power, the authorised person must, if it is practicable to do so, take a sample of the article or substance and give to a responsible person at the premises a portion of the sample marked in a manner sufficient to identify it; or

(b) exercises that power, the authorised person must leave a notice giving particulars of the article or substance sufficient to identify it and stating that possession has been taken, such notice to be left either—

(i) with a responsible person; or

(ii) if that is impracticable, fixed in a conspicuous place at those premises.

(4) Nothing in this regulation compels the production by any person of a document which that person would be entitled to withhold production of on the grounds of legal professional privilege on an order for discovery in an action in the High Court.

Warrant

24.—(1) If, in relation to the power to enter premises under regulation 23, a justice of the peace, on written information on oath—

(a) is satisfied that there are reasonable grounds to believe that any information or material relevant to the examination or investigation under regulation 23(1)(c) is on any such premises; and

(b) is satisfied that—

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

(ii) an application for entry, or the giving of such a notice would defeat the object of the entry, or that the case is one of urgency, or that such premises are unoccupied or the occupier is temporarily absent,

the justice may by warrant, which continues in force for a period of one month, authorise an authorised person to enter the premises, if necessary by force.

(2) If, in relation to a dwelling-house, a justice of the peace on written information on oath—

(a) is satisfied that there are reasonable grounds to believe that information or material relevant to an examination or investigation for the purpose of enforcing the EU Control Regulation, the EU Implementing Regulation and these Regulations is on such premises; and

(b) is satisfied that—

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

(ii) an application for entry, or the giving of such a notice would defeat the object of the entry, or that the case is one of urgency, or that such premises are unoccupied or the occupier is temporarily absent,

the justice may by warrant, which continues in force for a period of one month, authorise an authorised person to enter such premises, if necessary by force, and inspect them.

(3) Where an authorised person has been authorised under paragraph (2) to enter by warrant, the authorised person has the powers in regulation 23(1)(b) to (i).

Notices served by an authorised person

25.—(1) An authorised person may serve a notice in accordance with paragraph (2) where that person—

(a) considers that there is a contravention of, or failure to comply with an animal by-product requirement; or

(b) reasonably suspects that as a result of such contravention or failure to comply, premises constitute a risk to human or animal health.

(2) Notices may be served on the occupier of any premises, or the person in charge of the premises—

(a) requiring the disposal and, where applicable, storage pending such disposal of—

(i) animal by-products and derived products;

(ii) material in premises to which paragraph (1)(b) applies;

(b) requiring the cleansing and disinfection of premises to which paragraph (1)(b) applies and, where applicable, specifying the method for such cleansing and disinfection;

(c) prohibiting animal by-products and derived products being—

(i) moved in or brought on to premises;

(ii) moved in or brought on to premises unless in accordance with conditions specified in the notice, including a condition as to the satisfactory completion of the cleansing and disinfection in accordance with a notice as provided in sub-paragraph (b).

(3) A notice served under paragraph (2) must be complied with at the expense of the person on whom the notice is served and, if it is not complied with, an authorised person may arrange for it to be complied with at the expense of that person.

(4) Paragraph (1) does not apply where Article 46(1) (suspensions, withdrawals and prohibitions on operations) of the EU Control Regulation applies.

Power to disclose information for enforcement purposes

26.—(1) This regulation applies to information received by an enforcement authority or an authorised person in the course of enforcing these Regulations.

(2) That person may disclose the information to any comparable enforcement authority or authorised person (appointed elsewhere within the United Kingdom to enforce the EU Control Regulation and the EU Implementing Regulation) for the purposes of their enforcement role.

(3) For the purposes of this regulation, "an enforcement authority" *("awdurdod gorfodi")* includes the Food Standards Agency.

PART 6

Consequential amendments

Consequential amendments

27. Schedule 2 to these Regulations provides for consequential amendments.

PART 7

Revocations, transitional provision and commencement

Revocation of the Animal By-Products (Enforcement) (Wales) Regulations 2011

28.—(1) The Animal By-Products (Enforcement) (Wales) Regulations 2011 ("the 2011 Regulations")(**1**) are revoked.

(2) The provisions revoked by the 2011 Regulations are revived.

(3) The amendments made by the provisions of Schedule 2 of the 2011 Regulations are undone.

Other revocations

29. The following instruments are revoked—

(a) the Animal By-Products (Wales) Regulations 2006(**2**); and

(b) the Avian Influenza (H5N1) (Miscellaneous Amendments) (Wales) Order 2007(**3**).

Transitional provision

30.—(1) The collection, transport and disposal of Category 3 material in Article 10(f) of the EU Control Regulation (Category 3 material) is authorised for the period ending on 31 December 2012, where the requirements of paragraph (2) are satisfied.

(2) The requirements are—

(a) the material satisfies Article 36(3) of, and paragraphs (a) to (c) of Chapter 4 of Annex 6 to, the EU Implementing Regulation; and

(b) the means of disposal for such material, in addition to the means in Article 14 of the EU Control Regulation (disposal and use of Category 3 material), are disposal—

(i) in an authorised landfill without prior processing; or

(ii) where Article 21 of the EU Control Regulation is satisfied, to a biogas or composting plant for transformation in accordance with an authorisation under paragraph 2 of Section 2 of Chapter 3 of Annex 5 to the EU Implementing Regulation.

(**1**) S.I. 2011/600 (W.88).
(**2**) S.I. 2006/1293 (W.127).
(**3**) S.I. 2007/3375 (W.300).

Commencement

31.—(1) Regulation 28 comes into force at 12.01am on 20 October 2011.

(2) The remaining regulations come into force at 12.15am on 20 October 2011.

John Griffiths

Minister for Environment and Sustainable Development, one of the Welsh Ministers

27 September 2011

SCHEDULE 1 Regulation 17

Animal By-Product Requirements

Column 1 *Subject matter of requirement*	*Column 2* *Provisions containing the basic requirement*	*Column 3* *Provisions to be read with the provision(s) mentioned in Column 2*
1. General Obligation	Article 4(1) or (2) of the EU Control Regulation	Article 3 of the EU Implementing Regulation
2. General animal health restrictions	Article 6(1) of the EU Control Regulation	Article 4 of the EU Implementing Regulation
3. Restrictions on use for feeding purposes	Article 11 of the EU Control Regulation	Regulations 4 to 7 of these Regulations and Article 5 of the EU Implementing Regulation
4. Restrictions on access to carcases	Articles 12, 13 and 21(1) of the EU Control Regulation	Regulation 6 of these Regulations
5. Disposal and use of Category 1 material	Article 12 of the EU Control Regulation, subject to Article 16 (b) to (e) of that Regulation and Article 7 of the EU Implementing Regulation	Articles 6(3) to (5), 8(1), 9(b) and (c), 11(2), 12(2) and 15 of the EU Implementing Regulation
6. Disposal and use of Category 2 material	Article 13 of the EU Control Regulation, subject to Articles 15(2)(b) and 16(b) to (f) and (h) of that Regulation	Regulation 8 of these Regulations and Articles 6(3) to (5), 8(1), 9(b) and (c), 10(1), 11(2), 12(2), 13(1) and 15 of the EU Implementing Regulation

Column 1 *Subject matter of requirement*	*Column 2* *Provisions containing the basic requirement*	*Column 3* *Provisions to be read with the provision(s) mentioned in Column 2*
7. Disposal and use of Category 3 material	Article 14 of the EU Control Regulation, subject to Article 16 (b) to (h) of that Regulation and Article 7 of the EU Implementing Regulation	Regulation 30 of these Regulations and Articles 6(3) to (5), 8(1), 9(b) and (c), 10(1), 11(2), 12(2), 13(2), 15 and 36(3) of the EU Implementing Regulation
8. Collection and identification as regards category and transport	Article 21(1) to (4) of the EU Control Regulation	Article 17 of the EU Implementing Regulation
9. Traceability	Article 22(1) and (2) of the EU Control Regulation	Article 17 of the EU Implementing Regulation
10. Registration of operators, establishments or plants	Articles 23(1) and (2) and 55 of the EU Control Regulation	Regulation 11 of these Regulations and Articles 20(1) and (2) and 32(7) of the EU Implementing Regulation
11. Approval of establishments or plants	Articles 24, 44(3) and 55 of the EU Control Regulation	Regulation 13 of these Regulations and Articles 19, 32(7) and 33 of the EU Implementing Regulation

Column 1 *Subject matter of requirement*	*Column 2* *Provisions containing the basic requirement*	*Column 3* *Provisions to be read with the provision(s) mentioned in Column 2*
12. General hygiene requirements	Article 25 of the EU Control Regulation	Articles 9(a), 19 and 20 of the EU Implementing Regulation
13. Handling of animal by-products within food businesses	Article 26 of the EU Control Regulation	
14. Own checks	Article 28 of the EU Control Regulation	
15. Hazard analysis and critical control points	Article 29(1) to (3) of the EU Control Regulation	
16. Placing on the market animal by-products and derived products for feeding to farmed animals excluding fur animals	Article 31(1) of the EU Control Regulation	Articles 21 and 24(2) of the EU Implementing Regulation
17. Placing on the market and use of organic fertilisers and soil improvers	Article 32(1) and (2) of the EU Control Regulation	Regulation 7(1) of these Regulations and Articles 22(1) to (3) and 36(1) of the EU Implementing Regulation

Column 1 *Subject matter of requirement*	*Column 2* *Provisions containing the basic requirement*	*Column 3* *Provisions to be read with the provision(s) mentioned in Column 2*
18. Collection and movement for manufacture of derived products	Article 34 of the EU Control Regulation except in so far as it relates to imports	Article 33 of the EU Control Regulation and Article 23 of the EU Implementing Regulation
19. Prohibition on use for manufacture for products not within Article 33 or 36 of the EU Control Regulation	Article 24(1) of the EU Implementing Regulation	Articles 33 and 36 of the EU Control Regulation
20. Placing on the market of pet food	Article 35 of the EU Control Regulation	Articles 3 and 24(3) of the EU Implementing Regulation
21. Placing on the market of other derived products	Article 36 of the EU Control Regulation	Regulation 10 of these Regulations and Articles 3 and 24(1), (2) and (4) of the EU Implementing Regulation
22. Safe sourcing	Article 37(2) of the EU Control Regulation	
23. Export	Article 43 of the EU Control Regulation	
24. Controls for dispatch	Article 48 of the EU Control Regulation	Articles 11(3), 12(3) and 31 of the EU Implementing Regulation

SCHEDULE 2

Regulation 27

Consequential Amendments

The Controlled Waste (Registration of Carriers and Seizure of Vehicles) Regulations 1991

1. In regulation 2 of the Controlled Waste (Registration of Carriers and Seizure of Vehicles) Regulations 1991(**1**)—

(a) in paragraph (1)(i), for "Article 7(1) or 7(2)" substitute "Article 21(1) to (3)"; and

(a) in paragraph (2), for the definition of "the Community Regulation" substitute—

""the Community Regulation" means Regulation (EC) No. 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No. 1774/2002 (Animal by-products Regulation);".

The Waste Management Licensing Regulations 1994

2. In regulation 20 of the Waste Management Licensing Regulations 1994(**2**), for paragraph (9) substitute—

"(9) In this regulation, in relation to Wales, "animal by-products" has the meaning given in Article 3(1) of the Community Regulation and "Community Regulation" means Regulation (EC) No. 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No. 1774/2002 (Animal by-products Regulation).".

(**1**) S.I. 1991/1624, amended by S.I. 2006/937; there are other amending instruments but none is relevant.

(**2**) S.I. 1994/1056, amended by S.I. 2006/937: there are other amending instruments but none is relevant.

The Animal By-Products (Identification) Regulations 1995

3.—(1) The Animal By-Products (Identification) Regulations 1995(**1**) are amended as follows.

(2) In regulation 2(1)—

(a) omit the definition of "the 2003 Regulations";

(b) for the definition of "approved incineration plant" substitute—

""approved incineration plant" means an incineration plant which is approved under Article 24(1)(b) of the Community Regulation;";

(c) for the definition of "approved rendering plant" substitute—

""approved rendering plant" means a Category 2 processing plant which is approved under Article 24(1)(a) of the Community Regulation;";

(d) for the definition of "the Community Regulation" substitute—

""the Community Regulation" means Regulation (EC) No. 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No. 1774/2002 (Animal by-products Regulation);"; and

(e) for the definition of "specified bovine offal" substitute—

""specified risk material" has the meaning given in Article 3(18) of the Community Regulation;".

(3) For regulation 4(b) substitute—

"(b) affect the operation of the Animal By-Products (Enforcement) (No. 2) (Wales) Regulations 2011 or any order made, or having effect, under the Animal Health Act 1981.".

