



Constitutional and Legislative Affairs Committee

Report: CLA(4)-12-12 : 28 May 2012

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

CLA145 – The Velindre National Health Service Trust Shared Services Committee (Wales) Regulations 2012

Procedure: Negative.

Date made: 8 May 2012.

Date laid: 11 May 2012.

Coming in to force date: 1 June 2012

CLA146 – The Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) (Amendment) Regulations 2012

Procedure: Negative.

Date made: 9 May 2012.

Date laid: 11 May 2012.

Coming into force date: 2 June 2012

CLA148 – The Tobacco Advertising and Promotion (Display) (Wales) Regulations 2012

Procedure: Negative.

Date made: 14 May 2012.

Date laid: 16 May 2012.

Coming into force date: in accordance with regulation 1(1)

CLA149 – The Tobacco Advertising and Promotion (Specialist Tobacconists) (Wales) Regulations 2012

Procedure: Negative.

Date made: 14 May 2012.

Date laid: 16 May 2012.

Coming into force date: 6 April 2015

Affirmative Resolution Instruments

CLA147 – The Tobacco Advertising and Promotion (Display of Prices) (Wales) Regulations 2012

Procedure: Affirmative.

Date made: Not stated.

Date laid: Not stated.

Coming into force date: in accordance with regulation 1(1)

Other Legislation

CLA150 – Statutory Guidance to Risk Management Authorities – Flood and Water Management Act 2010

The Committee considered Statutory Guidance to Risk Management Authorities – Flood and Water Management Act 2010. The Committee took into account that although the Guidance is largely concerned with practical arrangements, the procedure applicable to it is distinctly legislative in character. Therefore, the Committee decided that it would scrutinise guidance to which such a procedure applies. Nevertheless, the Committee agreed that the only matter worthy of report on this occasion was the procedure applicable to the Guidance. The Committee's report on this Guidance is attached as Annex 1 to this Report.

Instruments that raise reporting issues under Standing Order 21.2 or 21.3

Negative Resolution Instruments

None

Affirmative Resolution Instruments

None

Other Business

CLA CM4 – Consent Memorandum for The Public Bodies (Abolition of Her Majesty's Inspectorate of Courts Administration and the Public Guardian Board) Order 2012

The Committee considered CLA CM4 – Consent Memorandum for The Public Bodies (Abolition of Her Majesty's Inspectorate of Courts Administration and the Public Guardian Board) Order 2012. Although it was observed that it would be clearer if the abolition of the Public Guardian Board and the HM Inspectorate of Court Administration were achieved through the making of two different orders, the Committee had identified no reason why consent should be withheld and recommended that it was content with the current Order.

Committee Inquiries: Inquiry into the establishment of a separate Welsh jurisdiction

The Committee took oral evidence from Elfyn Llwyd MP, Group Leader, Plaid Cymru, House of Commons. Mr Llwyd agreed to seek to provide additional statistical information in respect of the number of administrative law cases heard in Wales since 2010, when a specific office was established in Cardiff to deal with the Administrative Court claims.

School Standards and Organisation (Wales) Bill

The Committee took oral evidence from Leighton Andrews AM, Minister for Education and Skills, Welsh Government in respect of the School Standards and Organisation (Wales) Bill. The Minister was accompanied by the following Welsh Government officials: Anthony Jordan, Head of School Governance and Organisation, Amina Rix, Lawyer, Simon Morea, Lawyer, Ceri Planchant, Lawyer, Welsh Government. The Minister has promised to provide additional information in respect of:

1. The Draft of the School Organisation Code at the stage 2 proceedings
2. Details of where the powers contained in section 58, section 67, section 82 and para. 34(1)(b) of Schedule 5 are currently to be found and, specifically, whether, and if so when these powers have been used.
3. A table of derivations setting out the sources of the legislation proposed to be consolidated in the present Bill.

Food Hygiene Rating (Wales) Bill

The Committee considered the Food Hygiene Rating (Wales) Bill laid before the Assembly 28 May 2012 and decided to invite the Minister for Health and Social Services Lesley Griffiths AM to give evidence.

Resolution to Meet in Private

In accordance with Standing Orders 17.42(vi) and (ix) 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 establishment of a separate Welsh jurisdiction, the evidence on the School Standards and Organisation (Wales) Bill and the Welsh Government's Response to the Inquiry into Powers granted to Welsh Ministers in UK Laws.

David Melding AM
Chair, Constitutional and Legislative Affairs Committee

28 May 2012

Annex 1

Constitutional and Legislative Affairs Committee

(CLA(4)-12-12)

CLA150

Constitutional and Legislative Affairs Committee Report

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 18th 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 provided an opportunity for the Committee to consider and 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.

David Melding AM

Chair, Constitutional and Legislative Affairs Committee

28 May 2012