

## Constitutional and Legislative Affairs Committee Draft Report

CLA150

### Title: Statutory Guidance to Risk Management Authorities – Flood and Water Management Act 2010

1. “The purpose of the guidance is to provide advice to enable Risk Management Authorities to work together constructively to manage flood and coastal erosion risk. It also aims to ensure that when information is requested, it is done in an appropriate way.”
2. On the 18<sup>th</sup> May 2012, the Statutory Guidance was laid before the National Assembly together with a brief Explanatory Note. Statutory guidance may (or may not) constitute subordinate legislation. The usual test is whether or not the guidance is legislative in character. The persons (including public bodies) to whom the guidance is directed are required to have regard to such guidance. In practice this means that they must have a very good reason for not following that guidance. That reason must be capable of justifying the course of action adopted in any judicial review proceedings.
3. The Guidance under consideration is largely concerned with practical arrangements, and includes information such as contact details of the relevant authorities. It might therefore be argued that it is not legislative in character. However, the procedure applicable to it is distinctly legislative in character.

#### Enabling power

4. The enabling power is section 8 of the Flood and Water Management Act 2010 (“the Act”), subsection (1) of which provides that –

*“The Welsh Ministers must develop, maintain and apply a strategy for flood and coastal erosion risk management in Wales (a “national flood and coastal erosion risk management strategy”).”*

It is in that context that subsection (6) of that section provides that –

*“The Welsh Ministers may, in particular, issue guidance about how Welsh risk management authorities are to comply with the duties under sections 13(1) and 14.”*

5. Section 13(1) requires relevant authorities to “*co-operate with other relevant authorities in the exercise of their flood and coastal erosion risk management functions.*”  
Section 14 empowers Welsh Ministers, the Environment Agency and

lead local flood authorities to request a person to provide information in connection with their flood and coastal erosion risk management functions.

The guidance applies to the duty to co-operate and the requesting of information.

## **Procedure**

6. What makes this guidance unusual is the procedure applicable to it. That procedure is set out in section 8(7) as follows –  
*“The Welsh Ministers must lay any guidance in draft before the National Assembly for Wales; and it may not be issued if during the period of 40 days beginning with the date of laying (ignoring any periods for which the National Assembly is dissolved or is in recess for more than 4 days) the National Assembly resolves that it should not be issued (in that form).”*

7. Statutory guidance is not usually subject to an Assembly procedure, but in this case there is a variation on the negative procedure. As in negative procedure cases, the guidance can be made and come into force unless the Assembly resolves to the contrary within a specified period. However, in the case of statutory instruments made under a negative procedure, the instruments are normally made before they are laid. In this case, the guidance is laid in draft, and may not be made until the end of the specified period. The procedure therefore provides a greater measure of scrutiny than a standard negative procedure.

## **Scrutiny**

8. If the guidance is therefore regarded as subordinate legislation not made by statutory instrument, the Constitutional and Legislative Affairs Committee may report on it under Standing Order 21.7(i). Even if it is not so regarded, the Committee may still report on it as being a legislative matter of a general nature under Standing Order 21.7(v). It would be such a matter by virtue of the fact that similar procedures are proposed in the School Standards and Organisation (Wales) Bill (“the Bill”) currently before the Assembly. Section 33 of the Bill gives the power to Welsh Ministers to issue school improvement guidance but subject to a scrutiny procedure laid out in section 34 of the Bill. Similarly section 39 of the Bill sets out a procedure for Welsh Ministers to issue a Statutory Code on school organisation. The present case therefore provides an opportunity for the Committee to express a view on whether this procedure is appropriate, and whether it is, by virtue of that procedure, to be regarded as subordinate legislation for the purposes of the Assembly and its Standing Orders.

## **Technical Scrutiny**

9. For the record, no technical points are identified that would have been reported under Standing Order 21.2 if this had been a statutory instrument.

### **Merits Scrutiny**

10. Similarly, no merits points are identified that would have been reported under Standing Order 21.3 if this had been a statutory instrument.

This matter is drawn to the attention of the Assembly under Standing Orders 21.7 because it raises legislative and procedural issues likely to be of interest to the Assembly.

### **Legal Advisers**

Constitutional and Legislative Affairs Committee

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