(4) In regulation 5—

(a) in paragraph (1)(f), for "specified bovine offal" substitute "specified risk material";

(b) in paragraph (2)(c), for "the 2003 Regulations" substitute "the Community Regulation"; and

---

(**1**) S.I. 1995/614, relevant amending instruments are S.I. 1995/1955, 2002/1619, 2003/1484, S.I. 2006/14.

(c) in paragraph (2)(d), for "the 2003 Regulations" substitute "the Community Regulation".

(5) In regulation 9(3)—

(a) in sub-paragraph (d), for "Article 2.1(c)" substitute "Article 9"; and

(b) in sub-paragraph (e), for "Article 2.1(d)" substitute "Article 10".

The Bovine Offal (Prohibition) (England, Wales and Scotland) (Revocation) Regulations 1995

4. In the Bovine Offal (Prohibition) (England, Wales and Scotland) (Revocation) Regulations 1995(**1**), omit regulation 3.

The Products of Animal Origin (Import and Export) Regulations 1996

5.—(1) The Products of Animal Origin (Import and Export) Regulations 1996(**2**) are amended insofar they relate to Wales as follows.

(2) In regulation 1(2)—

(a) omit the definition of "Directive 90/667";

(b) in the definition of "product of animal origin", in sub-paragraph (f) for "Directive 90/667" substitute "Regulation (EC) No. 1069/2009 or Regulation (EU) No. 142/2011";

(c) after the definition of "Regulation 1274/91" insert—

""Regulation (EC) No. 1069/2009" means Regulation (EC) No. 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No. 1774/2002 (Animal by-products Regulation);

"Regulation (EU) No. 142/2011" means Commission Regulation (EU) No. 142/2011 implementing Regulation (EC) No. 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and implementing Council Directive 97/78/EC as regards certain samples and

(**1**) S.I. 1995/1955.
(**2**) S.I. 1996/3124, amended by S.I. 2006/2407; there are other amending instruments but none is relevant.

items exempt from veterinary checks at the border under that Directive.".

(3) In regulation 10, after each reference to "Directive 92/118" insert ", Regulation (EC) No. 1069/2009 or Regulation (EU) No. 142/2011".

(4) In regulation 11(1)—

(a) in sub-paragraph (a)—

(i) after "Directive 92/118" insert ", Regulation (EC) No. 1069/2009 or Regulation (EU) No. 142/2011"; and

(ii) for "paragraphs 1 to 11 or 13 to 15 of Schedule 3, under Directive 90/667" substitute "paragraphs 1 to 11 or 13 to 16 of Schedule 3"; and

(b) in sub-paragraph (b)—

(i) after "Directive 92/118" insert ", Regulation (EC) No. 1069/2009 or Regulation (EU) No. 142/2011";

(ii) after "that Directive" insert "or Regulation".

(5) In regulation 12(1)—

(a) after "Directive 92/118" insert ", Regulation (EC) No. 1069/2009 or Regulation (EU) No. 142/2011"; and

(b) in sub-paragraph (a), for "paragraphs 1 to 11 or 13 to 15 of Schedule 3, under Directive 90/667" substitute "paragraphs 1 to 11 or 13 to 16 of Schedule 3".

(6) In Schedule 3, renumber the second paragraph 13 (Wild game) as paragraph 15 and then after paragraph 15, insert—

"Animal By-Products

16. Regulation (EC) No. 1069/2009 and Regulation (EU) No. 142/2011.".

The Animal By-Products (Identification) (Amendment) (Wales) (No.2) Regulations 2003

6. In the Animal By-Products (Identification) (Amendment) (Wales) (No.2) Regulations 2003(**1**), omit regulation 4(b).

(**1**) S.I. 2003/2754 (W.265).

The Foot-and-Mouth Disease (Wales) Order 2006

7.—(1) The Foot-and-Mouth Disease (Wales) Order 2006(**1**) is amended as follows.

(2) In article 3(1), after the definition of "raw milk" insert—

> ""Regulation (EC) No. 1069/2009" means Regulation (EC) No. 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No. 1774/2002 (Animal by-products Regulation);
>
> "Regulation (EU) No. 142/2011" means Commission Regulation (EU) No. 142/2011 implementing Regulation (EC) No. 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and implementing Council Directive 97/78/EC as regards certain samples and items exempt from veterinary checks at the border under that Directive;".

(3) In article 26, in paragraph (2)(b) for "point 5 of Section II in Part A of Chapter III of Annex VIII to Regulation (EC) No. 1774/2002", substitute "Articles 15 and 32 of Regulation (EC) No. 1069/2009 and Articles 10 and 22 of and Section 2 of Chapter I of Annex XI to Regulation (EU) No. 142/2011".

(4) In article 27(2)(c) for "Regulation (EC) No. 1774/2002" substitute "Regulation (EC) No. 1069/2009".

(5) In Schedule 4—

(a) in paragraph 20(4), for "point 5 of Section II in Part A of Chapter III of Annex VIII to Regulation (EC) No. 1774/2002" substitute "Articles 15 and 32 of Regulation (EC) No. 1069/2009 and Articles 10 and 22 of and Section 2 of Chapter I of Annex XI to Regulation (EU) No. 142/2011"; and

(b) in paragraph 33(4), for "point 5 of Section II in Part A of Chapter III of Annex VIII to Regulation (EC) No. 1774/2002" substitute "Articles 15 and 32 of Regulation (EC) No. 1069/2009 and Articles 10 and 22 of and

(**1**) S.I. 2006/179 (W.30), as amended.

Section 2 of Chapter I of Annex XI to Regulation (EU) No. 142/2011".

(6) In Schedule 5—

(a) in paragraph 2, for "article 20 of and points A(2)(c) or (d) of Chapter VI of Annex VIII to Regulation (EC) No. 1774/2002" substitute "Article 36 of Regulation (EC) No. 1069/2009 and point 28(c) and (d) of Annex I to Regulation (EU) No. 142/2011";

(b) in paragraph 3, for "article 20 of and point A(1) of Chapter VIII to Regulation (EC) No. 1774/2002" substitute "Article 36 of Regulation (EC) No. 1069/2009 and Article 24(4) of Regulation (EU) No. 142/2011";

(c) in paragraph 5, for "point B(3)(e)(ii) of Chapter IV of Annex VIII to Regulation (EC) No. 1774/2002" substitute "point 2(b)(ii) of Chapter IV of Annex XIII to Regulation (EU) No. 142/2011";

(d) in paragraph 6, for "point B(2)(d)(iv) of Chapter IV of Annex VII to Regulation (EC) No. 1774/2002" substitute "point 3(d) of Chapter I of Annex XIV to Regulation (EU) No. 142/2011";

(e) in paragraph 7, for "points B(2), (3) or (4) of Chapter II of Annex VIII to Regulation (EC) No. 1774/2002" substitute "Chapter II of Annex XIII to Regulation (EU) No. 142/2011"; and

(f) in paragraph 8, for "points A(1), (3), or (4) of Chapter VII of Annex VIII to Regulation (EC) No. 1774/2002" substitute "Chapter VI of Annex XIII to Regulation (EU) No. 142/2011".

The Foot-and-Mouth Disease (Control of Vaccination) (Wales) Regulations 2006

8. For paragraph 18(4) of the Schedule to the Foot-and-Mouth Disease (Control of Vaccination) (Wales) Regulations 2006(**1**) substitute—

"(4) The occupier of any premises to which dung or manure is transported by authority of a licence granted under sub-paragraph (3) must ensure that it is treated in accordance with—

(a) Articles 15 and 32 of Regulation (EC) No. 1069/2009 of the European Parliament and of the Council; and

(**1**) S.I. 2006/180 (W.31), as amended.

(b) Articles 10 and 22 of and Section 2 of Chapter I of Annex XI to Commission Regulation (EU) No. 142/2011 implementing Regulation (EC) No. 1069/2009 of the European Parliament and of the Council.".

The Animals and Animal Products (Import and Export) (Wales) Regulations 2006

9. In Part 1 of Schedule 3 to the Animals and Animal Products (Import and Export) (Wales) Regulations 2006(**1**) for paragraph 7 substitute—

"Animal by-products

7. Regulation (EC) No. 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No. 1774/2002 (Animal by-products Regulation).

7A. Commission Regulation (EU) No. 142/2011 implementing Regulation (EC) No. 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and implementing Council Directive 97/78/EC as regards certain samples and items exempt from veterinary checks at the border under that Directive.".

The Products of Animal Origin (Third Country Imports) (Wales) Regulations 2007

10.—(1) The Products of Animal Origin (Third Country Imports) (Wales) Regulations 2007(**2**) are amended as follows.

(2) In regulation 2(1)—

(a) omit the definition of "Regulation (EC) No. 1774/2002"; and

(b) after the definition of "Regulation (EC) No. 136/2004" insert—

""Regulation (EC) No. 1069/2009" *("Rheoliad (EC) Rhif 1069/2009")* means Regulation (EC) No. 1069/2009 of the

(**1**) S.I. 2006/1536 (W.153), as amended.
(**2**) S.I. 2007/376 (W.36), as amended.

European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No. 1774/2002 (Animal by-products Regulation);

"Regulation (EU) No. 142/2011" *("Rheoliad (EU) Rhif 142/2011")* means Commission Regulation (EU) No. 142/2011 implementing Regulation (EC) No. 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and implementing Council Directive 97/78/EC as regards certain samples and items exempt from veterinary checks at the border under that Directive;".

(3) In regulation 4—

(a) in paragraph (1), at the end, insert "other than products to which Article 17 of Regulation (EC) No. 1069/2009 and Articles 11(2) and 12(2) of Regulation (EU) No. 142/2011 apply";

(b) in paragraph (4)(b), for "Regulation (EC) No. 1774/2002 and the Animal By-Products (Wales) Regulations 2006" substitute "Regulation (EC) No. 1069/2009 and the Animal By-Products (Enforcement) (No. 2) (Wales) Regulations 2011"; and

(c) in paragraph (5)(b), for "Regulation (EC) No. 1774/2002" substitute "Regulation (EC) No. 1069/2009".

(4) In regulation 5(1)(a), for "Regulation (EC) No. 1774/2002" substitute "Regulation (EC) No. 1069/2009".

(5) In regulation 6(1)(a), for "Regulation (EC) No. 1774/2002" substitute "Regulation (EC) No. 1069/2009".

(6) In regulation 21—

(a) in paragraph (3)(b), for "Regulation (EC) No. 1774/2002" substitute "Regulation (EC) No. 1069/2009"; and

(b) in paragraph (5)(b), for "Regulation (EC) No. 1774/2002" substitute "Regulation (EC) No. 1069/2009".

(7) In regulation 22—

(a) in paragraph (1), for "regulation 26 of the Animal By-Products (Wales) Regulations 2006" substitute "Articles 17 and 18 of

Regulation (EC) No. 1069/2009 and Articles 11(2), 12(2) and 14 of Regulation (EU) No. 142/2011"; and

(b) in paragraph (3), for "regulation 26 of the Animal By-Products (Wales) Regulations 2006" substitute "Articles 17 and 18 of Regulation (EC) No. 1069/2009".

(8) In regulation 24(4), for "Regulation (EC) No. 1774/2002" substitute "Regulation (EC) No. 1069/2009".

(9) Omit regulations 29 to 33.

(10) In regulation 43(1)(b), for "Regulation (EC) No. 1774/2002" substitute "Regulation (EC) No. 1069/2009".

(11) In Schedule 1—

(a) in Part 8, for paragraph 11 substitute—

"**11.** Regulation (EC) No. 1069/2009 and Regulation (EU) No. 142/2011."; and

(b) omit paragraphs 12 to 14.

The Avian Influenza (H5N1 in Poultry) (Wales) Order 2006

11.—(1) The Avian Influenza (H5N1 in Poultry) (Wales) Order 2006(**1**) is amended as follows.

(2) In article 2—

(a) in the definition of "bird by-product", for the words "Articles 4, 5 or 6 of Regulation (EC) No. 1774/2002" substitute "Articles 8, 9 or 10 of Regulation (EC) No. 1069/2009";

(b) for the definition of "Regulation (EC) No. 1774/2002" substitute—

""Regulation (EC) No. 1069/2009" means Regulation (EC) No. 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No. 1774/2002 (Animal by-products Regulation);"; and

(c) after the definition inserted by sub-paragraph (b) insert—

""Regulation (EU) No. 142/2011" means Commission Regulation (EU) No. 142/2011 implementing Regulation (EC) No.

(**1**) S.I. 2006/3309 (W.299), as amended.

1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and implementing Council Directive 97/78/EC as regards certain samples and items exempt from veterinary checks at the border under that Directive;".

