

Constitutional Affairs Committee

Report (CA (3) 08-10)

Date: 11 March 2010
Time: 9.00am
Venue: Committee Room 2, Senedd

CONTENTS

The Committee met on 11 March 2010. At the meeting the following Committee Members were present: Janet Ryder AM, Mike German AM, William Graham AM and Alun Davies AM. Apologies were received from Rhodri Morgan AM. There were no substitutions.

The Committee reports to the Assembly as follows:

Instruments and draft instruments in respect of which the Assembly is not invited to pay special attention under Standing Order 15.2 and 15.3

Instruments subject to annulment pursuant to a resolution of the Assembly (Negative Procedure)

CA406 - The Home Energy Efficiency Schemes (Wales) (Amendment) Regulations 2010

Negative Procedure. Date made 24 February 2010. Date laid 26 February 2010. Coming into force date 22 March 2010

CA407 - The Fire and Rescue Authorities (Improvement Plans) (Wales) Order 2010

Negative Procedure. Date made 24 February 2010. Date laid 1 March 2010. Coming into force date 1 April 2010

CA408 - The Local Government (Performance Indicators and Standards) (Wales) Order 2010

Negative Procedure. Date made 24 February 2010. Date laid 1 March 2010. Coming into force in accordance with article 1(2) and (3)

Draft instruments subject to approval pursuant to a resolution of the Assembly (Affirmative Procedure)

CA404 - The Animal Welfare (Electronic Collars) (Wales) Regulations 2010

Affirmative Procedure. Date made not stated. Date laid not stated. Coming into force date not stated.

Instruments and Draft Instruments in respect of which the Assembly is invited to pay special attention under Standing Orders 15.2 and/or 15.3

Instruments subject to annulment pursuant to a resolution of the Assembly (Negative Procedure)

CA405 - The Planning (Hazardous Substances)(Amendment)(Wales) Regulations 2010

Negative Procedure. Date made 24 February 2010. Date laid 26 February 2010. Coming into force date 19 March 2010

The Committee agreed that the delay of four and a half years in implementing the 2003 Directive should be reported as a matter of legal importance under Standing Order 15.3(ii). The Committee also agreed to draw the issue to the attention of the Sustainability Committee and the Merits of Statutory Instruments Committee of the House of Lords.

Draft Instruments subject to approval pursuant to a resolution of the Assembly (Affirmative Procedure)

CA402 - The Safeguarding Vulnerable Groups Act 2006 (Controlled Activity) (Wales) Regulations 2010

Affirmative Procedure. Date made not stated. Date laid not stated. Coming into force date in accordance with regulation 1

The Committee agreed Reports under S.O.15.2 and S.O.15.3 on these Regulations, which are attached as Annexes 1- 2.

Other Business

Committee Inquiries: Inquiry into the Developments in Schedule 5 to the Government of Wales Act 2006, including Exceptions to Matters

The Committee took oral evidence from Lee Waters, National Director of SUSTRANs Cymru.

Consideration of the Proposed Carers Strategies (Wales) Measure – Oral Evidence from the Deputy Minister for Social Services Gwenda Thomas AM

As part of scrutiny of the Proposed Carers Strategies (Wales) Measure conducted under SO 15.6 (ii) (the Committee may consider and report on “the appropriateness of provisions in Proposed Assembly Measures ... that grant powers to make subordinate legislation to the Welsh Ministers”) the Committee heard evidence from the Deputy Minister for Social Services Gwenda Thomas AM.

The Deputy Minister agreed to provide further information on existing legislation that provided clarification of provisions in the proposed

Measure, such as the Mental Capacity Act. She also agreed to provide the Committee with a note reflecting on the lessons learned from the process of securing the Carers' Legislative Competence Order, in particular seeking Whitehall clearance and on joint working between the Wales Office and the Welsh Government.

Committee's Inquiries – additional information

The Members noted additional evidence for the Committee's Inquiry into Monitoring the outcome of the Committee's Reports on Statutory Instruments: Consolidated Schedule 5 to the Government of Wales Act 2006, Schedule 7 Acts of the Assembly, the National Assembly for Wales (Legislative Competence) (Exceptions to Matters) Order 2009; Pre-legislative Scrutiny of Legislative Competence Orders and Legislative competence under Schedule 5 not contained under Schedule 7. The Additional evidence was provided by Wales Governance Centre, Members Research Service and Welsh Government.

