

Constitutional Affairs Committee

Report CA(3)-13-10

Date: 13 May 2010
Time: 13.00
Venue: Committee Room 4, Tŷ Hywel

CONTENTS

The Committee met on 13 May 2010. At the meeting the following Committee Members were present: William Graham AM, Rhodri Morgan AM and Mike German AM. Apologies were received from Janet Ryder AM and Alun Davies AM. Ann Jones AM substituted for Alun Davies AM and Dr Dai Lloyd AM substituted for Janet Ryder AM.

In accordance with the Standing Order 10.19 (“each committee has a power to appoint a temporary Chair in the absence of its Chair”) the Committee appointed Dr Dai Lloyd AM as a Temporary Chair.

The Committee reports to the Assembly as follows:

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)

- CA439 - The Meat (Official Controls Charges) (Wales) (Amendment) Regulations 2010
Negative Procedure. Date made 24 April 2010. Date laid 27 April 2010. Coming into force date 25 May 2010
- CA441 - The Gower College Swansea (Incorporation) Order 2010
Negative Procedure. Date made 25 April 2010. Date laid 29 April 2010. Coming into force date 20 May 2010
- CA442 - The Gower College Swansea Further Education Corporation (Government) Regulations 2010
Negative Procedure. Date made 25 April 2010. Date laid 29 April 2010. Coming into force date 20 May 2010
- CA443 - The Food (Jelly Mini-Cups) (Emergency Control) (Wales) (Amendment) Regulations 2010
Negative Procedure. Date made 28 April 2010. Date laid 30 April 2010. Coming into force date 21 May 2010

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

- CA438 - The Health Protection (Local Authority Powers) (Wales) Regulations 2010
Affirmative Procedure. Date made not stated. Date laid 21 April 2010. 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)

- CA440 - The Census (Wales) Regulations 2010
Negative Procedure. Date made 24 April 2010. Date laid 28 April 2010. Coming into force date 16 June 2010

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

- CA437 - The Health Protection (Part 2A Orders) (Wales) Regulations 2010
Affirmative Procedure. Date made not stated. Date laid 21 April 2010. Coming into force date not stated

Although there were no technical reporting points in respect of the CA437, having considered the National Aids Trust's briefing, the Committee decided to report on the 'merits' of these Regulations as they gave rise to issues of public policy likely to be of interest to the Assembly.

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 Correspondence

NHS Redress (Wales) Measure 2007 - Draft of the Regulations resulting from the Measure

The Committee noted the draft legislation, consultation document and background policy paper provided by the Minister for Health and Social Services Edwina Hart MBE AM at the Committee's request. The Committee asked the legal advisers to inform the Welsh government informally of issues they had identified in the draft regulations at this stage.

CA423 - The National Health Service (Charges to Overseas Visitors) (Amendment) (Wales) Regulations 2010

The Committee noted the response of the Minister for Health and Social Services Edwina Hart MBE AM to the Chair's letter asking her to clarify the general position of the Assembly Government in respect of this and related pieces of legislation (the legislation conveyed a decision by the UK Government to revoke a bilateral agreement on health care provisions with the Isle of Man).

Response of the Minister for Environment, Sustainability and Housing Jane Davidson AM to the Committee's Report on The Planning (Hazardous Substances)(Amendment)(Wales) Regulations 2010 (CA405)

The Committee noted the response of the Minister for Environment, Sustainability and Housing, Jane Davidson AM, to the Committee's Report on the Planning (Hazardous Substances) (Amendment) (Wales) Regulations 2010 (CA405).

In accordance with Standing Order 10.37(vi) the Committee resolved to exclude the public from the remainder of the meeting to deliberate on recommendations of the Report on the Proposed Carers Strategies (Wales) Measure.

Dr Dai Lloyd AM

Temporary Chair, Constitutional Affairs Committee

13 May 2010

Annex 1

Constitutional Affairs Committee

(CA(3)-13-10)

CA437

Constitutional Affairs Committee Report

Title: The Health Protection (Part 2A Orders) (Wales) Regulations 2010

Procedure: Affirmative

The Health Protection (Part 2A Orders) (Wales) Regulations 2010 (“the Part 2A Orders Regulations”) supplement the provisions in Part 2A of the Public Health (Control of Disease) Act 1984 (“the 1984 Act”) by which Justices of the Peace (JPs) may by order impose restrictions and requirements on people, or in relation to premises or things, for health protection purposes. These regulations set out requirements as to the evidence a JP must have before making an order, provide safeguards for people who might be affected by an order, and make provision for monitoring of orders and some procedural matters.