(3) In article 3(6), for sub-paragraph (c) substitute—

"(c) the following plants if approved under Article 24 of Regulation (EC) No. 1069/2009—

(i) incineration plants;

(ii) co-incineration plants;

(iii) processing plants;

(iv) biogas plants;

(v) composting plants;

(vi) petfood plants.".

(4) In article 14—

(a) for paragraph (2) substitute—

"(2) But a veterinary inspector or an inspector acting under the direction of a veterinary inspector may licence the movement of any of the following bird by-products—

(a) processed animal protein within the meaning of paragraph 5 of Annex I to Regulation (EU) No. 142/2011 which complies with the requirements of paragraph B of Section 1 of Chapter II of Annex X to that Regulation;

(b) blood products within the meaning of paragraph 4 of Annex I to Regulation (EU) No. 142/2011 which comply with the requirements of paragraph B of Section 2 of Chapter II of Annex X to that Regulation;

(c) rendered fats within the meaning of paragraph 8 of Annex I to Regulation (EU) No. 142/2011 which comply with the requirements of paragraph B of Section 3 of Chapter II of Annex X to that Regulation;

(d) gelatine within the meaning of paragraph 12 of Annex I to Regulation (EU) No. 142/2011 which complies with the requirements of paragraph B of Section 5 of Chapter II of Annex X to that Regulation;

(e) hydrolysed protein within the meaning of paragraph 14 of Annex I to Regulation (EU) No. 142/2011 which complies with the requirements of paragraph B of Section 5 of Chapter II of Annex X to that Regulation;

(f) dicalcium phosphate which complies with the requirements of paragraph B of Section 6 of Chapter II of Annex X to Regulation (EU) No. 142/2011;

(g) tricalcium phosphate which complies with the requirements of paragraph B of Section 7 of Chapter II of Annex X to Regulation (EU) No. 142/2011;

(h) collagen within the meaning of paragraph 11 of Annex I to Regulation (EU) No. 142/2011 which complies with the requirements of paragraph B of Section 8 of Chapter II of Annex X to that Regulation;

(i) egg products which comply with the requirements of paragraph B of Section 9 of Chapter II of Annex X to Regulation (EU) No. 142/2011;

(j) processed pet food within the meaning of paragraph 20 of Annex I to Regulation (EU) No. 142/2011 which complies with the requirements of Chapter II of Annex XIII to that Regulation;

(k) raw petfood within the meaning of paragraph 21 of Annex I to Regulation (EU) No. 142/2011 which complies with Chapter II of Annex XIII;

(l) dogchews within the meaning of paragraph 17 of Annex I to Regulation (EU) No. 142/2011 which comply with the requirements of Chapter II of Annex XIII to that Regulation;

(m) processed manure and processed manure products which comply with the requirements of Section 2 of Chapter I of Annex XI to Regulation (EU) No. 142/2011;

(n) game trophies having undergone a complete taxidermy treatment ensuring their preservation at ambient temperatures within the meaning of Chapter VI of Annex XIII to Regulation (EU) No. 142/2011;

(o) those by-products which are transported to designated plants within article 3(6)(c) for disposal, treatment, transformation or use which ensures inactivation of the avian influenza virus;

(p) those products which are transported to users or collection centres authorised and registered in accordance with Article 23 of Regulation (EU) No. 142/2011 for the feeding of animals after they have been treated by a method approved by the competent authority which ensures inactivation of the avian influenza virus;

(q) untreated feathers or parts of untreated feathers produced from poultry within the meaning of paragraph 30 of Annex I to Regulation (EU) No. 142/2011 which comply with the requirements of paragraph A of Chapter VII of Annex XIII to that Regulation;

(r) poultry feathers, feathers from wild game birds or parts of such feathers which have been treated with a steam current or by another method which ensures inactivation of the avian influenza virus.";

(b) in paragraph (3), for "Annex V to Regulation (EC) No. 1774/2002" substitute "Regulation (EC) No. 1069/2009 and Annex IV to Regulation (EU) No. 142/2011"; and

(c) in paragraph (4), for "Chapter X of Annex II to Regulation (EC) No. 1774/2002" substitute "Chapter III of Annex VIII to Regulation (EU) No. 142/2011".

The Avian Influenza (H5N1 in Wild Birds) (Wales) Order 2006

12.—(1) The Avian Influenza (H5N1 in Wild Birds) (Wales) Order 2006(**1**) is amended as follows.

(2) In article 2—

(a) in the definition of "bird by-product" for the words "Articles 4, 5 or 6 of Regulation (EC) No. 1774/2002" substitute "Articles 8, 9 or 10 of Regulation (EC) No. 1069/2009";

(b) for the definition of "Regulation (EC) No. 1774/2002" substitute—

(**1**) S.I. 2006/3310 (W.300), as amended.

""Regulation (EC) No. 1069/2009" means Regulation (EC) No. 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No. 1774/2002 (Animal by-products Regulation);"; and

(c) after the definition inserted by sub-paragraph (b) insert—

""Regulation (EU) No. 142/2011" means Commission Regulation (EU) No. 142/2011 implementing Regulation (EC) No. 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and implementing Council Directive 97/78/EC as regards certain samples and items exempt from veterinary checks at the border under that Directive;".

(3) In article 13(1), for sub-paragraph (c) substitute—

"(c) the following plants if approved under Article 24 of Regulation (EC) No. 1069/2009—

(i) incineration plants;

(ii) co-incineration plants;

(iii) processing plants;

(iv) biogas plants;

(v) composting plants;

(vi) petfood plants.".

(4) In Schedule 1—

(a) in paragraph 13, for sub-paragraph (2) substitute—

"(2) A veterinary inspector may not grant or direct the grant of a licence under sub-paragraph (1) unless it is for a movement of—

(a) processed animal protein within the meaning of paragraph 5 of Annex 1 to Regulation (EU) No. 142/2011 which complies with the requirements of paragraph B of Section 1 of Chapter II of Annex X to that Regulation;

(b) blood products within the meaning of paragraph 4 of Annex I to Regulation (EU) No. 142/2011 which comply with the requirements of paragraph B of

Section 2 of Chapter II of Annex X to that Regulation;

(c) rendered fats within the meaning of paragraph 8 of Annex I to Regulation (EU) No. 142/2011 which comply with the requirements of paragraph B of Section 3 of Chapter II of Annex X to that Regulation;

(d) gelatine within the meaning of paragraph 12 of Annex I to Regulation (EU) No. 142/2011 which complies with the requirements of paragraph B of Section 5 of Chapter II of Annex X to that Regulation;

(e) hydrolysed protein within the meaning of paragraph 14 of Annex I to Regulation (EU) No. 142/2011 which complies with the requirements of paragraph B of Section 5 of Chapter II of Annex X to that Regulation;

(f) dicalcium phosphate which complies with the requirements of paragraph B of Section 6 of Chapter II of Annex X to Regulation (EU) No. 142/2011;

(g) tricalcium phosphate which complies with the requirements of paragraph B of Section 7 of Chapter II of Annex X to Regulation (EU) No. 142/2011;

(h) collagen within the meaning of paragraph 11 of Annex I to Regulation (EU) No. 142/2011 which complies with the requirements of paragraph B of Section 8 of Chapter II of Annex X to that Regulation;

(i) egg products which comply with the requirements of paragraph B of Section 9 of Chapter II of Annex X to Regulation (EU) No. 142/2011;

(j) processed pet food within the meaning of paragraph 20 of Annex 1 to Regulation (EU) No. 142/2011 which complies with the requirements of Chapter II of Annex XIII to that Regulation;

(k) raw petfood within the meaning of paragraph 21 of Annex I to Regulation (EU) No. 142/2011 which complies with Chapter II of Annex XIII;

(l) dogchews within the meaning of paragraph 17 of Annex I to Regulation (EU) No. 142/2011 which comply with

the requirements of Chapter II of Annex XIII to that Regulation;

(m) processed manure and processed manure products which comply with the requirements of Section 2 of Chapter I of Annex XI to Regulation (EU) No. 142/2011;

(n) game trophies having undergone a complete taxidermy treatment ensuring their preservation at ambient temperatures within the meaning of Chapter VI of Annex XIII to Regulation (EU) No. 142/2011;

(o) those by-products which are transported to designated plants within article 13(1)(c), processing plants for disposal, treatment, transformation or use which ensures inactivation of the avian influenza virus;

(p) those products which are transported to users or collection centres authorised and registered in accordance with Article 23 of Regulation (EU) No. 142/2011 for the feeding of animals after they have been treated by a method approved by the competent authority which ensures inactivation of the avian influenza virus;

(q) untreated feathers or parts of untreated feathers produced from poultry within the meaning of paragraph 30 of Annex 1 to Regulation (EU) No. 142/2011 which comply with the requirements of paragraph A of Chapter VII of Annex XIII to that Regulation;

(r) poultry feathers, feathers from wild game birds or parts of such feathers which have been treated with a steam current or by another method which ensures inactivation of the avian influenza virus.";

(b) in paragraph 13(3), for "Annex V to Regulation (EC) No. 1774/2002" substitute "Regulation (EC) No. 1069/2009 and Annex IV to Regulation (EU) No. 142/2011";

(c) in paragraph 13(5), for "Chapter X of Annex II to Regulation (EC) No. 1774/2002" substitute "Chapter III of Annex VIII to Regulation (EU) No. 142/2011";

(d) in paragraph 14(a), for "Regulation (EC) No. 1774/2002" substitute "Regulation (EC) No.

1069/2009 and Section 2 of Chapter I of Annex XI to Regulation (EU) No. 142/2011";

(e) in paragraph 15(a), for "Regulation (EC) No. 1774/2002" substitute "Regulation (EC) No. 1069/2009 and Section 2 of Chapter I of Annex XI to Regulation (EU) No. 142/2011".

The Cattle Identification (Wales) Regulations 2007

13. For paragraph 3(3) of Schedule 3 to the Cattle Identification (Wales) Regulations 2007(**1**), substitute—

"(3) If the Welsh Ministers do not provide a replacement, the animal to which it relates must not be moved off a holding except (under the authority of a licence granted by the Welsh Ministers) to—

(a) a plant approved under Article 24(1)(a), (b), (c) or (h) of Regulation (EC) No. 1069/2009 of the European Parliament and of the Council; or

(b) a registered collection centre which complies with Section 1 of Chapter II of Annex VI of Commission Regulation (EU) No. 142/2011 implementing Regulation (EC) No. 1069/2009 of the European Parliament and of the Council.".

The Legislative and Regulatory Reform (Regulatory Functions) Order 2007

14. In Part 2 of the Schedule to the Legislative and Regulatory Reform (Regulatory Functions) Order 2007(**2**), under the cross-heading "animal health and welfare"—

(a) omit the entry "Animal By-Products Regulations 2005"; and

(b) after the entry "Veterinary Medicines Regulations 2008" insert "Animal By-Products (Enforcement) (No. 2) (Wales) Regulations 2011".

(**1**) S.I. 2007/842 (W.74).

(**2**) S.I. 2007/3544, amended by S.I. 2009/2981; there are other amending instruments but none is relevant.

The Cosmetic Products (Safety) Regulations 2008

15. In the Table in Schedule 3 to the Cosmetic Products (Safety) Regulations 2008(**1**), in entry number 419, for "Articles 4 and 5 respectively of Regulation (EC) No. 1774/2002 of the European Parliament and of the Council and ingredients derived therefrom", substitute "Articles 8 and 9 respectively of Regulation (EC) No. 1069/2009 of the European Parliament and of the Council and ingredients derived therefrom".

The Animal Gatherings (Wales) Order 2010

16. In article 8(2) of the Animal Gatherings (Wales) Order 2010(**2**), for "Animal By-Products (Wales) Regulations 2006" substitute "Regulation (EC) No. 1069/2009 of the European Parliament and of the Council".

The Environmental Permitting (England and Wales) Regulations 2010

17.—(1) The Environmental Permitting (England and Wales) Regulations 2010(**3**) are amended as follows insofar as they relate to Wales.

(2) In regulation 2(1)—

(a) omit the definition "the Animal By-Products Regulations"; and

(b) after the definition of "regulated facility" insert—

> ""Regulation (EC) No. 1069/2009" means Regulation (EC) No. 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No. 1774/2002 (Animal by-products Regulation);".

(3) In paragraph 1 of Section 5.1 of Chapter 5 of Part 2 of Schedule 1, in the definition of "excluded plant", for sub-paragraph (a)(vii) substitute—

> "(vii) animal carcasses as regulated by Regulation (EC) No. 1069/2009;".

(4) In Section 6.8 of Chapter 6 of Schedule 1, omit paragraph 1(g) and (i).

(**1**) S.I. 2008/1284, amended by S.I. 2008/2173; there are other amending instruments but none is relevant.
(**2**) S.I. 2010/900 (W.93).
(**3**) S.I. 2010/675, amended by S.I. 2010/2172; there are other amending instruments but none is relevant.

