

EXPLANATORY MEMORANDUM TO
THE LOCAL AUTHORITIES (CONDUCT OF REFERENDUMS) (WALES)
REGULATIONS 2008

This Explanatory Memorandum has been prepared by the Local Government Policy Division and is laid before the National Assembly for Wales.

PART 1

1. Description

1.1 This Instrument provides for the organisation of the holding of a referendum in a local authority in Wales to decide whether that authority should adopt a political structure involving (amongst others) a directly elected mayor. The Instrument provides for the questions to be put to the electorate, the publicity for a referendum, limits on expenditure, the conduct of the local authority concerned, plus the manner of voting, counting and matters connected with the register.

2. Matters of special interest to the Subordinate Legislation Committee

2.1 None.

3. Legislative Background

3.1 The powers enabling this Instrument to be made are contained in sections 45, 105 and 106 of the Local Government Act 2000. The functions of the National Assembly for Wales under these provisions have been transferred to the Welsh Ministers by virtue of section 162 of, and paragraph 30 of, Schedule 11 to the Government of Wales Act 2006. The Instrument is being made using the affirmative resolution procedure.

4. Purpose and intended effect of the legislation

4.1 This Instrument will revoke and replace, with appropriate amendments, The Local Authorities (Conduct of Referendums) (Wales) Regulations 2004 (SI No 870 (W.85)) (the 2004 Regulations). The principal changes made in these draft Regulations are to implement the changes made by the Electoral Administration Act 2006, which, inter alia, introduces measures to prevent electoral fraud. A summary of these changes is set out in the attached Annex 1. In addition the Instrument sets out in full, and as one document (in Schedule 3), the procedural rules for running such referendums. This will ensure ease of access and use by local authority counting officers and electoral administrators. The option of a referendum being conducted by means of an all-postal ballot has been removed (in consequence of a new provision on the collection and checking of personal identifiers for postal voters introduced by the Electoral Administration Act 2006).

4.2 The Instrument also includes new limits of referendum expenses (expenses incurred by or on behalf of any individual or body for referendum purposes) which will apply to any referendum held on or after the date on which these Regulations come into force. The increase in the maximum rate, from £2,000 to £2,362, is in line with inflation (and replicates the rates contained in the comparable regulations for England – paragraph 5.2 refers).

5. Implementation

5.1 If the Regulations are not made it will delay the safeguards against electoral fraud, contained in the Electoral Administration Act 2006, from being incorporated into this particular electoral process.

5.2 The comparable legislation in England, The Local Authorities (Conduct of Referendums) (England) Regulations 2007 (SI No 2089) (The England 2007 Regulations) were made on 23 May 2007. They revoke and replace the Local Authorities (Conduct of Referendums) (England) Regulations 2001 (SI No 1298) (the England 2001 Regulations) and incorporate, as appropriate, changes resulting from the Electoral Administration Act 2006. The England 2007 Regulations are broadly similar to the proposed Wales Regulations but differ in the following respects:-

- The Referendum Questions in The England 2007 Regulations, as was the case with their predecessor regulations, are not preceded by a “Statement” by way of preamble/explanation. The “Statement” was included in the Wales Regulations following representations made by the Electoral Commission and Ceredigion County Council, in response to the consultation on the draft of the 2004 Regulations.
- The England 2007 Regulations continue to enable a referendum to be combined with that of another election or referendum. This is not considered appropriate for Wales. As mayoral referendums are likely to be rare events in Wales, separating them from other elections will enable the electorate to concentrate on one issue.
- In England a local authority’s electorate are not “time-bound” in that they do not have “petition periods” and so a petition calling for a change in political structure may be submitted at any time.

6 Consultation

6.1 The Electoral Commission, local government and other interested parties have been consulted on the draft of the regulations (see paragraph e of the Regulatory Impact Appraisal).

PART 2

7 Regulatory Impact Assessment

a. Options (for achieving the policy objective – as set out in paragraph 4 of Part 1 above)

• Option 1 – Do Nothing

The 6 month “petition period”, affecting 21 of the 22 local authorities, which could have resulted in the need for them to hold a referendum) ended on 31 October 2007. As such they will not require the use of these regulations. (Generally speaking a 6 month petition period occurs every 4 years. During this period a valid petition may be presented to a local authority by at least 10% of its electorate calling for a change in their political structural model, to that which may include a directly elected mayor. These petition periods are set out in The Local Authorities (Referendums) (Petitions and Directions) (Wales) Regulations 2001 (SI No 2290 (W.180)) as amended by The Local Authorities (Referendums) (Petitions and Directions) (Wales) Regulations 2003 (SI No. 398 (W.55)) (“the Petition Regulations”).

• Option 2 – Make the Regulations

The one local authority which is not subject to the petition period, which ended 31 October 2007, is Ceredigion County Council. Their 6 month “petition period” did not commence until 20 May 2008. This is because the County Council received a valid petition, during the first petition period, May to November 2003; the resulting referendum was against the holding of an election for an elected mayor. Their next petition period has been delayed by the requirements of section 45(1) of the Local Government Act 2000 which provides that an authority may not hold more than one referendum in any period of five years (and Regulation 3A of the Petition Regulations refers). Ceredigion County Council would require use of these regulations in the event they receive a valid petition between 20 May and 19 November 2008.

In addition, these regulations may be required, at any time, for a referendum held under The Local Authorities (Changing Arrangements and Alternative Arrangements) (Wales) Regulations 2004 which enables a local authority to change their constitutional arrangements in ways which include changing their model (political structure). A referendum of local electors is required before an authority can adopt a model involving an elected mayor.

Whilst it is difficult to predict when these Regulations will next be required, and it is unlikely that they will be called into regular use, their approval now will ensure that this particular electoral process incorporates the measures to prevent electoral fraud introduced by the Electoral Administration Act 2006. Not to make them now, and rely instead on what is in effect outdated regulations, could lead to problems of democratic accountability both for the authority concerned and for the Assembly.

b. Benefits

Approval of these regulations will ensure that this particular electoral process incorporates the measures against electoral fraud introduced by the Electoral Administration Act 2006 and will enable a local authority to change the model of their political structure to that which involves an elected mayor. The Regulations

will also increase, in line with inflation, the limits on referendum expenses. By setting out, in one Schedule of the Regulations, the procedural rules for running a local authority referendum, they will provide local authority counting officers and electoral administrators with a more user-friendly reference document.

c. Costs

There are no direct costs for either the Welsh Assembly Government or the National Assembly for Wales implicit in the approval of these regulations. The cost of holding a referendum will be met by the local authority concerned.

d. Competition Assessment

The introduction of these regulations will not impact on other sectors and no competition filter is necessary.

e. Consultation

Section 45(8B), (8C) and (8D) of the Local Government Act 2000, as inserted by Schedule 21 of the Political Parties, Elections and Referendums Act 2000, requires the Electoral Commission to be consulted on the intelligibility of the questions which may be asked at a referendum, together with the statements which precede those questions and on the matter of the limitation of referendum expenses. In addition to the Electoral Commission, the draft regulations also issued on 5 December 2007 for an 8 week consultation period expiring on 1 February 2008 to Chief Executives, Returning Officers and Monitoring Officers of county and county borough councils, the Society of Local Authority Chief Executives, the Association of Electoral Administrators (Wales), , the Welsh Local Government Association, the Wales Audit Office, the Public Services Ombudsman for Wales, representatives of political parties and Assembly Members.

Four responses have been received – from the Electoral Commission and from 3 local authorities. The Electoral Commission has suggested that minor policy changes be made to Regulation 5 (Restriction on the Publication etc of Promotional Material) and Rule 26 (Voting Procedure) of the Referendum Rules in Schedule 3. The Welsh Assembly Government does not accept that these changes are necessary. The Welsh Assembly Government's view is that the Electoral Commission's suggested amendment to Regulation 5 could be open to challenge, whilst the Commission's proposed sanction for inclusion in Rule 26 is not required. A number of very minor corrections to headings and the numbering of paragraphs, suggested by the Electoral Commission and Denbighshire County Council, have been accepted. A summary of the responses to the consultation exercise, together with the Welsh Assembly Government's response to the comments made is at Annex 2.

The Electoral Commission have confirmed that they are content with the wording of both the statements and the questions which may be asked in a referendum. The Commission have also confirmed that they are content with the new

referendum expenses limit. A report stating the Commission's views will be laid before the National Assembly for Wales.

f. Post Implementation Review

The impact of this policy is predictable. It is not likely to need review in the foreseeable future. It is likely that any difficulties in administering the regulations would be reported by local authorities.

g. Summary

These particular regulations will only impact on local government and they will bear the costs. The making of these regulations will ensure that this particular electoral process incorporates the measures to prevent electoral fraud which have been introduced by Parliament by way of the Electoral Administration Act 2006.

ANNEX 1

SUMMARY OF ELECTORAL ADMINISTRATION ACT 2006 CHANGES INCLUDED IN THE LOCAL AUTHORITIES (CONDUCT OF REFERENDUMS) (WALES) REGULATIONS 2008:-

- New security measures: more flexibility on security markings and introduction of the unique identifying marks on ballot papers;
- Counterfoils on ballot papers are replaced by corresponding number lists;
- Requirements are imposed requiring postal voters and postal proxies to provide both their signature and date of birth when returning postal ballot papers;
- New circumstances in which a person may give a tendered vote;
- New requirements are introduced as to the information and accessibility of information to be provided by Returning Officers to different type of electors;
- Changes made as to the persons who may be admitted to a polling station and the count to observe elections;
- Provision for transmission of information to presiding officers of alterations to the electoral register taking effect on the day of the poll;
- Amendments consequential upon the introduction of a scheme for the anonymous registration of certain electors;
- Changes made regarding the retention and inspection of election documents after the poll; and
- Consequential amendments to existing forms and new forms prescribed for use at such referendums.

SUMMARY OF RESPONSES TO CONSULTATION ON THE DRAFT LOCAL AUTHORITIES (CONDUCT OF REFERENDUMS) (WALES) REGULATIONS 2008

Consultation Period – 5 December 2007 to 1 February 2008

Those Consulted:-

The Electoral Commission
Chief Executives, Returning Officers and Monitoring Officers of County and
County Borough Councils
Director of the Welsh Local Government Association
Society of Local Authority Chief Executives
Association of Electoral Administrators (Wales)
Wales Audit Office
Public Services Ombudsman for Wales
Assembly Members
Political Parties

4 Responses Received From:-

- The Electoral Commission
Kay Jenkins – Head of Wales Office
- Carmarthenshire County Council
Phil Grafton – Senior Solicitor
- Denbighshire County Council
Ian Hearle – County Clerk
- Wrexham County Borough Council
Trevor Coxon – Chief Legal and Democratic Officer

Summary of Responses:-

1. Incorporation of Changes Resulting From Electoral Administration Act 2006
 - Electoral Commission – Welcome.
 - Denbighshire CC – Welcome.
 - Wrexham CBC – Welcome.
2. Questions and Explanatory Statements
 - Electoral Commission – In the consultation on the draft of the predecessor regulations (The Local Authorities (Conduct of Referendums) (Wales) Regulations 2004) the Commission made a submission on the intelligibility

of the wording of the referendum questions. As a result the questions were revised and are substantially replicated in the draft regulations.

The Commission remains concerned about the intelligibility of the questions in the comparable England Regulations (The Local Authorities (Conduct of Referendums) (England) Regulations 2007) and also the necessity to revisit these questions in light of the changes in the range of constitutional options available to local authorities in England under the Local Government and Public Involvement in Health Act 2007.

The Commission asks whether the Welsh Assembly Government is likely to make any revisions to the range of constitutional options available to local authorities in Wales and, if so, wishes to flag up the need to revisit the form of the referendum questions set out in the regulations.

Welsh Assembly Government Response: Noted. The questions to remain as drafted as there are no plans, at this time, to revise the range of constitutional options available to Welsh local authorities. The Commission has been asked to inform officials of the outcome of their discussions with the UK Government.

3. Level of Expenses

- Electoral Commission – The Commission had recommended that the limits in the comparable England Regulations be raised in line with inflation, and therefore welcome the Welsh Assembly Government's proposal to do the same.
- Carmarthenshire CC – Regulations on expenditure limits should be clearly written and displayed together with respective criminal offences. This may help to diminish the feeling of uncertainty and ambiguity often associated with election expenditure. Criminal offences should be created regarding expenditure limits.