Technical Scrutiny

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

Merits Scrutiny

Concerns of National AIDS Trust (NAT)

A briefing paper from the NAT was drawn to the attention of Committee Members and is attached as an annex to this report. The NAT raised concerns about the implications of Part 2A Orders for people with HIV and for sexual health policy more generally.

The NAT were concerned that the powers available to Justices of the Peace (JPs) give too much scope for coercive measures to be taken against those with sexually transmitted infections (STI). They were concerned, among other things, that this could undermine the willingness of people with HIV and other STIs to present voluntarily for testing and treatment.

The NAT asked the Committee to seek a number of assurances from the Welsh Government. In particular, that the Government should issue guidance, similar to guidance already issued by the Department

of Health in England, emphasising that the powers in these regulations should be applied only very exceptionally and sensitively in relation to people with HIV or other STIs.

Committee Consideration

The Committee noted:

- that these regulations are substantively similar to regulations already made in England;
- that the Explanatory Memorandum (EM) had mentioned consultation responses that outlined concerns about the position of people with HIV or other STIs;
- that the EM explained that the Welsh Government had endeavoured to meet these concerns where possible but felt, in some instances, that the issues would be better covered in guidance;
- that guidance to accompany the regulations had not yet been produced; and
- that the Equality of Opportunity Committee has been conducting an inquiry into discrimination against people living with HIV by healthcare professionals and providers.

The Committee agreed that it would be helpful for the Minister to address the NAT's concerns directly during the plenary debate on the regulations.

The Equality of Opportunity Committee's inquiry report is due to be published shortly. The Government may also wish to consider the impact of these regulations in relation to issues covered by that report particularly in relation to stigmatisation of those with HIV or other STIs.

In the light of the above, the Committee agreed that NAT's concerns raised issues of public policy likely to be of interest to the Assembly and that the Committee should, therefore, report to the Assembly under Standing Order 15.3(ii).

Dr Dai Lloyd AM

Temporary Chair, Constitutional Affairs Committee

13 May 2010

**NAT Constitutional Affairs Committee Briefing:
The Health Protection Regulations and the future of
sexual health services**



Introduction:

NAT (the National AIDS Trust) is the UK's leading charity dedicated to transforming society's response to HIV. We develop policy and campaign for change to stop the spread of HIV and improve the lives of people living with HIV. We provide fresh thinking, expert advice and practical resources.

NAT accepts that modernisation of public health powers was necessary and long overdue. However, throughout the extended consultation process, there have been grave concerns across the sexual health sector as to the implications of extending coercive public health powers to those infected with HIV and other STIs.

NAT asks members of the Constitutional Affairs Committee to raise our concerns on the use of Part 2A orders during the Committee's consideration of the Regulations on 13 May. We also ask you to seek assurances that the Welsh Assembly Government will publish appropriate operational guidance, monitor the use of these powers and respond promptly should there be any indication that the powers are being misused against people with HIV and other STIs.

Background:

The Health Protection (Part 2A Orders) (Wales) Regulations 2010 introduce new powers for a JP, on application from a local authority, to order a 'restriction or requirement' to be imposed on an individual to remove or reduce the risk of him/her infecting others (the orders being known as 'Part 2A orders').

Such orders might include for example – submitting to medical examination; detention in hospital; answering questions about one's health or about 'other circumstances'; abstaining from work; restrictions of where one goes or whom one had contact with; attending training or advice sessions on risk reduction; identifying others with whom one has come into contact.

Historically, such powers could only be used in relation to a list of specified conditions. 'AIDS' was only on that list in relation to the power to order a medical examination (which was only ever used once, causing such a public outcry that this was never attempted again). No other STI was on that list at all.

The new powers being introduced take an 'all hazards' approach which means they can be applied to any infection or contamination which poses a risk of significant harm to human health, thus including HIV and all other STIs.

Concerns:

Sexual health services, more perhaps than any other part of the NHS, rely on trust in their confidentiality for the effectiveness of their work. If, for example, people fear they will routinely in sexual health clinics be required to provide information on their sexual partners (rather than the current voluntary system), or be subject, if HIV positive, to some form of social control if they present repeatedly with another STI, this will fundamentally undermine their willingness to

present for HIV and STI testing and treatment. The result will be significant numbers remaining undiagnosed, untreated and infectious, passing their infection on to others and, especially in the case of HIV, responding far less well to treatment when eventually diagnosed late.

The response of NAT and the sexual health sector:

The HIV and sexual health sector has consistently, from the inception of these proposals, called for cases of sexually transmitted infection to be excluded from the scope of these powers. The concern was that these powers available to JPs gave far too great a scope for coercive measures which would affect people often already from marginalised communities, undermine trust in sexual health services and place an inappropriate burden of social control on people with long-term incurable conditions such as HIV.

Over 30 sexual health organisations from across England and Wales supported NAT's submissions on the Health Protection Regulations, including voluntary sector organisations such as Terrence Higgins Trust, the fpa and the National Children's Bureau, professional bodies such as the British Association for Sexual Health and HIV and the British HIV Association, as well as the Independent Advisory Group on Sexual Health and HIV, and the All Party Parliamentary Group on AIDS.

Both the Welsh Assembly Government and the English Department of Health in response have refused to exclude cases of HIV and other STIs from the scope of the Part 2A orders but have assured NAT and other sexual health organisations that these powers would only be used in relation to HIV/STIs, if at all, in the most exceptional of circumstances.

In England the Department of Health and the Health Protection Agency have published useful guidance on how to apply the new Regulations, which emphasise how exceptional would be any use of these powers in relation to HIV or an STI, and how routine, confidential and consensual sexual health procedures remain the norm and should be unaffected by these Regulations. It is important that the parallel guidance planned for Wales takes the same approach.

We ask the Constitutional Affairs Committee to seek assurances that the Welsh Assembly Government -

- **will agree operational guidance for the new public health powers which re-state the importance of consensual and confidential sexual health services and emphasise how exceptional would be any consideration of use of these powers in relation to HIV or another STI**
- **will look carefully at the annual reports from the Health Protection Agency on the use of Part 2A orders, to ensure the orders are being used appropriately and in line with the planned operational guidance**
- **will look again at whether to legislate to exclude HIV and STIs from the scope of Part 2A orders if the evidence suggests their use is harming the effectiveness of sexual health services or increasing stigma against people with HIV or people from particular communities.**

NAT contact: Yusef Azad, Director of Policy and Campaigns 0207 814 6732

May 2010

Annex 2

Constitutional Affairs Committee

(CA(3)-13-10)

CA440

Constitutional Affairs Committee Report

Title: The Census (Wales) Regulations 2010

Procedure: Negative

These Regulations set out the detailed arrangements necessary for the conduct in Wales of the census directed to be taken on the 27 March 2011 by the Census (England and Wales) Order 2009 (“the Census Order”).

Technical Scrutiny

Under Standing Order 15.2 the Assembly is invited to pay special attention to the instrument on the following ground:

1. The English text of regulation 10(5) contains the following form of words:
“that the prescribed person in question—
(a) is incapable of completing and returning a questionnaire; and
(b) is unable to authorise any person to act on their behalf,”
whilst the Welsh text contains the following:
“fod y person rhagnodedig o dan sylw—
(a) yn methu llenwi holiadur a’i ddychwelyd; a
(b) yn methu awdurdodi unrhyw berson i weithredu ar ei ran,”.
2. The English provision therefore contains two apparently different concepts of a person being “incapable” and “unable” that have to be satisfied for the consequences that follow in the regulation to be permitted. The Welsh text, on the other hand, uses the single concept of “methu”, which in any case is normally used in legislation to correspond to “fails”, which would include a decision not to do something.
3. It is therefore unclear from the legislation whether the test to be applied under paragraphs (a) and (b) is different, as the English indicates, or the same, as the Welsh indicates, and in either case, the meaning of the test to be applied. [Standing Order 15.2(v)]

Merits Scrutiny

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

4. Under Standing Order 15.3(ii) the Assembly is invited to pay special attention to this instrument on the grounds “that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly.”