(5) In paragraph 2(3) of Schedule 2, for "the authority responsible for granting an authorisation under regulation 27 of the Animal By-Products Regulations" substitute "the competent authority for the purposes of Regulation (EC) No. 1069/2009".

(6) In the table in paragraph T13(2) of Section 2 of Chapter 3 of Part 1 of Schedule 3, in the third entry (200199) for the words "the Animal By-Products Regulations" substitute "Regulation (EC) No. 1069/2009".

(7) In paragraph T22 of Section 2 of Chapter 3 of Part 1 of Schedule 3—

(a) in sub-paragraph (3)(b), for "an authorisation under regulation 27 of the Animal By-Products Regulations" substitute "the requirements of paragraphs 2(a) or (b) and 4 of Section 1 of Chapter II of Annex VI to Regulation (EU) No. 142/2011"; and

(b) for sub-paragraph (4) substitute—

"(4) In this paragraph—

(a) "animal by-product" has the meaning given in Article 3(1) of Regulation (EC) No. 1069/2009;

(b) "collection centre" has the meaning given in paragraph 53 of Annex 1 to Commission Regulation (EU) No. 142/2011 implementing Regulation (EC) No. 1069/2009 of the European Parliament and of the Council.".

The Transmissible Spongiform Encephalopathies (Wales) Regulations 2008

18.—(1) The Transmissible Spongiform Encephalopathies (Wales) Regulations 2008(**1**) are amended as follows.

(2) In regulation 2(1)—

(a) omit the definition of "Regulation (EC) No. 1774/2002"; and

(b) insert after the definition of "Regulation (EC) No. 882/2004"—

""Regulation (EC) No. 1069/2009" *("Rheoliad (EC) Rhif 1069/2009")* means Regulation (EC) No. 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not

(**1**) S.I. 2008/3154 (W.282).

intended for human consumption and repealing Regulation (EC) No. 1774/2002 (Animal by-products Regulation);".

(3) In regulation 4(2), for "Regulation (EC) No. 1774/2002" substitute "Regulation (EC) No. 1069/2009".

(4) In Schedule 1, omit paragraph (b).

(5) In Schedule 6, omit paragraphs 1(2) and (3), 2(5), 3 and 18.

The Zoonoses and Animal By-Products (Fees) (Wales) Regulations 2008

19.—(1) The Zoonoses and Animal By-Products (Fees) (Wales) Regulations 2008(**1**) are amended as follows.

(2) In regulation 2, omit the definition of "the 2006 Regulations".

(3) In regulation 3, omit "regulation 21 of the 2006 Regulations or" wherever it appears.

(**1**) S.I. 2008/2716 (W.245).

Explanatory Memorandum to the Animal By-Products (Enforcement) (No.2) (Wales) Regulations 2011

This Explanatory Memorandum has been prepared by The Department for Environment and Sustainable Development 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 Animal By-Products (Enforcement) (No.2) (Wales) Regulations 2011. I am satisfied that the benefits outweigh any costs.

John Griffiths AM

Minster for Environment and Sustainable Development, one of the Welsh Ministers

27 September 2011

1. Description

Animal By-Products (ABP) Regulation (EC No.1774/2002) protected animal & public health by controlling the use and disposal of ABPs not intended for human consumption. Following extensive consultation, the new ABP Regulation (EC No. 1069/2009) updating the current rules was agreed in April 2009, following a first reading agreement between the EP & Council (published in the Official Journal on 14 November 2009) and came into force on 4 March 2011. The technical details (Implementing Rules) for the Regulation have been laid down in a separate legal act. The implementing rules, Regulation (EC) 142/2011 came into force simultaneously with the new Regulation on 4 March 2011.

The Welsh Assembly Government introduced new ABP Regulations with effect from 4 March 2011. The Animal By-Products (Enforcement) (Wales) Regulations 2011 ("the 2011 Regulations") replaced the current Animal By-Product (Wales) Regulations 2006 thus implementing the EU requirements.

The Animal By-Products (Enforcement) (No.2) (Wales) Regulations 2011 ("the No 2 Regulations") revoke and replace the Animal By-Products (Enforcement) (Wales) Regulations 2011. They will be made bilingually.

2. Matters of special interest to the Constitutional Affairs Committee

Due to the public and animal health risks associated with a prolonged enforcement gap, it was necessary to breach the 21 day rule and produce the 2011 Regulations in English only. The Minister agreed to this on the condition that bilingual regulations would be made and laid for 21 days in due course.

The Constitutional Affairs Committee raised a number of issues with the 2011 Regulations and the Government's view, supported by its lawyers, is that the 2011 Regulations are fully enforceable and that the technical points raised by the report do not materially affect the enforceability of the new legislative provisions in the 2011 Regulations.

The powers of entry provisions in the 2011 Regulations have been revisited in the No 2 Regulations to take account of the human rights issued raised in the report.

The Government is satisfied that the penalties set out in the 2011 Regulations and which will be replicated in the No 2 Regulations are reasonable and proportionate. The penalties are identical to the England ABP Regulations which came into force on the 23rd March 2011. Non-compliance with the provisions of the Regulations could lead to potential severe risks to human and animal health and the penalties reflect the seriousness of this risk.

Because the revocations and amendments in the 2011 Regulations have taken effect, section 15 of the Interpretation Act is being used to revive those revocations and amendments before the No.2 Regulations can take effect.

3. Legislative background

The Welsh Ministers are designated to implement European legislation in relation to veterinary and phytosanitary fields for the protection of public health by virtue of SI 2008/1792. The proposed No.2 Regulations will be made by the Welsh Ministers under section 2(2) of the European Communities Act 1972 using this designation.

The instrument is subject to the negative procedure.

4. Purpose & intended effect of the legislation

The objectives of the new EU ABP Regulation and hence domestic legislation to implement are to introduce a set of updated rules on animal by-products providing legal certainty, simplified requirements and reductions in the administrative burden on operators. It also raised the issue that the 2002 European Regulation (1774/2002) needed to be updated to reflect new scientific/technological/practical experience since the adoption of that European Regulation, and updates the categorisation of ABPs according to the risk they pose. The effect will be to make ABP controls more effective and efficient, and reduce administrative burdens on business while ensuring continued protection of public and animal health and food safety.

In Wales there are approximately 250 premises approved to handle or dispose of ABPs. In addition to that there are approximately 200 educational establishments, taxidermists and wool collection points that use and dispose of ABPs in line with the derogations permitted in the current European Regulation.

The Council adopted the current European Regulation in April 2009 (1069/2009) (published in Official Journal 14 November 2009), following a first reading agreement with the European Parliament. The technical details (Implementing Rules) for the Regulation were laid down in a separate legal act. The implementing rules (142/2011) came into force on 4 March 2011.

The previous Animal By-products (ABP) European Regulation 1774/2002/EC was introduced in 2002 in response to a number of crises affecting the safety of public and animal health as regards products of animal origin - linked in particular to Transmissible Spongiform Encephalopathies, dioxin contamination, and outbreaks of Classical Swine Fever and Foot and Mouth Disease. The Regulation consolidated, simplified and replaced 19 previous legal acts. It also introduced stricter rules for the approval of certain premises, the channelling and traceability of ABPs and controls based on risk categories for different types of ABP in order to guarantee the safety of final products intended for feed or technical uses.

In 2005 the Commission submitted a report to the European Parliament and Council reflecting on the experience of Member States in implementing the 2002 Regulation. The report stated that although the legislation was working well and generally met its overall objectives, there were areas where changes need to be considered in order to update the legislation and to provide legal certainty, simplify it and thereby reduce administrative burdens. It also raised the issue that the 2002 Regulation needed to

be updated to reflect new information which has emerged since the adoption of that Regulation. For example, the products and industries in relation to ABP was wider ranging than foreseen by the legislators at the time of the adoption of the Regulation; and further information on the risks posed by certain ABP material, and the effectiveness of treatment standards in producing a "safe" product, has now become available. Furthermore some plants handling ABPs were subject to legislation under other European controls, such as pharmaceutical companies and there was duplication of control without benefit.

The Commission considered retaining the current rules unchanged or adopting non–regulatory tools but concluded that a regulatory review was most likely to provide effective solutions. Following extensive consultation, the Commission's new 2009 Regulation has been designed to address the identified shortfalls, in particular:

- Clarity of scope
- Proportionate categorisation of ABPs
- Removal of double approvals
- Derogations
- Provision for the possibility of on farm containment of fallen stock prior to disposal subject to European Food Safety Authority approval.

5. Consultation

The details of consultation undertaken are included in the RIA below.

REGULATORY IMPACT ASSESSMENT

Options

During its review the Commission considered various options for updating the EU ABP legislation, such as retaining the current rules unchanged, or adopting non–regulatory tools, but concluded that regulatory change was most likely to provide effective solutions. The Government agrees with this analysis. In order to minimise the impact on business, when putting in place replacement domestic legislation the Government proposes to impose the minimum burden on industry consistent with meeting its obligations to enforce the EU ABP Regulation. The Government's view is that it should take advantage in full of the majority of the potential derogations available to member states, seeking to leave in place controls only in the minority of cases where there are public & animal health issues which override potential economic benefits. Details of the derogations and their impacts are detailed in the costs & benefits section below.

The regulation is broadly deregulatory affecting a diverse range of industrial sectors and some members of the public. In some instances there are cost increases but many of these are expected to be quite small & overall are more than offset by any benefits. Attempts were made to monetise cost increases but this has proved to be not possible without disproportionate effort.

The two main monetised benefits affect respectively the small retail sector and the shell fish processing sector. Both benefits take the form of cost reductions to the affected sectors. In the former case this arises from food waste disposal costs and amounts to about £35m a year. In the latter case it arises from the disposal of shell material and comes to about £5.4m a year. For more detail see table of impacts below - items 7 and 14.

The EU ABP Regulations include provision for on-farm containment of carcasses prior to disposal which will provide farmers with additional options when dealing with their fallen stock. WAG has funded research into on-farm containment in the form of a bioreducer system. Following satisfactory completion of the research, WAG will support an application to the European Food Safety Authority (EFSA) for it to be considered an accepted process under the revised regulations.

Costs & benefits

Below is an assessment of the impact of the derogations available in implementing the EU regulation in domestic legislation. The article numbers refer to ABP Regulation (EC No. 1069/2009).

Issue and sectors affected	Current Position/ Baseline	New derogation/ provision	Use of derogation/ provision	Costs and Benefits relative to current position/baseline	Overall impact
2. Derogation **Articles 16 (c) and 18 (1):** Use of certain ABPs for feeding to animals **Affected sectors:** Fishing bait producers/ users, those feeding certain wild animals /birds, cat & dog shelters	The derogation from the current regulation allows MSs to set conditions to control public and animal health risks for the collection and use of Category 2 material from animals which were not killed or did not die from actual or suspected disease communicable to humans or animals, and of Category 3 material for feeding to the following animals:	The derogation from the new regulation allows MSs to set conditions to control public and animal health risks for the collection and use of these materials for the following **additional** categories of animals: 1) Fur animals (not applicable in UK in any case); 2) Cats and dogs in shelters (applicable); 3) Worms for fishing bait (applicable).	The Welsh Government believe that there would be a risk to animal and public health if the feeding of category 3 material was allowed for all wild animals. Therefore we will make use of this derogation but will limit the feeding of category 3 material only to wild birds in domestic gardens. We will also use the derogation to allow feeding	Compared with current position, there will be a very small benefit as this largely regularises the current position.	Small net benefit

	(a) Zoo animals (b) Circus animals (c) Reptiles/birds of prey other than zoo or circus animals (d) Dogs from recognised kennels or packs of hounds (e) Maggots for fishing bait (f) wild animals (not currently in use in England)		category 2 and 3 material to cats and dogs in shelters (although we are not aware of any demand for this) and to allow feeding to worms used for fishing bait which will regularise the current position. N.B Animals are not permitted to be farmed in the UK for fur so this will not apply.		
3. Derogation **Articles 16 (c) and 18 (2):** Feeding of Category 1 material to zoo animals & necrophagous birds **Affected sectors:** Zoos,	The current Regulation does not allow Cat 1 material to be fed to zoo animals. There are no programmes approved in Wales (or the rest of the UK) for feeding Cat 1 material to necrophagous bird species - so does not apply	The derogation from the new Regulation allows MSs to authorise the feeding to zoo animals of Category 1 material under Article 8(b) (ii) (i.e. entire bodies/parts of dead animals containing SRM at time of disposal), and of material derived from zoo animals.	Government intend to take advantage of this derogation **in full**. This would allow zoos etc to "re-cycle" their own fallen stock that fall under Category 1 (e.g. entire deceased antelopes, zebras) to their carnivorous animals (e.g. big cats) in addition to the Cat 2 material that is already permitted. Additional controls would be attached to feeding animals containing SRM.	Compared with the current position, there will be a small benefit to those few zoos which want to feed carnivorous animals in this way. Many zoos will be unaffected as they do not keep carnivorous species.	Very small net benefit overall
4. Derogation **Articles 16(d) and 19(1)(a):**	The derogation from the current Regulation	The derogation from the new Regulation allows MSs to authorise	Government intend to take advantage of this derogation	Costs of burial are likely to be lower than rendering/	Small reduction of costs associated with burial rather

