

Constitutional Affairs Committee Draft Report

CA581

Title: The Waste (Miscellaneous Provisions) (Wales) Regulations 2011

Procedure: Negative

These Regulations are supplementary to the Waste (England and Wales) Regulations 2011 (“the England and Wales Regulations”). They make amendments to several Welsh statutory instruments for the purposes of transposing, in relation to Wales, Directive 2008/98/EC of the European Parliament and of the Council on waste (OJ No. L 312, 22.11.2008, p3). They also revoke, for the same purpose, one Welsh statutory instrument.

Technical Scrutiny

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

Merits Scrutiny

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

1. These Regulations have failed to be implemented in Wales within the time frame set by the revised Waste Framework Directive (“the RWFD”). The UK (including the devolved administrations) was required to transpose the RWFD by 12th December 2010. The UK Government has not met that deadline. The Minister for Business and Budget has written to the Presiding Officer notifying him of the reasons pertinent to the breach. The primary reason was that it was necessary to wait for the England and Wales Regulations to be made in the first instance because it was those Regulations that principally transposed the RWFD. The Waste (Miscellaneous Provisions) (Wales) Regulations 2011 (“the Welsh Regulations”) make a number of consequential amendments to Welsh Statutory Instruments which had been made by the Welsh Ministers previously. The need for separate legislation was because the Welsh instrument must be made bilingually, and the UK Government, for administrative reasons in the context of the transposition timetable, were unwilling to include such amendments in the England and Wales Regulations.

(Standing Order 21.3 (iv) – that it inappropriately implements European Union legislation.)

2. Regulations made under section 2(2) of the European Communities Act 1972 can be made using either the negative or affirmative procedure. The choice of procedure is at the discretion of the maker of the regulations (in

this case the Welsh Ministers) and no criteria are laid down in law for doing so.

These particular regulations were made in breach of the 21-day rule. The reasons for the breach were set out in the then Minister for Business and Budget's letter of 28 March 2011 to the Presiding Officer. Her letter also offered the following explanation for the use of the negative procedure in this case:

"...the choice of procedure has depended on the nature of the provision being made rather than procedural considerations. The Wales Regulations do not substantially affect the provisions of an Act of Parliament or Assembly Measure, they do not amend any provision of an Act or Measure, and provide only for consequential updatings of subordinate legislation to reflect changes in Directive terminology and objectives. It was concluded, therefore, that it would not be appropriate to make the Wales Regulations under the affirmative procedure."

The Committee is wholly content with this explanation. Moreover, the Committee believes that it also provides important and useful criteria for judging whether any future legislation made under these powers (or legislation where Ministers have similar discretion over the procedure to be used) should be made by the affirmative or negative procedure.

The Committee believes that it would be helpful if explanatory memorandums relating to any future use of such powers could set out briefly, as a matter of special interest to the Committee, how the criteria set out in the Minister's letter have been used to judge whether to use the negative or affirmative procedures.

(Standing Order 21.3 (ii) – that it is of political or legal importance.)

Legal Advisers

Constitutional Affairs Committee

April 2011

The Government has responded as follows:

The Waste (Miscellaneous Provisions) (Wales) Regulations 2011

The Government has explained, through the Minister for Business and Budget's letter to the Presiding Officer, why it was necessary for the Welsh Regulations to contain provisions which refer to and depend on provisions in the England and Wales Regulations. It followed from this that the Welsh Regulations could not be made earlier than the England and Wales Regulations. As to those Regulations, the Government would point out that the revised Waste Framework Directive introduces several new provisions, in

addition to consolidating earlier Waste Directives, and places emphasis on engagement with stakeholders. The Government therefore considered it necessary to engage effectively with stakeholders through extensive public consultation before introducing the necessary legislation. However, the issues arising from the consultations had an impact on the timetable for the transposition of the Directive. The Government regrets this, but considers that its consultation and consideration of the issues arising has helped to ensure a more effective implementation of the Directive in Wales.