5. The 2001 census was the subject of considerable criticism because the question in relation to national identity did not contain a tick-box option for “Welsh”. That matter has now been resolved for the 2011 census by its inclusion as the first option in question 15.

6. Attention is drawn to the provisions of regulations 3(3) and (4) not by way of criticism, but to draw the National Assembly’s attention to the unusual approach adopted. Regulation 3(3) provides that in the body of the Regulations, the term “aelwyd” is used in Welsh to correspond to “household” in English. This is in accordance with the usual practice in bilingual legislation. However, regulation 3(4) provides that in the census questionnaires themselves, the term “cartref” is used to correspond to “household”. “Aelwyd” is more generally used to correspond to “hearth”, whilst “cartref” would be used to correspond to “home”. There has clearly been careful consideration of the clearest term to use in the Welsh forms, which has led to these unusual provisions.

Dr Dai Lloyd AM

Temporary Chair, Constitutional Affairs Committee

13 May 2010

The Government has responded as follows:

Introduction

1. This is the Welsh Assembly Government’s response to points made in the “*Technical Scrutiny*” section of the report set out above (paragraphs 1 to 3 inclusive) and in the “*Merits Scrutiny*” section (paragraph 5).

Paragraphs 1 to 3

2. The relevant points may be summarised as follows:-

- The English provision contains two apparently different concepts of a person being “incapable” and “unable” that have to be satisfied for the consequences that follow in the regulation to be permitted (“*the consistency point*”).
- The Welsh text, on the other hand, uses the single concept of “methu”, which in any case is normally used in legislation to correspond to “fails”, which would include a decision not to do something (“*the translation point*”).
- It is therefore unclear from the legislation whether the test to be applied under paragraphs 10(5)(a) and (b) is different, as the English indicates, or the same, as the Welsh indicates, and in either case, the meaning of the test to be applied (“*the clarity point*”).

Response to the consistency point

3. Our view is that the distinction between “*incapable*” and “*unable*” is a valid one within the scheme of regulation 10(5). In summary, this provision allows an appointee (as defined in regulation 3(1)) to make enquiries about the particulars which a prescribed person (as defined in regulation 3(1)) would be required by the Census Order to provide and the appointee may record the answers to those enquiries. However, the appointee may only do this if he or she is satisfied, having spoken with the prescribed person, that the prescribed person is incapable of completing and returning a questionnaire and is unable to authorise any person to act on their behalf.
4. This would enable the appointee to collect information through the telephone helpline where the prescribed person was “incapable” of making a return, for example through physical disability, as opposed to being unable to do so because, for example, that person was going to be away on holiday and there was no other person in the household who was “able” to do so (whether or not capable of doing so) – for example the person’s son might well be capable of making a return but be unable to do so because of a temporary absence from the household.
5. Regulation 10(5) uses the same wording as the corresponding provision in the *Census (England) Regulations 2010*. Given that the 2011 Census for England and Wales will be a single unified census, conducted on behalf of the Registrar General pursuant to a single Census Order for England and Wales - albeit governed by separate regulations for each country - we believe that there should be as much consistency as possible between both sets of regulations.

6. The Office of National Statistics have confirmed that Joint Committee on Statutory Instruments has not raised any query in relation to the corresponding provision in the regulations for England.

Response to the translation point

7. We accept that there is room for debate about how best to translate “*incapable*” and “*unable*” (the University of Wales 4-volume Dictionary of the Welsh Language confirms that, in addition to “*fail*”, “*methu*” can convey being either incapable *or* unable). The Welsh Assembly Government welcomes the Constitutional Affairs Committee's helpful observations in this regard and will explore the possibility of making suitable clarificatory amendments to the Welsh text immediately upon publication or, if necessary, making amending regulations.

Response to the clarity point

8. In view of our responses to the consistency point and the translation point, we invite the Committee to accept that the meaning of the test to be applied is clear from the English version of regulation 10(5).

Response to paragraph 5

9. Simply by way of clarification, the 2001 Census was the subject of considerable criticism because the question in relation to ethnicity did not contain a tick-box option for “Welsh”. That matter has now been resolved for the 2011 census by the introduction of a national identity question in addition to the ethnicity question. The national identity question includes a Welsh tick box.