Burial of pet animals **Affected sectors:** Pet owners, horse owners	allows the burial of pet animals. Wales currently apply this derogation, and includes 'pet horses' under the description of 'pet animals'. Other equidae are not currently included in derogation.	the disposal by burial of dead pet animals **and all equidae.**	**in full.** Government will allow the burial of all equidae but we would recommend that the owners of dead equidae should first of all consider disposal of the carcase via the normal route for ABPs. Alternatively owners could consider the burial of the animal subject to any Environment Agency or Local Authority controls	incineration in most cases, but burial is not always practical and the horse industry does not anticipate there will be a major increase in burial from horse owners. There will be a negligible associated increase in disease risk of burial, as opposed to incineration.	than incineration. Small increase in benefits associated with wider choice of method of disposal.
5. Derogation **Articles 16(d) and 19(1)(b):** Disposal in **<u>remote areas</u>** by burning/burial on site or by other means under official supervision of **Category 1 material** under Article 8(a)(v) (i.e. wild animals) and 8(b)(ii) (i.e. entire bodies or parts of dead animals containing SRM at time of disposal), and **Category 2 + 3** material. **Affected sectors:**	The derogation from the current Regulation is the same as the one presented in the new Regulation- but the present derogation does not allow MSs to authorise disposal of diseased wild animals in remote areas, instead requiring their disposal by rendering or incineration.	The derogation from the new Regulation **now includes** Cat 1 wild animals, when suspected of being infected with diseases communicable to humans or animals. It also allows for burial.	Government intend to take advantage of this derogation **in full.** We consider that burial is the most expedient and practical method of disposal in remote areas.	In practice few dead diseased wild animals will come to the attention of landowners and the effect should be minimal.	There will be a very small reduction in the costs to landowners.

Landowners					
6. Derogation **Articles 16 (d) and 19 (1) (c):** Disposal of fallen Stock carcasses in areas where access is practically impossible or where access would only be possible under circumstances, related to geographical or climatic reasons or due to a natural disaster, which would pose a risk to the health and safety of the personnel carrying out the collection or where access would necessitate the use of disproportionately onerous means of collection. **Affected sectors:** Livestock farmers, fallen stock collection and disposal sector	The current Regulation says that fallen stock must be collected and disposed of in line with ABPR, except in a very few specific circumstances.	The new derogation from the Regulation says that MSs may now authorise the disposal by burning/burial on site or by other means under official supervision of **Category 1 material** under Article 8(b)(ii), (i.e. entire bodies/parts of dead animals containing SRM at time of disposal), **Category 2** and **Category 3 material** in areas where access is practically impossible or where access would only be possible under circumstances, related to geographical or climatic reasons or due to a natural disaster, which would pose a risk to the health and safety of the personnel carrying out the collection or where access would necessitate the use of disproportionately onerous means of collection.	The Government intend to take advantage of this derogation **in full,** where the farmer is able to demonstrate that the appropriate criteria are met. Will provide guidance on the conditions to apply to ensure the derogation is not subject to abuse.	There will be a small reduction in costs for livestock farmers who will be now able to dispose of fallen stock in areas meeting these criteria by burial on site or leaving them to degrade naturally (depending on the circumstances), rather than being obliged to arrange for their collection & disposal by rendering/ incineration. There will be a very small associated increase in disease risk. .	Small reduction in overall costs.
7. Derogation **Articles 16(d) and 19(1)(d):** Small Quantities of ABPs **Affected sectors:** Small Retailers	The current Regulation says that all ABPs must be disposed of in line with the Regulation.	The derogation from the new Regulation says that MSs may authorise the disposal of 20kg (or potentially 50kg) per week of raw meat and fish arising from retailers outside of the control of the	The Government intend to take advantage of this derogation **in full using the 20kg limit,** as the terms which the Commission has set out for the detailed	There will be considerable reduction in costs to small retailers and food manufacturers. There will be a very small associated increase in disease risk.	Evidence provided by the British Retail Consortium and the Association of Convenience Stores suggests the cost saving to this sector could be in the

		ABPR (50kg only permissible where MS have provided detailed justification to the Commission).	justification required to apply the 50kg limit cannot be met in the UK In any case bodies representing retailers have said that the 20kg limit will accommodate the requirements of most small retail outlets.		range £30m to £40m a year (on a UK basis). This is based on a cost saving of about £1,000 a year per shop across the sector. Within the sector there might be in the order of 20,000 non-affiliated independent convenience stores which would probably fall within the definition of 'small business'.
8. Derogation **Article 16 (f):** Use of ABPs in Bio-Dynamic preparations **Affected sectors:** Farmers & landowners, those wishing to prepare & apply bio-dynamic preparations to land	The current Regulation does not authorise the use of bio-dynamic preparations.	The derogation from the new Regulation says that MSs may allow Cat 2 and 3 materials to be used for the preparation and application to land of bio-dynamic preparations as per Article 12(1) (c) of Regulation 834/2007. MS have discretion to set conditions.	The Government intend to take advantage of this derogation **in full** in order to meet specialist demand in this area.	There will be a small benefit to those wishing to prepare and apply bio-dynamic preparations to land, (although in practice this change largely regularises the current position.)	
9. Derogation **Article 16 (g):** Use of ABPs for Pet Food **Affected sectors:** Pet food manufacturers , individuals wishing to feed such material	Under the current Regulation only "petfood", (processed or raw) which has been prepared in accordance with the requirements of the regulation may be fed to pet animals.	The derogation from the new Regulation allows MSs to set out conditions which permit Category 3 material to be used for feeding to pets (instead of the regulation's requirements which apply to manufacturers of raw and processed petfood products). MS have discretion to set conditions.	The Government will not be taking advantage of this derogation.	The controls necessary to address the risks identified would be equal to the existing approval process as a petfood plant, which is already provided for in the Regulations.	No direct benefit or additional costs/impacts.

10. Derogation **Article 16 (h):** Disposal of ABPs on farm **Affected sectors:** Livestock farmers	The current Regulation does not permit the disposal of ABPs arising from surgical intervention or birth of animals on farm, they must be disposed of in line with the Regulation (rendering/ incineration).	The derogation from the new Regulation allows MSs to authorise ABPs (except Category 1 material) arising from surgical intervention on live animals or during birth of animals on farm to be disposed of on that farm. MS have discretion to set conditions.	The Government intend to take advantage of this derogation **in part.** We propose to allow material to be disposed of on farm, with the exception of foetuses or placenta, where there may be a risk of spreading disease to humans or animals (e.g. aborted calf foetuses/placenta where there may be a risk of diseases such as brucellosis).	The derogation as proposed would bring a small benefit to livestock farmers who would benefit from a reduction in certain disposal costs (although to some extent this may just regularise current practice). There would be a very small associated increase in disease risk. If the derogation were fully implemented, there might be a further slight reduction in costs to farmers, but with significant potential disease risks which might then result in higher costs, e.g. if animals were suffering from a notifiable disease, or burial was not carried out correctly**.**	Small net benefit
11. New Provision **Article 13 (e) (ii):** ABPs used for Composting & biogas **Affected sectors:** Biogas plants, those supplying them with raw material	The current Regulation permits the composting or anaerobic digestion (biogas) of Category 3 ABPs. A limited number of Category 2 materials such as manure and milk can also be composted or anaerobically digested, provided they are not considered a	The new Regulation maintains this regime and expands it slightly to include milk products, and Category 2 egg and egg products.	The Government intend to take advantage of this new provision **in full.** The new provision allows a wider range of material to be used without a significantly increased disease risk. It also removes a previous anomaly where Category 2 milk	There will be a small benefit to compost and biogas plants and those who supply them, who will now be able to supply/use a wider range of material.	Small net benefit

	disease risk.		could be composted but not products derived from the milk.		
12. Relaxation of current domestic controls National provisions on composting of catering waste on the premises on which it originates. **Affected sectors:** Composting/ anaerobic digestion community (including domestic householders), specifically small community composting or anaerobic digestion projects.	The current Regulation says that catering waste intended for composting or anaerobic digestion must be sent to an AH approved plant. There is a current exception for 'home composting' which permits the composting of catering waste on the premises of origin without the need for an approval from AH, provided that the resultant compost is used only on those premises.	The Government intend to broaden the home composting exception to allow for composting and anaerobic digestion on the premises of origin **or elsewhere**, without approval from AH, provided that livestock cannot gain access to this material.	The Government intend to relax the current national controls to allow for off-site disposal of 'home composting'	Compared with the current position, if Government implement this new provision there will be a significant benefit to the composting/ anaerobic digestion community particularly for small-scale community composting and anaerobic digestion projects who may be able to operate without the requirement for a full plant approval from Animal Health	Benefit to sector likely but sector unable to quantify due to uncertainty about potential take up
13. New Provision **Article 13 (f):** Application of ABPs to land **Affected sectors:** Landowners, users/ suppliers of certain waste ABP material	The current Regulation allows Category 2 digestive tract content separated from digestive tract, milk and colostrum to be applied to land without processing, if the MS considers this does not present a risk of spreading serious transmissible	The new Regulation maintains this regime, also now enables Category 2 milk-based products to be spread to land unprocessed, and also certain lower risk Category 3 materials.	The Government intend to take advantage of this new provision **in full.** With milk and milk products there may be a potential risk of disease spread when they are applied to land in the case of a notifiable disease outbreak. A requirement to	There would be a small benefit to suppliers/users of this waste ABP material derived from its increased potential use. There will be a very small associated increase in disease risk.	Small net benefit

	disease.		allow restrictions relating to animal and public health to be imposed if necessary would be included in any new provision to mitigate the increased disease risk.		
14. New provision **Article 14 (h):** Use of shellfish shells **Affected sectors:** Shellfish sector	The current Regulation requires all shellfish shells to undergo at least "Method 7" processing (i.e. rendering) before use.	1) The new Regulation enables MSs to determine conditions for disposal of shells from shellfish **in which soft tissue remains.** 2) Article 2.2(d) in any case removes from scope shells **where no soft tissue remains.**	The Government intend to take advantage of this new provision subject to the following conditions: 1) Any shells with flesh present would need to be processed(subject to rendering/heat treatment) in accordance with the Regulation to ensure there is no public and animal health risk. 2) operators will be required to demonstrate that the shells are "free of flesh" (using criteria to be laid down), in which case controls on their use would be removed from the scope of the regulation. .	There would be a substantial benefit to the shellfish sector from the potential sale of shells without flesh remaining for productive uses, and from the less costly disposal requirements, compared with current requirement (rendering).	Net benefit to industry of removing shells from scope of the regulation. This amounts to about £4.4m a year as a consequence of a disposal cost saving of about £70/t rising to over £6m a year after 5 years as the tonnage increases (UK figures).
15. New provision	The current Regulation requires	The new Regulation allows Category 3 egg	The Government intends to take	There will be a benefit to industry, as the cost of rendering	Egg sector acknowledge benefit but

Article 14 (h): Egg shells to land **Affected sectors:** Egg Processing Industry, farmers	eggshells to undergo at least "Method 7" processing (i.e. rendering) before use.	shells to be used under conditions determined by the MS which prevent risks arising to public and animal health.	advantage of this new provision, to put in place less burdensome control measures which operators may use as an alternative to processing but which will still protect animal and public health.	is approximately twice that of putting shell onto land without processing. There will also be some potential reduction in the carbon footprint from not needing to render product, as well as a benefit to the land to which shell would be applied. This will create additional avenues for disposal of egg shell, making the industry more viable. There will also be an additional saving to landowners using shells as a soil improver for application to the land.	unable to quantify
16. New Provision **Article 32: Use of organic fertilisers** **Affected sectors: Landowners, renderers**	The current Regulation permits the application to land of organic fertilisers and soil improvers (OF/SI) derived from processing Cat '2 or Cat '3 material in an approved processing (rendering) plant. Cat' 1 material cannot be used for the production of OF/SI. Cat' 2 material can only be used where it is pressure-rendered in	The new Regulation allows MSs to adopt national rules imposing conditions or restrictions on the use of organic fertilisers and soil improvers if they are justified to protect public or animal health. The Implementing Regulation set down conditions that must be complied with.	The Government do not intend to impose additional national restrictions(which it does at present in relation to certain material) However, would propose to keep a grazing restriction of two months in the case of pigs, and 21 days for other livestock after application of	Compared with the current position there will be a small benefit to industry, permitting the use of category 2 and category 3 processed animal protein in organic fertilisers and soil improvers provided that they are mixed with a suitable material so that they are not palatable to livestock and cannot be used in animal feed.	Small net benefit

	accordance with the Regulation. Cat 3 materials may use any of the processing standards set out in the Regulation.		OF/SI to land (the regulation permits MSs to set a minimum period of 21 days).		
17. New Requirements **Article 41** Imports of ABPs from third countries into the EU **Affected sectors:** Importers of ABPs,	The current Regulation sets down detailed rules for the importation of ABPs from third countries and the documentation which needs to accompany the consignments (usually in the form of health certificates).	The new Regulations requirements update and consolidate the existing import rules. Notable changes are: 1) Scope has been increased (and correspondingly the model declaration) for use of intermediate products (ABPs which have undergone a degree of processing but are not finished). For example, the definition now includes medicinal products, veterinary medicinal products and active implantable medical devices; some Cat 1 & Cat 2 materials are now specifically included; and blood from live animals (including from livestock species) is now listed for use as an intermediate product. 2) Import authorisation requirements for specific ABPs (such as aquatic and terrestrial invertebrates, rodentia and	The Government intends to **fully implement** the changes in the new Regulation, which tend to simplify and consolidate the requirements for both importers and for the Competent Authority.	Compared with the current position the Government expects that when the changes are considered in aggregate they should have a positive benefit/outcome (with any small costs being out-weighed by the benefits) for both Government and Industry, since the changes tend to be de-regulatory, allowing industry to make greater use of ABPs with less intervention from Government. These changes should enable greater use of intermediate products with savings for both industry and Government (e.g. more widespread use of the model declaration rather than individual authorisations). The reclassification of ABPs from e.g. Cat' 2 to 3 and the relaxation around some of	Small net benefit

		lagomorpha) are now less prescriptive. 3) Research and diagnostic samples imported via another Member State need to be presented to a BIP on entry to the EU, but not vet checked, and the Member State of destination notified via TRACES. Most research and diagnostic samples are imported directly into the UK, so likely to have little impact, 4) Trade samples and display items need to be imported via a BIP for vet checks. Trade samples also need to be channelled to their final destination. It is estimated that in 2010 only 18 trade samples and 8 display items were imported, leading to a small additional cost to industry.		the rules for Cat' 1 material, should increase the scope for imports and their usage, which should be beneficial for industry and Government.	
18. Implementing Regulation **Annex XIV section II, Chapter IV, Part II:** Colostrum for feeding **Affected sectors:** Livestock owners	The current Regulation does not permit the supply of colostrums directly from one farm to another farm within the same MS for feeding purposes.	The new Implementing Regulation provides by way of derogation from controls on colostrum for the competent authority to authorise the supply of colostrum from one farm to another farm within the same MS for feeding purposes under conditions which prevent the transmission of health risks.	The Government intends to apply this derogation under conditions which prevent the potential spread of animal diseases	There will be a small benefit to livestock owners due to the increased availability and reduced cost of obtaining commercial colostrum. The likely demand for transferring colostrum from one farm to another is not, according to the dairy industry, thought to be very great.	Small net benefit

				Providing guidance is followed, there will only be a very small associated increase in disease risk.	
19. Implementing Regulation **Annex XVII, Chapter VII:** Unprocessed wool **Affected sectors:** Wool industry	The current Regulation does not permit unprocessed wool to be placed on the market.	The new Implementing Regulation provides for the competent authority to authorise the placing on the market of unprocessed wool under conditions which prevent the transmission of health risks.	The Government intends to apply this derogation without restrictions, provided the operator registers with Animal Health to enable tracing of the wool in case. restrictions needed to be put in place in the case of a notifiable disease outbreak. Otherwise, no controls are proposed as the risks, are minimal.	There will be a small benefit to the wool sector who can take advantage of the new potential for movement, storage and placing on the market of wool without restrictions (including for example composting of wool without restrictions). There will be a negligible associated increase in disease risk.	Small net benefit

Consultation

A six week consultation was held seeking views on how to implement the available derogations in Wales. The consultation package was sent to around 350 representative bodies and individuals, and was also made available on the Welsh Government website. Six responses were received and there was broad support for our proposals.

A summary of responses and The Welsh Assembly's response will be available at www.wales.gov.uk

As a result of the consultation the original suggestion to restrict the derogation to allow the burial of pets and equidae to pet equidae has been extended to all equidae.

Competition Assessment

The competition assessment is at Annex A

Post implementation review

A post implementation review will take place three to five years after implementation of the policy. The effect of the subordinate legislation will be assessed against the net cost saving to businesses compared with the previous regulations with no increase in risks to animal and public health.

Information will be gathered through stakeholder engagement and delivery and enforcement agency feedback. Areas that could be improved will be highlighted for possible amendment.

The competition filter test	
Question	**Answer yes or no**
Q1: In the market(s) affected by the new regulation, does any firm have more than 10% market share?	No
Q2: In the market(s) affected by the new regulation, does any firm have more than 20% market share?	No
Q3: In the market(s) affected by the new regulation, do the largest three firms together have at least 50% market share?	No
Q4: Would the costs of the regulation affect some firms substantially more than others?	No
Q5: Is the regulation likely to affect the market structure, changing the number or size of businesses/organisation?	No
Q6: Would the regulation lead to higher set-up costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q7: Would the regulation lead to higher ongoing costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q8: Is the sector characterised by rapid technological change?	No
Q9: Would the regulation restrict the ability of suppliers to choose the price, quality, range or location of their products?	No

Conclusion

It is unlikely that there will be any detrimental effects on competition.

Constitutional and Legislative Affairs Committee Draft Report

CLA43

Title: The Animal By-Products (Enforcement) (No. 2) (Wales) Regulations 2011

Procedure: Negative

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

Technical Scrutiny

No points are identified for reporting under Standing Order 21.2 in respect of this instrument at this stage-

Merits Scrutiny

The Third Assembly's Constitutional Affairs Committee (CA Committee) considered *"The Animal By-Products (Enforcement) (Wales) Regulations 2011"* (CA553) on 17 March 2011. The regulations now before the Committee (the Number 2 Regulations) revoke and replace those earlier regulations (the original regulations).

The original regulations were introduced in breach of the 21 day rule to ensure that there was no "enforcement gap" between them and a previous enforcement regime. The CA Committee reported on a considerable number of technical deficiencies in the original regulations as well as wider points on the merits of the regulations. There seems little doubt that many of the technical deficiencies, including that the regulations were made in English only, were caused by the urgency with which they were made.

The original regulations also raised substantive merits points including human rights concerns about relatively unfettered rights of entry to private dwelling houses and concerns at the proportionality of penalties that could be imposed under the regulations. The Committee's report on the original regulations is attached for information.

By contrast, the Committee is pleased to note that no technical deficiencies have been identified in the number 2 regulations, which are being made in both Welsh and English.

The Committee is also pleased to note that the number 2 regulations now contain provisions that protect private householders through the explicit provision of a requirement to obtain a warrant to enforce the right of entry.

Although the penalties in the number 2 regulations are the same as those in the original regulations, the Explanatory Memorandum explains that the penalties are identical to those in use in England and that non-compliance with the provisions of the Regulations could lead to potential severe risks to human and animal health. The penalties reflect the seriousness of this risk and the Committee is content to accept the Government's judgement on this point.

In view of the previous Committee's concerns about the original regulations, the Committee believes it is important to place on the public record that these concerns do not arise in respect of the number 2 regulations.

The Committee agrees, therefore, to report that the Assembly should pay special attention to these regulations as giving rise to matters of political or legal importance likely to be of interest to the Assembly. [Standing Order 21.3(ii)]

Constitutional and Legislative Affairs Committee
October 2011

Annex to the Constitutional and Legislative Affairs Committee Report on CLA43 (The Animal By-Products (Enforcement) (No. 2) (Wales) Regulations 2011)

Constitutional Affairs Committee Report

CA553

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

Procedure: **Negative**

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

Technical Scrutiny

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

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

1.1 The absence of a safeguard to apply for a warrant before an authorised person may enter domestic premises may constitute an infringement of Article 8 of the European Convention of Human Rights ("ECHR") which provides for the right to respect for private and family life, and home and correspondence and section 81 of the Government of Wales Act 2006 ("GOWA"), which states that Welsh Ministers have no power to make subordinate legislation which is incompatible with any of the Convention Rights.

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

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

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

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

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

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

3. These Regulations are provided in English only.

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

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

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

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

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

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

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

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

8. Schedule 1(Animal By-Product Requirements), paragraphs 9 and 10, refer to "Registration of operators, establishments and plants" and "Approval of establishments and plants" respectively, when the provisions should refer to "Registration of operators, establishments **or** plants" and "Approval of establishments **or** plants" respectively in order properly to reflect the titles of Articles 23 and 24 of the EU Control Regulation.

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

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

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

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

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

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

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

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

13. The form of wording which paragraph 20 of Schedule 2 to these Regulations states is required to be substituted by a new form of wording within article 26 (slaughter; control of faecal material) of the 2006 Order does not already exist in its entirety within article 26. Paragraph 20 states that "point 5 of Section II in Part A of Chapter III of Annex VIII to Regulation (EC) No. 1774/2002 of the European Parliament and of the Council laying down health rules concerning animal by-products not intended for human consumption, as amended" is the current form of wording within article 26 when the correct form of wording reads as "point 5 of Section II in Part A of Chapter III of Annex VIII to Regulation (EC) No. 1774/2002 and under the authority of a licence granted by the National Assembly of Wales."

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

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

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

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

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

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

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

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

17. Schedule 3, column 1 of these Regulations refers to the Animal By-Products (Wales) Regulations 200" to be revoked. Consequently it is not known what Regulations it is intended are to be revoked.

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

18. The Products of Animal Origin (Third Country Imports) (Wales) Regulations 2006 (S.I. 2006/376"), are not in existence or/and the title and

the S.I. reference is inaccurate. S.I. 2006/376 refers to the Penalty Charges (Exemption from Criminal Proceedings) Regulations (Northern Ireland) 2006, and the Stirling (Electoral Arrangements) Order 2006 respectively. Consequently it is not certain what Regulations the provision is intended to revoke.

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

Merits Scrutiny

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

1. **Power of entry:-Human Rights Implications**

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

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

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

1.3 Consequently is a power of entry into a dwelling house without a warrant and without notice proportionate to the severity of the crime, for example the obstruction of an authorised person? Compare, for example the situation where Police can only enter premises without a warrant if a serious or

dangerous incident has taken place, such as a breach of the peace or prevention thereof, enforcing an arrest warrant, arresting a person in connection with certain offences, recapturing someone who has escaped from custody and save life or prevent serious damage to property.

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

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

1.5 The European Court of Human Rights takes a robust approach to powers of entry, search and seizure. These powers are invasive and must be accompanied by clear justification in order to meet the requirements of Article 8(2) ECHR that any interference with the right to respect for private life and the home is necessary. The legislative framework for these powers must afford adequate and effective safeguards against abuse in practice. Whether the safeguards in the Bill are adequate to meet the requirements of Article 8(2) ECHR will depend on the nature, scope and duration of the proposed powers of entry, search and seizure, the circumstances in which they will be authorised, the identity of the individuals authorised to conduct them, and the remedies provided by national law. An individual adversely affected by the exercise of these powers must have access to an effective remedy for any alleged breach of their Convention rights as guaranteed by Article 13 ECHR.

1.6 The Joint Committee on considering the Tribunals Courts and Enforcement then Bill found that the Bill proposed that, in certain circumstances, a certified enforcement agent would be able to enter any "relevant premises" without a warrant.[99] Relevant premises are any premises where an enforcement agent "reasonably believes" that the debtor "usually lives" or carries on a trade or business (including third party premises). If powers of entry without a warrant are intended to be limited to the premises identified by the information in the relevant judgment, warrant or writ, then the Committee considered that this should be clearly expressed on the face of the Bill. The Committee recommended that the Bill be amended accordingly and stated that it is important to ensure that these new statutory powers are not misunderstood, or misrepresented, in order to protect the rights of debtors' families and third parties against unnecessary or disproportionate invasions of their right to respect for their private life.

