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Llywodraeth Cymru
Welsh Government

Welsh Government
Consultation Document

Welsh Ministers' Regulatory Impact Assessment Code for Subordinate Legislation

Date of issue: 8th December 2020
Action required: Responses by 4th March 2021

Mae'r ddogfen yma hefyd ar gael yn Gymraeg.
This document is also available in Welsh.

Overview The Welsh Government is seeking views on a revised draft of the Welsh Ministers' regulatory impact assessment code for subordinate legislation.

How to respond You can respond by completing the short questionnaire at the end of this document and posting or emailing it to the address below.

Further information and related documents **Large print, Braille and alternative language versions of this document are available on request.**

Insert any references to the internet, documents or information which might be useful to consultees e.g. consultation web address, detailed appendix to consultation

Contact details For further information or queries regarding this consultation, please email:

EconomicAppraisal@gov.wales

RIA Code consultation
Welsh Government
Llys-Y-Ddraig
Penllergaer Business Park
Swansea
SA4 9NX

Also available in Welsh at: <https://llyw.cymru/cod-asesu-effaith-rheoleiddiol-ar-gyfer-is-ddeddfwriaeth>

General Data Protection Regulation (GDPR)

The Welsh Government will be data controller for any personal data you provide as part of your response to the consultation. Welsh Ministers have statutory powers they will rely on to process this personal data which will enable them to make informed decisions about how they exercise their public functions. Any response you send us will be seen in full by Welsh Government staff dealing with the issues which this consultation is about or planning future consultations. Where the Welsh Government undertakes further analysis of consultation responses then this work may be commissioned to be carried out by an accredited third party (e.g. a research organisation or a consultancy company). Any such work will only be undertaken under contract. Welsh Government's standard terms and conditions for such contracts set out strict requirements for the processing and safekeeping of personal data.

In order to show that the consultation was carried out properly, the Welsh Government intends to publish a summary of the responses to this document. We may also publish responses in full. Normally, the name and address (or part of the address) of the person or organisation who sent the response are published with the response. If you do not want your name or address published, please tell us this in writing when you send your response. We will then redact them before publishing.

You should also be aware of our responsibilities under Freedom of Information legislation

If your details are published as part of the consultation response then these published reports will be retained indefinitely. Any of your data held otherwise by Welsh Government will be kept for no more than three years.

Your rights

Under the data protection legislation, you have the right:

- to be informed of the personal data held about you and to access it
- to require us to rectify inaccuracies in that data
- to (in certain circumstances) object to or restrict processing
- for (in certain circumstances) your data to be 'erased'
- to (in certain circumstances) data portability
- to lodge a complaint with the Information Commissioner's Office (ICO) who is our independent regulator for data protection.

For further details about the information the Welsh Government holds and its use, or if you want to exercise your rights under the GDPR, please see contact details below:

Data Protection Officer:
Welsh Government
Cathays Park
CARDIFF
CF10 3NQ

e-mail:

Data.ProtectionOfficer@gov.wales

The contact details for the Information Commissioner's Office are:

Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Tel: 01625 545 745 or
0303 123 1113

Website: <https://ico.org.uk/>

1. Introduction

- 1.1 This is a consultation on a draft of the Welsh Ministers' Regulatory Impact Assessment Code (the draft Code) attached at Annex A.
- 1.2 Section 76(1) of the Government of Wales Act 2006 (GOWA 2006) places a requirement on the Welsh Ministers to make a Code of Practice setting out their policy for producing regulatory impact assessments (RIAs) for relevant Welsh subordinate legislation.
- 1.3 An RIA is a key part of the policy-making process in Wales, providing the Welsh Ministers with information on the relative costs, benefits and risks associated with alternative policy interventions and enabling them to make an informed decision on the most appropriate course of action from a value for money perspective.
- 1.4 The assessment also provides the Senedd and stakeholders such as service providers, businesses, third sector organisations and consumers with information on the options which have been considered by Welsh Government and the reasons why a particular option has been selected as the preferred option. The completion of a robust, proportionate assessment is important in enabling these groups to scrutinise proposed legislation effectively.