The Committee asked the Legal Advisers to consider the information contained in the papers 9 and 10 – "Consolidated Schedule 5 to the Government of Wales Act 2006" and "Schedule 7 Acts of the Assembly" and to provide further analysis of Schedule 7 as originally drafted; any subsequent amendments to these powers and the changes to competence after a referendum, with the emphasis on the issue of the significance of the powers to be lost. The Committee also agreed to write to the Counsel General for his views on these issues.

Committee Correspondence: Regulations resulting from Measures - NHS Redress (Wales) Measure 2007

The Committee noted the response of the Chair of the Health, Wellbeing and Local Government Committee Darren Millar AM to the letter from the Chair of the Constitutional Affairs Committee in which the attention was drawn to the fact that as the Regulations resulting from the NHS Redress (Wales) Measure 2007 were the first substantial Statutory Instrument, the Health, Wellbeing and Local Government Committee might be interested in considering appropriate scrutiny arrangements for them.

In accordance with Standing Order 10.37(vi) the Committee resolved to exclude the public from the remainder of the meeting to discuss the evidence submitted thus far on Inquiry into the Developments in Schedule 5 to the Government of Wales Act 2006, including Exceptions to Matters.

Janet Ryder AM
Chair, Constitutional Affairs Committee

11 March 2010

Annex 1

Constitutional Affairs Committee

(CA(3)-08-10)

CA402

Constitutional Affairs Committee Report

Title: The Safeguarding Vulnerable Groups Act 2006 (Controlled Activity) (Wales) Regulations 2010

Procedure: Affirmative

These draft Regulations specify the circumstances in which employers (“responsible persons”) may permit individuals to undertake work in Wales which is a controlled activity as defined in sections 21 and 22 of the Safeguarding Vulnerable Groups Act 2006 (“the Act”), and which the individual was not already engaged in for that employer when these Regulations come into force. The employer will either have to be satisfied that the individual is not on a barred list, nor on a list which predates the Act pending migration to one of the barred lists, or have seen an enhanced criminal record certificate (“CRB disclosure”) or a notification that the individual is not on such a list issued within the previous 90 days.

Technical Scrutiny

No points are identified for reporting under Standing Order 15.2 in respect of this draft instrument.

Merits Scrutiny

The following points have been identified for reporting under Standing Order 15.3 (ii) in respect of this draft instrument.

Regulations 2 and 3 refer to the Secretary of State issuing a notification under Section 113B of the Police Act 1997 stating that a person is not barred from regulated activity in relation to children and/or vulnerable adults, instead of an enhanced criminal record certificate.

At present the power for the Secretary of State to issue such notification is not provided for in Section 113B of the Police Act 1997.

The Safeguarding Vulnerable Groups Act 2006 (Controlled Activity and Miscellaneous Provisions) Regulations 2010 have been laid in draft

before Parliament for approval by both houses. The draft English Regulations make similar provision to the draft Welsh Regulations, and in addition amend Section 113B of the Police Act 1997 in order to allow the Secretary of State to issue a notification instead of an enhanced criminal record certificate.

The Explanatory memorandum confirms that the draft Welsh Regulations are intended to come into force on 1st April 2010, at the same time as the draft English Regulations.

In the event that there were any delay in the draft English Regulations coming into force, the draft Welsh Regulations would need to be duly delayed.

Janet Ryder AM
Chair, Constitutional Affairs Committee

11 March 2010

Annex 2

Constitutional Affairs Committee

(CA(3)-08-10)

CA405

Constitutional Affairs Committee Report

Title: The Planning (Hazardous Substances) (Amendment) (Wales) Regulations 2010

Procedure: Negative

These Regulations implement, in relation to town and country planning in Wales, Article 12 of Directive 96/82/EC on the control of major accident hazards involving dangerous substances (O.J. No. L. 10, 14.1.1997, p.13) (the Seveso II Directive), as amended by Directive 2003/105/EC of the European Parliament and of the Council (O.J. No. L. 345, 31.12.2003, p.97) (the 2003 Directive).

Technical Scrutiny

Under Standing Order 15.2 the Assembly is invited to pay special attention to the following instrument.

1. Regulation 3(2) refers to Directive 2003/105/EC as being a Council Directive. In fact it is a Directive of the European Parliament and the Council. [Standing Order 15.2(vi)]
2. The English regulation 5(2) states “(2) In paragraph (1) “the established quantity”, in relation to any land, means the maximum quantity which was present on, over or under the land at any one time within the period of 12 months ending on 19 March 2010.” The corresponding Welsh text uses the expression “unrhyw dir” (any land) to correspond to the words underlined above. [Standing Order 15.2(vii)]

Merits Scrutiny

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

The 2003 Directive (made 16 December 2003) contained an implementation date of 1 July 2005 (Article 2.1). Paragraph 5.1 of the Explanatory Memorandum for these Regulations refer to a consultation closing on 28 June 2005. Whilst some delay after that date might be expected, a delay of four and a half years appears remarkable.

The significance of this delay is underlined by the requirement of section 106 of the Government of Wales Act 1998 for the unified National Assembly (as it then was) to implement Community obligations. That requirement was carried forward to Welsh Ministers by section 80 of the Government of Wales Act 2006.

This is a matter of legal importance under Standing Order 15.3(ii) and inappropriately implements European Union legislation under Standing Order 15.3(iv) by virtue of the substantial breach of the implementation provision.

Janet Ryder AM
Chair, Constitutional Affairs Committee

11 March 2010

The Government has responded as follows:

The Planning (Hazardous Substances) (Amendment) (Wales) Regulations 2010

Technical Scrutiny

The two points made in relation to technical scrutiny are accepted as valid and will be dealt with immediately upon publication.

Merits Scrutiny

It has not been possible to meet the transposition deadline of July 2005 due to the need for a co-ordinated approach across the United Kingdom on the issue of whether 'deemed consent' should be available to industry for their existing inventory of substances.

On previous occasions when controlled quantities specified in similar legislation have been lowered, the amending legislation has included provisions to allow the chemical industry to claim 'deemed consent' based on what they held on sites in the twelve months prior to the controls coming into force. This kind of transitional provision was considered appropriate at that time to lessen the effect on industry.

Deemed consent was not included within the 2005 consultation proposals because it was recognised that deemed consent was inconsistent with the Directive's scope and purpose. There were six responses to that consultation in Wales. Only one consultee (the Law Society) voiced concerns about transitional issues.

However, in England, the petroleum industry voiced opposition to the lack of provision for deemed consent in the proposals consulted on..

These concerns stalled progress on the regulations across the United Kingdom. Progress resumed in April 2009 when the Department for Communities and Local Government issued a further consultation paper which included proposals for deemed consent. Following extensive discussion between UK administrations, the England regulations (the Planning (Hazardous Substances) (Amendment) (England) Regulations 2009) were made with no deemed consent provisions.

The Welsh Assembly Government's consultation did not propose deemed consent or any other kind of transitional provision. However, in light of the consultation responses, transitional arrangements have been included in the Regulations that allow operators six months to obtain any necessary additional consents.

It is imperative that these regulations remain as made, as they represent the Welsh Assembly Government's compliance with the United Kingdom's obligation to transpose the Directive. As the Committee has pointed out, this transposition is already some years late. This constitutes a breach – or 'infraction' of the UK's European Union obligation. The European Commission can bring a legal action against a Member State in the European Court of Justice in cases of infraction. In cases such as the present one, where a Member State (or part of a Member State) has failed to transpose a Directive in time, the Lisbon Treaty has accelerated the process so that when a case is brought before the European Court of Justice the Commission may also request immediate fines and or penalties. This accelerates the process by some 2 years on average. Any fines for non-compliance relating to the present regulations would be payable by the Assembly Government as set out in the Devolution Memorandum of Understanding and Supplementary Agreements. Fines/penalties can amount to hundreds of thousands of pounds per day.