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

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

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

The European Regulation that these Regulations seek to enforce date back to February 2009, and consequently at least two years have elapsed within which legislation could have been enacted in order to give effect to the purposes of the 2009 EC Regulation ("the Control Regulation"). Despite, this these Regulations have breached the 21 day rule. The Minister's response to this was provided in a letter to the Presiding Officer dated 3rd March 2011 which states that "the requirement to breach the 21 day rule arises primarily because of delays in finalising the Implementing Regulations at an EU level, combined with further delays in finalising the legal text of the draft Statutory Instrument." Both the EU Control Regulation and the EC Implementing Regulation came into force on 4 March 2011. However knowing that both Regulations were coming into force on this date, it is not clear why these Regulations were not prepared and laid at an earlier date so as not to breach the 21 day rule.

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

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

3. Disproportionality of penalty

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

Janet Ryder AM
Chair, Constitutional Affairs Committee

17 March 2011

The Government has responded as follows:

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

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

The government wishes to stress that ensuring no enforcement gap by bringing the Regulations into force on 4th March 2011 was essential to ensure that any risks to animal and human health from animal by-product issues were reduced to a minimum. Such risks could have been severe and

without implementing legislation, breaches of the European legislation could have been unenforceable."

CLA GP5

Constitutional and Legislative Affairs Committee

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

Response from Farmers Union of Wales

NATIONAL ASSEMBLY FOR WALES' CONSTITUTIONAL AND LEGISLATIVE COMMITTEE'S INQUIRY INTO THE GRANTING OF POWERS TO WELSH MINISTERS IN UK LAWS

Response from the Farmers' Union of Wales

September 2011

NATIONAL ASSEMBLY FOR WALES' CONSTITUTIONAL AND LEGISLATIVE AFFAIRS COMMITTEE'S INQUIRY INTO THE GRANTING OF POWERS TO WELSH MINISTERS IN UK LAWS

Response from the Farmers' Union of Wales

INTRODUCTION

1. The Farmers' Union of Wales welcomes this opportunity to contribute to the Constitutional and Legislative Affairs Committee's Inquiry into the Granting of Powers to Welsh Ministers in UK Laws, with particular reference to how this practice impacts on the scrutiny of legislation affecting rural Wales.

2. The Farmers' Union of Wales (FUW) supported Devolution and the establishment of a National Assembly for Wales believing that this would enable Wales to promote, develop and institute policies that were designed specifically to cater for the needs and aspirations of the people of Wales.

3. The Union firmly believes that the interests of farmers and the rural economy of Wales are best served by policies and legislation determined and fashioned, wherever possible, by the elected representatives of the National Assembly for Wales who would be more attuned to the particular concerns and needs of Wales' rural areas.

4. As a means of achieving this, the Union supported the strengthening of the powers and responsibilities afforded to the National Assembly for Wales, believing that legislative parity was needed between Wales and the other devolved nations.

5. The Union, therefore, welcomed the Referendum on Further Law Making Powers for Wales held earlier this year.

Questions

The extent of the current National Assembly scrutiny of delegated powers given to Welsh Ministers through provisions in UK Acts and through other statutory mechanisms.

6. The FUW believes that the National Assembly for Wales should have the opportunity to comment on all legislation pertaining to Wales, whether emanating from Westminster or Cardiff, and that full scrutiny should be undertaken by the appropriate Assembly Committee to ensure total transparency and appropriateness of any new legislation implemented in Wales.

7. The current practice, where the National Assembly does not have the power to formally scrutinise those UK Acts of Parliament which confer powers directly onto Welsh Ministers is a cause of concern to the Union.

8. The FUW believes that unless the National Assembly, through an appropriate scrutiny Committee, is able to influence primary legislation through Assembly Ministers prior to its drafting in Westminster, then the opportunity to shape the content of such legislation could be compromised.

9. The Union believes that the various scrutiny Committees within the Assembly play a vital role in informing and shaping the activities undertaken by the Welsh Government.

10. During the third Assembly, the Union became increasingly concerned over the decline in emphasis given to the reports, recommendations and advice provided by scrutiny Committees to Assembly Ministers.

11. The FUW was particularly disappointed that, under the current Welsh Government, the Business Committee abolished the Rural Development Sub-Committee, thus, in its view, weakening the opportunity for discussion and debate on the particular challenges facing the rural economy in Wales.

12. While acknowledging that the Environment and Sustainability Committee will establish, when needed, 'Task and Finishing Groups' to look at specific issues affecting rural areas, such as the recently formed Common Agricultural Policy Task and Finish Group, the FUW believes that, due to the predominately rural nature of Wales and the importance of agriculture to rural areas, a separate Committee was needed to consider and scrutinise any issues and legislation which affects agriculture or rural Wales.

13. The Union believes that, for the scrutiny process to be seen to be working, the current process whereby Westminster can confer powers directly onto Welsh Ministers, without involving the National Assembly, needs to be amended so that the National Assembly is able to fully scrutinise any relevant pieces of legislation.

The extent to which the National Assembly is able to exercise robust scrutiny of such processes through its Standing Orders.

14. As outlined in the Annex document issued with the Inquiry letter, the National Assembly has no formal role in scrutinising powers transferred to Welsh Ministers through UK Acts of Parliament.

15. The FUW believes that the Assembly's role in the process needs to be formalised to prevent inappropriate legislation or parts of legislation being implemented in Wales.

16. At present, when a UK Act of Parliament confers powers directly onto Welsh Ministers, the Standing Orders, particularly Standing Order 30, only requires a written statement regarding the Bill and its provisions. Once this statement has been laid, there is no requirement for it, or the actual legislation, to be scrutinised by the Business Committee or, by referral, a relevant Committee.

17. The Union supports the comments made by the Constitutional Affairs Committee during the third Assembly regarding amending the Standing Orders to enable legislation applied to both the Assembly and individual Welsh Ministers to be scrutinised at an appropriate point. The subsequent changes made to the Standing Orders, particularly Standing Order 30, appear to be insufficient to address these recommendations and subsequently the level of scrutiny which can be undertaken.

18. If Welsh Ministers are to be more accountable to the National Assembly and the relevant Assembly Committees, the Union believes that Standing Order 30 should be amended to increase the level of scrutiny of UK legislation which confers powers directly onto Welsh Ministers.

19. These amendments should include referral of the statement and the actual legislation to the Business Committee who, in turn, would be able to scrutinise and comment on the documents or refer them to the Committee with the relevant knowledge and expertise to undertake this work. Similar provisions are contained within paragraph 29.4 of Standing Order 29 which the Union believes could be used as a basis to amend Standing Order 30.

20. Standing Order 21, paragraphs 21.8 and 21.9, already confers powers on a 'responsible Committee' to consider draft European Union legislation and make written representations on behalf of the National Assembly, to the relevant Committee in the House of Commons or the House of Lords. The Union also believes that, with some minor amendments, there is scope within this Standing Order to extend this to include the scrutiny of UK legislation which confers powers directly onto Welsh Ministers.

The relevance of the UK Government's Devolution Guidance Notes in the light of recent Welsh constitutional developments.

21. The Union is concerned that the Devolution Guidance Notes have yet to be updated to reflect the changes in the powers afforded to the National Assembly following the outcome of the Referendum. It believes that this work should be undertaken as a matter of urgency to ensure that UK Government acts appropriately following the changes brought about by the Referendum.

The procedures for Legislative Consent Motions compared to the position in the other devolved legislatures.

22. The Union welcomes the changes to Standing Order 29, for the fourth Assembly, which bestows the appropriate Assembly Committee with the ability to scrutinise and report on a Legislative Consent Motion (LCM) and the legislation which led to it being tabled.

23. In practice, this scrutiny can only take place if the Business Committee refers the LCM to the relevant Committee. The Union believes that the Business Committee should be required to refer all LCMs to the most appropriate Committee. This would allow the legislation to be fully debated and reported and allow the tabling of amendments which would allow the legislation to be adapted for Wales.

24. The Union also believes that an Assembly Committee should be able to request the referral of an LCM to it if it believes that it is important or could have implications for the work areas within its remit.

25. The FUW supports the conclusion of the Scottish Parliament's Procedures Committee in its report on 'The Sewel Convention' that "any legislation must either be the product of its own deliberations [the Scottish Parliament] or require its explicit consent. Either way, it remains in control".

29th September 2011

CLA GP6

Constitutional and Legislative Affairs Committee

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

Response from Welsh Refugee Council

Response by the Welsh Refugee Council to the Constitutional and Legislative Affairs Committee into the Granting of Powers to Welsh Ministers in UK Law

Prepared by Mike Lewis, CEO
Mike.lewis@welshrefugeecouncil.org

& Daisy Cole, Head of Influencing, PR & Child Policy
Daisy.cole@welshrefugeecouncil.org

029 20489 800
Phoenix House, 389 Newport Road, Cardiff, CF24 1TP

Background on the Welsh Refugee Council

1. The Welsh Refugee Council was established in 1990 and now employs 32 staff and has 60 volunteers. Its head office is in Cardiff and it has offices in Newport, Swansea and Wrexham. In 2010/11 it provided 22,366 advice sessions to asylum seekers, and provided nearly 7,000 advice sessions to refugees. As well as providing advice services to asylum seekers and refugees it has an influencing role and function. It receives funding from the Welsh Government, UK Border Agency, Diana Fund, Children in Need, Community Fund and Lloyds TSB Charitable Trust.

Inquiry Response

2. We are pleased to respond to this inquiry. As is generally agreed Devolution is a process which most commentators, including ourselves, arguing that it has made significant benefits to the people of Wales. As Devolution has matured stating the obvious the complexity of law making has increased and we welcome how this process is being embedded into the thinking and practice of the National Assembly for Wales.

3. One of our many roles is to explain to Refugee Community Groups about how the process of influencing the political process is structured in Wales and strategies for influencing both the National Assembly for Wales and the Welsh

Government. We are therefore after a simple, clear and straight forward process free of nuance and subtext, which has clear outcomes within the process and is easily understood. Whether this is possible is a challenge and we would like any changes made to be measured against this framework. This is especially important if all sectors in civil society are to engage effectively with the law making processes.

4. If given a simple choice between Westminster legislation giving powers to Welsh Ministers or the National Assembly for Wales giving powers to Welsh Ministers, we would like one approach that is consistent. However we are aware that the devolutionary settlement does not allow this currently. However, whilst it may be good for the process to be clear to the citizen if one approach was adopted we do not want simplicity to replace effectiveness.

5. We are aware of the deficiencies in the powers of Welsh Ministers, which are articulated in provision about Welsh Ministers in the UK August 2011 and we do not intend amplifying them further in our submission.

6. Our specific concern in responding to this is to ensure a high level of monitoring between a UK Government function which is non-devolved such as immigration. We often see lack of clarity operationally between London and Cardiff in the interface of two competing jurisdictions. As an example the current UKBA Consultation on Family Migration takes no account that health is a devolved competency. It in fact suggests a challenge to Welsh Government Policy and Practice. We would therefore like Welsh Ministers to have a more robust scrutiny role when there is an interaction between UK and Welsh Legislation and Policy and Practice. This is especially important where Cross Party Support in Wales articulates a significantly different approach to broad social issues such as Child Safeguarding or the Protection of Vulnerable Adults. Immigration may also be considered to be one of these issues. As an example the National Assembly for Wales sees inclusion as a two way process between refugee and host community. Whereas UK Government sees integration as being the responsibility of the refugee solely.

7. As a significant example which currently concerns us UKBA and WLGA are developing proposals on ‘Age Assessment’ of asylum seeking children which has no involvement of Welsh Government, the Children’s Commissioner or broader civil society. Under our current system of legislative scrutiny these arrangements can continue without any scrutiny, which affects Welsh children as evidenced by the commitments articulated in the recent Refugee Inclusion Strategy and Refugee Inclusion Action Plan. We would therefore like powers for Welsh Ministers to increase so they are able to monitor the level of protection required so that it is consistent with the Welsh Government policy framework.

8. Additionally we see inconsistencies in the way that London and Cardiff deal with the monitoring of International Conventions and again we would like consideration to be given to the scrutiny of International Treaties, so it is consistent up and down the M4 corridor. Welsh Ministers do after all have a range of responsibilities under International Treaties, though they are not

signatories directly per se, they will be responsible for delivering significant Treaty obligations in their own right.

9. In conclusion we welcome the opportunity to respond to this Inquiry and are happy to develop any points raised, if this is felt to be appropriate.

A Michael Lewis
CEO
29th September 2011

'Influence, Represent Negotiate'

The Committee Clerk
Constitutional and Legislative Affairs Committee
Tŷ Hywel
National Assembly for Wales
Cardiff CF99 1NA

E-mail: CLA.Committee@wales.gov.uk

Dear Sir,

Consultation – The granting of powers to Welsh Ministers

1. Introduction

The Police Federation was formed in 1919 by an Act of Parliament. In the UK, it currently represents over 140,000 police officers and some 7,600 in Wales. This is made up of 98% of all uniformed and CID ranks from Constable to Chief Inspector. The Superintendents Association and Association of Chief Police Officers form the remaining 2%.