2. The current position

- 2.1 The current version of the Code was published in 2009 and states the Welsh Ministers policy is to carry out an RIA for subordinate legislation unless one of a handful of exceptions applies.
- 2.2 While we believe this broad policy for developing RIAs for subordinate legislation remains valid, we recognise some of the terminology used in the current Code is out of date and that the current Code does not reflect some significant legislative changes which have taken place since 2009. We also believe the current Code should be clearer in places. The draft Code seeks to address these points.
- 2.3 The following is a link to the current Code:

<https://gov.wales/welsh-ministers-regulatory-impact-assessment-code-for-subordinate-legislation>

3. The changes we are proposing to make to the Code

- 3.1 The initial sections of the Code have been re-written to make the issues covered by the Code clearer. The drafting of section 76 of GOWA is such that the RIA Code only applies to that subset of subordinate legislation which is made by the Welsh Ministers (including the First Minister or Counsel General), is made by statutory instrument and which must be laid before the Senedd (in draft or otherwise). Subordinate legislation which meets these criteria is 'relevant Welsh subordinate legislation' under section 76 of GOWA.

Policy for completing an RIA for Welsh subordinate legislation

3.2 The Welsh Ministers' policy will be to always carry out an RIA for relevant Welsh subordinate legislation subject to a small number of exceptions. The exceptions are discussed in the next section of this document.

3.3 As explained above, section 76 of GOWA does not cover all Welsh subordinate legislation. It does not cover subordinate legislation which is not made by the Welsh Ministers or which does not need to be laid before the Senedd. However, it may still be the case that the Welsh Ministers opt to voluntarily produce an RIA in relation to subordinate legislation which is not covered by the definition of 'relevant Welsh subordinate legislation' in GOWA. As is explained in the draft Code, the Welsh Ministers will take a proportionate approach in deciding whether to voluntarily produce an RIA. The greater the expected impact of the subordinate legislation, the more likely it is that an RIA will be produced.

Exceptions

3.4 At the same time as updating terminology and simplifying the Code, we have also taken the opportunity to review the scenarios or 'exceptions' whereby an RIA wouldn't be required to accompany relevant Welsh subordinate legislation. The current Code sets out the following seven 'exceptions':

- Where the subordinate legislation does not meet the section 76 criteria, i.e. that it is not made by statutory instrument or required to be laid before the Assembly.
- Where the subordinate legislation simply increases a statutory fee by a predetermined formula (for example, the rate of inflation).
- Where routine technical amendments or factual amendments are required to update regulations, etc. that have no major policy impact.
- For Commencement Orders bringing into force primary legislation or Assembly Measures, including such Orders also making consequential provision or savings, etc.
- Where the relevant Welsh subordinate legislation is subject to an additional UK Parliament procedure. In those instances, a joint view with the relevant UK government department should be taken as to whether a regulatory impact assessment is required.
- Where the relevant Welsh subordinate legislation needs to be put in place quickly to deal with an emergency (e.g. foot-and-mouth or avian flu).
- Where relevant Welsh subordinate legislation is made in the exercise of statutory powers granted by an act or measure which do not in any way give the Welsh Ministers discretion as to how those powers should be exercised.

3.5 By clarifying what is meant by ‘relevant Welsh subordinate legislation’ and the circumstances in which the Code applies in the initial sections of the draft Code, we consider that the first exception is now redundant and so it has been removed.

3.6 The current Code recognises it would be disproportionate to require an RIA for subordinate legislation which simply increases a statutory fee by a predetermined formula (for example, the rate of inflation). We believe this exception remains appropriate and consider the same argument can be applied to subordinate legislation which increases tax rates (for example, landfill disposal tax rates), payments, allowances or grants by a predetermined formula. The exception has therefore been extended in the draft Code.

3.7 Discussions with policy departments within Welsh Government found that one of the main areas of uncertainty when using the current Code was around the circumstances in which the third exception – routine technical and factual amendments – can be applied. In the draft Code, this exception has been split in two to make the intended application clearer. In this context, ‘technical amendments’ refers to changes made to the wording of the law which do not alter the substance or effect of the law (for example, where references need to be updated). ‘Minor factual amendments’ are considered to be changes made to the law which do not alter the policy in any significant way or have a significant impact on how the law is applied in any given situation. An example would be the amending regulations made each year to apply student finance legislation to a new academic year. It is worth reinforcing that the intention is for these exceptions to apply only where the impact of the legislative change is expected to be minimal and where it is not expected to impose any or any significant additional cost on business, the public sector or third sector organisations in Wales.