Welsh Assembly Government Response. Reject. Regulation 6 already imposes a referendum expenses limit. Under Regulation 6(3) there is an offence for expenditure in excess of the referendum expenses limit, whilst Regulation 4(c)(v), requires the notice of publication by the local authority to include details of the referendum expenses limit. (Carmarthenshire CC has subsequently advised that their comments, in fact, related to expenses for local government elections and not the conduct of referendums and is therefore not a matter for consideration for these particular regulations.)

4. Incorporation of Procedural Rules In One Document

- Electoral Commission – Welcome.

5. Option for All-Postal Ballot No Longer Available

- Electoral Commission – Supports fact that these regulations will no longer provide for the holding of all-postal ballots. This reflects recommendations made by the Commission in previous reports for all-postal voting not to be used at UK statutory elections.

- Carmarthenshire CC – Agree that all-postal ballots should not be an option. All-postal ballots would be impracticable and likely to disenfranchise voters.
- Denbighshire CC – Support. Acknowledge the difficulties an all-postal ballot would create.
- Wrexham CBC - Welcome. Incorporating the changes arising from the Electoral Administration Act 2006 into the regulations would render an all-electoral postal referendum impossible to deliver whilst complying with the necessary security requirements.

6. No Provisions Allowing for Combination of Elections

- Electoral Commission – Supports approach not to include any provisions enabling a referendum to be combined with another election or referendum. The Commission opposes the combination of local elections and mayoral referendums, particularly on grounds of voter confusion.

7. Other

- Electoral Commission – Has concerns about Regulation 5 (Restriction on the Publication etc of Promotional Material) which prohibits councils from undertaking proactive information campaigns within 28 days of a referendum. The Commission recommends that the UK Government should consider the options for permitting the publication of factual information about the practical consequences of a “yes” or “no” vote during the campaign period, either by councils directly, or by the Returning Officer, or some other body or individual.

Welsh Assembly Government Response: Reject. The danger in enabling a body or individual to publish factual information about the practical consequences of a “yes” or “no” vote within 28 days of the referendum, is that such information could be misinterpreted as being bias in favour of one side (and in particular for the “no” vote) and could result in legal challenge.

- Electoral Commission – Concerns about the drafting of Rule 26 (Voting Procedure) of the Referendum Rules in Schedule 3, with respect to the delivery of a ballot paper to an anonymous elector. Whilst the Rule specifies that an anonymous elector must show their poll card to the Presiding Officer before a ballot paper can be delivered, there is no sanction in the Rule that would allow the Presiding Officer to refuse to issue a ballot paper in the event of an anonymous elector not presenting their poll card. The Commission recommends that, in order to avoid any potential future uncertainty in the polling station in relation to anonymous electors, the Welsh Assembly Government should insert an explicit sanction in the regulations.

Welsh Assembly Government Response: Reject. . Such a sanction is not required. The requirement to produce the poll card is designed as a practical way to safeguard the identity of the anonymous voter. As the Rule requires the anonymous voter to show his poll card to the presiding officer, it follows that the presiding officer will not be in a position to issue a ballot paper to a voter who is in breach of the requirement.

8. Miscellaneous

- Denbighshire CC – In the definition of “further referendum” under Regulation 2(1), reference should be to Regulation 13(4) rather than 14(3).

Welsh Assembly Government Response: Accept. Regulation 2(1) amended accordingly.

- Electoral Commission - Appendix of Forms
“The Corresponding Number List Form L1” should make clear in a heading that this form is to be used for “Postal Votes”. There is also an error in the instructions for the column entitled “Number on Electoral Register”. Reference should be to “postal” voters and “proxies” voting rather than “personal” voters and “persons” voting.

Welsh Assembly Government Response: Accept. Form amended accordingly.

“The Corresponding Number List Form L2” should make clear in a heading that this form is to be used “In Polling Stations at a Referendum”.

Welsh Assembly Government Response: Accept. Form amended accordingly.

- Wrexham CBC – Would have no objection to a change to the period for submission of a referendum petition. As there can only be one such petition within a five year period by virtue of Section 45 of the Local Government Act 2000, there seems little point in limiting the date for submission of that petition further.

Welsh Assembly Government Response: No action necessary.

Section 45 of the Local Government Act 2000 provides that a local authority may not hold more than one referendum in any period of 5 years. Petition periods form part of The Local Authorities (Referendums) (Petitions and Directions) (Amendment) (Wales) Regulations 2003 which are not under review.