The Federation's membership comes from each of Wales' four police forces. It's staff – who are themselves, serving police officers – are elected to their respective roles.

The Federation was established to protect and promote the 'welfare & efficiency' of police officers and in its discharge of functions as laid down by statute.

2. Overview

The Police Federation of England & Wales (*The Federation*) welcomes the opportunity to provide advice to The Constitutional and Legislative Affairs Committee concerning the granting of powers to Welsh Ministers.

The Federation recognises that there is a changing and differing constitutional base across the UK and as such, the matters being investigated by the Committee are both timely and highly relevant to how 'Cardiff & London' operate in the future. Given that The Federation is a UK-wide organisation, within our submission, we will naturally have a view from both sides of the border.
It may prove useful to the Committee that our submission does answer some (not all) of the issues raised in the consultation, but also, quite deliberately,

touches upon areas that may be regarded presently as being on the periphery. We fully accept that, but the issues and examples we raise are of importance, both historically and in the future and need to be identified as being noteworthy, or even subject to debate, as the devolved power base of Wales changes.

The Federation are happy to have this advice placed in the public domain; we do not however, think we could add further to this advice to the Committee by appearing to give oral evidence.

The Federations advice to the Committee is submitted not as a *'constitutional expert'* but moreso as we regard, as coming from a *'unique user'*. The relevance to that classification is that The Federation recognise that an imbalance exists between the two government institutions at London and Cardiff, whereby *criminal law* is devolved, yet *criminal justice* is presently not devolved. This anomaly places strains and some ambiguity on how policy and powers – moreover their understanding - become devolved and their impact upon existing or planned Welsh Government policy, conferred or granted powers and directions. There are, in short, loose ends within our remit that The Police Federation continually have to focus upon from matters raised by The Welsh and UK Governments.

Devolved functions and responsibilities that impact upon policing in Wales include:

- Council Tax "capping" policy for local and police authorities;
- The unhypothecated funding of local authorities and police authorities in Wales through the local government revenue and capital settlements;
- Cross cutting responsibilities for the strategic approach to the delivery of public services including performance and collaboration, including such policing services;
- Community Safety;
- Relations with the Police and other Criminal Justice Agencies, including counter-terrorism issues (and the part funding thereof such as Wales Extremist & Counter Terrorism Unit);
- Youth Justice;
- Drug and alcohol misuse (including the delivery of the substance misuse strategy);
- Domestic violence;
- Road Safety.

The above are wide ranging and any movement generated by 'UK policy' or 'UK powers' in these matters could create a further imbalance on how the 'UK police' are trained and implement initiatives on the ground for such changes specific in Wales. Naturally this could include powers granted to Welsh Ministers.
It is worthy to note that in November 2006 at an HM School of Governance seminar held in The Senedd, Sir Jeremy Beecham (Beecham Report *'Beyond Boundaries'* on public sector workings), stated that *"policing will fall within the*

cracks of devolution". It is a concern that The Federation share, that given the diversity of modern day policing and the demands placed up it. This should be viewed against a backdrop that there does exist a lack of 'coherence' between London and Wales that issues which do affect policing (and the service we give to the public) could, given the devolved settlement, become for Wales, more undefined and un-scrutinised. At its extremities, this issue has potential to become arguably un-democratic and lacking in transparency.

There is a danger therefore, that any subject issue that is prefixed 'policing' – howsoever defined - may seemingly not be considered by London as being of relevance to Wales (when in fact it is) or not worthy of consideration in Wales by the Welsh Government, perhaps through a lack of knowledge.

It would be fair to state, that the understanding of Welsh devolution by Westminster & Whitehall is poor. As such, in 2006, during the *'Police amalgamation process'* under Home Secretary Charles Clarke, we saw policing minister Tony McNulty attending 'the Assembly' completely unaware of the roles and responsibilities of Welsh Ministers in respect of policing.

Later in 2009 during an inquiry led by the House of Commons, Welsh Affairs Committee, the former First Minister, Rhodri Morgan and Sir Jon Shortridge (Permanent Secretary in Wales) gave evidence to the effect that *'London did not understand devolution'* and that *'devolution was seen as an experiment'.*

Of late, under the current UK-coaltion Government, the progression of the *Police Reform Bill*, sees a serious lack of understanding by the Police Minister, Nick Herbert on the functions and responsibilities of Welsh Ministers; this criticism is extended also to his government officials. Indicative of this, is the result witnessed by the Legislative Consent Motion on parts of that Bill rejected by The National Assembly for Wales on already devolved functions.

It is worthy to note that prior to this, in 2009, *'The all-Wales Convention'*, headed by Sir Emyr Jones-Parry highlighted in his report (Chapter 4) of concerns in respect of policing and that it was by *"default rather than design"* that the Home Office had some understanding of devolution. This was resolved simply as David Hanson, a Welsh MP, just so happened to be the Minister of State for Policing. Such was the concern that it warranted inclusion in the Conventions report. Seemingly nothing has changed.

Taking the above into consideration, The Federation therefore submits that given the concurrent misunderstanding of the mechanisms of devolution in Wales that as and when powers become 'devolved' and/or 'granted' to Welsh Ministers, they too are likely to have had little or no understanding of present Welsh powers – and how it affects policing - or indeed how they impact upon the development of unique and current Welsh policy. Ergo, any scrutiny will be lacking, missed or un-researched. This then *de facto* extends towards how Ministers in Wales receive such powers, how they are interpreted or are ultimately held accountable for such powers.

It is only with a high degree of detailed advice from stakeholders that such issues can be captured. For example, The Police Federation have, over successive years, been progressing matters in respect of 'mental health'; a serious issue the police are operationally facing daily. Given all-party support in Wales a 'Mental Health (Wales) Measure' – now termed a Bill – has been placed upon the statute. It awaits secondary legislation to 'fill-in' details.

That framework legislation has subsequently been progressed in Wales and The Federation shall be progressing, complex issues, such as, and in lay terms, on how those arrested under S135 and S136 of the Mental Health Act can be dealt with by police, in a non-devolved capacity, but under devolved 'Welsh law'.

The previous UK Labour Government (under Welsh Secretary Paul Murphy) had to have substantial advice passed to their offices to allow 'the boundaries to be stretched' via the [then] LCO process so as to facilitate – in the future – such issues that Welsh Ministers wished to progress that were quite different to those of UK Ministers. Clearly this *ad hoc* process is not conducive with clarity or a smooth transition of devolved powers. The result being that when powers were granted to Health Minister, Edwina Hart AM, the Police Federation had to re-advise of its concerns. But from the police's perspective, (not the NHS) that process, at that very early stage did not have scrutiny by The National Assembly for Wales of the Minister. It was subsequently recognised and rectified. But this issue was reflective of an embryonic legislative and constitutional system that was flawed.

The present Welsh Government are to progress a *Domestic Violence (Wales) Bill*. It has been advised – in Plenary by The First Minister - that there is not to be any criminal justice elements to the Bill, but it will *"place a duty on relevant public sector bodies to have a domestic abuse and 'a violence against women' strategy and support elements in place".* Clearly this process will involve the police and The Police Federation will examine the Bill when it is published.

But to physically affect this future strategy, there will be a need to be a change to current 'policing procedures' and indeed this would demand dedicated training of officers and perhaps additional funding for the police to meet the demands of the new polices in place.

Although, the Bill hasn't been published, natural supposition leads us to highlight that such a strategy should lie in parallel to the current powers of policing (for example *'powers of entry'*). Of course by the very nature of developing legislation, that Bill may well change in its terms. The danger being that this could then start to create differing 'police powers' in Wales to that of England. That in itself could become an issue if such powers were to be granted from Westminster – no matter how small – and indeed how Welsh Ministers could be scrutinised on 'policing' in this respect.

The Police Federation accept that this scenario is presently hypothetical, but the reality exists that a Bill will be forthcoming and if such a Domestic

Violence Strategy – backed by legislation - is to be effective then it will need to have 'teeth'.

A further example – albeit in the future is worthy of mentioning. That of 'Smoking in Cars'. The Welsh Government have consulted upon this issue and may decide to progress a Welsh law to stop smoking in cars that have children under the age of 16 as passengers. The Police Federation have submitted evidence in this respect. Essentially, there is no evidence to support that smoking (*per se*) is a road safety issue, but considerable evidence that smoking is a health issue.

Therefore, if the Welsh Government were to follow a legislative route, scrutiny of existing Welsh Ministers powers could be examined for an already devolved function (health) but possibly implemented by a non-devolved function (policing).

In effect 'the police' may be directed to uphold this law, that itself, would require some serious thinking between Cardiff and London on where that power and responsibility lays and with whom, The Home Secretary or The Wales Health Minister.

Conclusion:

The Criminal Justice system is not alone in these issues, as an example a Transfer of Function Order was made to allow 'education' to be a devolved function to allow teaching in prisons (a non-devolved area), so the problems above are fairly well rehearsed.

The Committee will know that these debates have been made across many portfolios and are regularly exercised. They are reflective of where the dynamic constitutional base of Wales currently lays. Policing has its feet in many camps, acting in both non-devolved and devolved capacities and that adds up to unclear lines of responsibilities and likely continuous legal advice being taken on where powers actually lay. Moreover where scrutiny lays for Welsh Ministers ahead of, or after powers have been granted.

This can be best be defined by the words of David Lambert (Cardiff Law School) who said of devolution *"...we are entering the unknown, a weather-vane of politics, we will all need to look four ways, to Westminster, Cardiff bay, Whitehall and Cathays park. What we have is a seismic shift in constitutional matters, in policy areas and in Wales only law making powers that is going to test the political will, mechanisms and strength of governments. What Wales has, is unique in any government structure and in legislative capacity….."*

The Police Federation firmly believe that a stout mechanism should exist between The Welsh Government and The National Assembly for Wales to capture these non devolved/devolved issues. And that any powers to be conferred upon Welsh Ministers should have an 'open conduit' – ahead of powers being devolved - to allow advice to be passed to both London and

Cardiff upon the implications of such Welsh/English policy. Furthermore, that pre scrutiny could exist so that Ministers can be questioned by subject Committees, perhaps a function of the Constitutional Committee, on where such powers will likely sit amongst Welsh Government policy and for 'the Assembly' (a generic terminology) to define those lines of scrutiny.

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.

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

Cynulliad Cenedlaethol Cymru
National Assembly for Wales

Constitutional and Legislative Affairs Committee

Report: CLA(4)-06-11 : 3 October 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

CLA41 - The Education (Information About Individual Pupils) (Wales) (Amendment) Regulations 2011
Procedure: Negative.
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
Procedure: Affirmative.
Date made: not stated.
Date laid: not stated.
Coming into force date: 1 February 2012

The Committee decided to write to the Minister for Education and Skills to clarify the reason for the different coming into force dates in England and Wales.

Instruments that raise reporting issues 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
Procedure: Negative.
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

The Committee agreed to write to the Deputy Minister for Agriculture, Food, Fisheries and European Programmes to thank him for his undertakings that in future:

- a Welsh language version of instruments made jointly with the UK Parliament would be provided; and
- Explanatory Memorandums for such instruments would be provided in a way that would include both a Welsh perspective and be addressed to the relevant Assembly Committee

The Committee also agreed to clarify with Deputy Minister whether:

- his undertakings applied to all the Welsh Ministers; and
- in the case of these regulations, an assessment had been made of the impact of the regulations on Wales alone.

Affirmative Resolution Instruments

CLA39 - The Mental Health (Independent Mental Health Advocates) (Wales) Regulations 2011
Procedure: Affirmative.
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
Procedure: Affirmative.
Date made: 2011.
Date laid: not stated.
Coming into force date: 6 June 2012

The Committee agreed the Reports under S.O.21.2 and S.O.21.3 on these statutory instruments, which are attached as Annexes 1 - 3.

Other Business

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

The Committee took oral evidence from David Lambert, Research Fellow; Marie Navarro, Research Associate and Manon George, Research Assistant, from the Wales Governance Centre.

Resolution to Meet in Private

In accordance with Standing Order 17.42(vi) the Committee resolved to exclude the public from the remainder of the meeting to discuss the evidence submitted thus far on the Inquiry into the Granting of Powers to Welsh Ministers in UK Laws.

David Melding AM
Chair, Constitutional and Legislative Affairs Committee

3 October 2011

Annex 1

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.

Annex 2

Constitutional and Legislative Affairs Committee Report

CLA39

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.

David Melding AM
Chair, Constitutional and Legislative Affairs Committee

3 October 2011

Annex 3

Constitutional and Legislative Affairs Committee Report

CLA40

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.

David Melding AM
Chair, Constitutional and Legislative Affairs Committee

3 October 2011