3.8 The current pandemic has highlighted a lack of clarity in the current wording of the exception relating to emergency situations. The current exception refers to subordinate legislation which ‘needs to be put in place quickly to deal with an emergency’. However, there have been several pieces of subordinate legislation which have needed to be put in place quickly not necessarily to ‘deal with’ coronavirus itself but rather to respond to a consequence of the pandemic.

3.9 To reflect this, the exception has been re-written to make it clear that the exception applies where relevant Welsh subordinate legislation is urgently needed to respond directly to an emergency and to properly respond to less direct circumstances resulting from an emergency situation. The revised exception will only apply to legislation needed to deal with a threat to human, plant or animal health or serious damage to property. Examples of when this exception could be applied include subordinate legislation relating to coronavirus, avian flu or the risk of imminent and serious flooding etc. In each case, requiring an RIA to be completed may delay the laying of subordinate legislation and risks exacerbating an emergency situation.

3.10 The draft Code also includes a broader exception which would only apply in urgent situations where the delay caused by producing an RIA would defeat the object of introducing the subordinate legislation. The intention is for this exception to only be applied in rare and extreme circumstances in which an instantaneous response is required.

3.11 The final change to the exceptions relates to subordinate legislation which is subject to an additional UK Parliament procedure. To the best of our knowledge, this exception has never been applied and the circumstances in which it would be applicable are unclear. For this reason, the exception has been removed from the draft Code.

Other changes

Minor changes have been made to the consultation section of the draft Code (Section 4) to ensure it reflects the latest Local Government Partnership, Third Sector and Business schemes and refers to all statutory duties. The commitment to engage with partners when developing legislation and RIAs has not changed.

Questions

1. Do you agree with the proposed approach set out in the draft Code for producing RIAs in relation to relevant Welsh subordinate legislation?
2. Do you agree that the exceptions set out in the draft Code (which describe situations in which no RIA would be required in relation to relevant Welsh subordinate legislation) are appropriate?
3. Are there any other scenarios in which you do not think it should be necessary for an RIA to be produced in relation to relevant Welsh subordinate legislation?
4. Do you agree with the proposed approach for producing an RIA in relation to subordinate legislation which is not covered by the definition of 'relevant Welsh subordinate legislation'?

The consultation response form at the end of this document also includes questions relating to the Welsh language.

4 Next Steps

4.1 The consultation on the draft Code will be open for a twelve-week period. Following the end of the consultation, responses will be considered and any further amendments which may be required will be drafted.

4.2 Subject to the views submitted during this consultation exercise, it is intended that the revised Code will come into effect during 2021.

Consultation Response Form

Your name:	
Organisation (if applicable):	
Email/telephone number:	
Your address:	

Questions

Question 1: Do you agree with the proposed approach set out in the draft Code for producing an RIA in relation to relevant Welsh subordinate legislation?
Question 2: Do you agree that the exceptions set out in the draft Code (which describe situations in which no RIA would be required in relation to relevant Welsh subordinate legislation) are appropriate?
Question 3: Are there any other scenarios in which you do not think it should be necessary for an RIA to be produced in relation to relevant Welsh subordinate legislation?

Question 4: Do you agree with the proposed approach for producing an RIA in relation to subordinate legislation which is not covered by the definition of 'relevant Welsh subordinate legislation'?

Question 5: We would like to know your views on the effects that the draft Code would have on the Welsh language, specifically on opportunities for people to use Welsh and on treating the Welsh language no less favourably than English.

What effects do you think there would be? How could positive effects be increased, or negative effects be mitigated?

Question 6: Please also explain how you believe the draft Code could be formulated or changed so as to have positive effects or increased positive effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language, and no adverse effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language.

Question 7: We have asked a number of specific questions. If you have any related issues which we have not specifically addressed, please use this space to report them:

Responses to consultations are likely to be made public, on the internet or in a report. If you would prefer your response to remain anonymous, please tick here: