

National Assembly for Wales
Constitutional and Legislative Affairs
Committee

Report on the Environment (Wales) Bill

October 2015

Cynulliad
Cenedlaethol
Cymru

National
Assembly for
Wales



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Constitutional and Legislative Affairs Committee

The Committee was established on 15 June 2011 with a remit to carry out the functions of the responsible committee set out in in Standing Orders 21.2 and 21.3 and to consider any other legislative matter, other than the functions required by Standing Order 26, referred to it by the Business Committee.

Current Committee membership:



David Melding (Chair)
Welsh Conservatives
South Wales Central



Alun Davies
Welsh Labour
Blaenau Gwent



Suzy Davies
Welsh Conservatives
South Wales West



Dafydd Elis-Thomas
Plaid Cymru
Dwyfor Meirionnydd



William Powell
Welsh Liberal Democrats
Mid and West Wales



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The Committee's Recommendations

Recommendation 1. We recommend that the Welsh Government should table an amendment to the Bill to apply the affirmative procedure to the making of regulations under section 24. (Page 15)

Recommendation 2. We recommend that the Welsh Government should table amendments to the Bill to require there to be a charge for carrier bags sold or delivered to persons in Wales, and for the net proceeds of that charge to be applied to charitable purposes. This would replace the discretionary power to impose a charge which is provided for in Section 55 of the Bill. (Page 16)

Recommendation 3. We recommend that the Welsh Government should table an amendment to the Bill to remove section 63. (Page 17)

Recommendation 4. We recommend that the Welsh Government should table an amendment to the Bill to ensure that the appeals processes for both shellfishery and marine licensing are treated consistently in the Bill. (Page 18)

1. Introduction

Committee Remit

1. The remit of the Constitutional and Legislative Affairs Committee (“the Committee”) is to carry out the functions of the responsible committee set out in Standing Order 21 and to consider any other constitutional or governmental matter within or relating to the competence of the Assembly or the Welsh Ministers.
2. Within this, the Committee considers the political and legal importance and technical aspects of all statutory instruments or draft statutory instruments made by the Welsh Ministers and reports on whether the Assembly should pay special attention to the instruments on a range of grounds set out in Standing Order 21.
3. The Committee also considers and reports on the appropriateness of provisions in Assembly Bills and UK Parliament Bills that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister or the Counsel General.

Introduction and consideration of the Bill

4. On 11 May 2015, the Minister for Natural Resources, Carl Sargeant AM (“the Minister”) introduced the Environment (Wales) Bill (“the Bill”), accompanying Explanatory Memorandum and Statement of Policy Intent.¹
5. The Assembly’s Business Committee referred the Bill to the Environment and Sustainability Committee for consideration with a deadline of 9 October to report on the general principles.
6. We considered the Bill on 1 June 2015, taking evidence from the Minister.

¹ Welsh Government, *Environment (Wales) Bill, Explanatory Memorandum Incorporating the Regulatory Impact Assessment and Explanatory Notes*, May 2015

2. Background

Purpose of the Bill

7. The Explanatory Memorandum states that the over-arching aims of the Bill are:

“...to put in place legislation that will enable Wales’ resources to be managed in a more proactive, sustainable and joined-up manner and to establish the legislative framework necessary to tackle climate change.”²

8. The Explanatory Memorandum goes on to explain that the Bill will:

- establish the necessary legislative framework to tackle climate change;
- improve resource use in relation to carrier bag usage and waste management;
- clarify the law for a number of existing regulatory regimes including marine licensing, shellfisheries, land drainage and flood risk management.³

9. The Bill is the third in a series of inter-connected Bills with links to the *Well-Being of Future Generations (Wales) Act 2015* and the *Planning (Wales) Act 2015*.

² Explanatory Memorandum para 1

³ Explanatory Memorandum para 3

3. Legislative Competence

General

10. The Explanatory Memorandum states that the National Assembly has competence as the provisions in the Bill relate to the following subjects in Part 1 of Schedule 7 to the *Government of Wales Act 2006*:

1 Agriculture, forestry, animals, plants and rural development;

6 Environment; and

19 Water and flood defence.⁴

11. It goes on to state that none of the exceptions listed in Schedule 7 are applicable.⁵

12. The Minister, when asked, if there were any issues around competence, told us:

“No, we don’t believe there are any issues.”⁶

13. The Presiding Officer wrote to us about five issues relating to legislative competence, which we will refer to throughout the report.⁷

Consents

14. The Explanatory Memorandum highlights that the Bill contains provisions which confer functions on Ministers of the Crown. It says that these provisions will be in competence, if the Secretary of State consents to these provisions under Part 3 of Schedule 7 to the *Government of Wales Act 2006*.⁸

15. The letter from the Presiding Officer states that the Bill is within the legislative competence of the Assembly, apart from those sections⁹ which do not yet currently have Secretary of State consent. She highlights that the Minister would seem to have interpreted the *Government of Wales Act 2006* differently to her, as her statement on

⁴ Explanatory Memorandum para 6

⁵ Explanatory Memorandum para 7

⁶ Constitutional and Legislative Affairs (“CLA”) Committee, 1 June 2015, RoP [12]

⁷ CLA Committee, 1 June, [CLA\(4\)-14-15 Paper 2 – Letter from the Presiding Officer](#)

⁸ Explanatory Memorandum, para 8

⁹ Sections 6, 11(2) and 21

competence is based on whether the Bill would be within competence if it were passed as drafted when introduced.¹⁰

Evidence from the Minister

16. The Minister stated that the consents were not granted before introduction because:

“The general election came upon us, and the discussions with the Wales Office continued, but we weren’t able to secure the granting of permissions. But we have had no indication of concern over the principle of competence.”¹¹

17. He went onto confirm that he expected that the consents would be granted shortly.¹² However, one of the consents (relating to section 6) was subsequently refused by the Secretary of State.¹³

Our view

18. The *Fixed-term Parliaments Act* was introduced in 2011, and therefore the date of the UK General Election has been known for four years. Furthermore, the Welsh Government has been working on this piece of legislation for a number of years. Therefore, we do not accept this rationale for bringing forward legislation which, in the view of the Presiding Officer, was not fully in competence.

19. It suggests that something has gone awry in planning for the introduction of this Bill. It is an issue we have considered and expect to report on generally in our Making Laws inquiry.

20. The fact that one of the consents has been refused highlights to us the danger of this approach. We would strongly advocate that Bills should only be introduced when all the appropriate consents have been authorised.

¹⁰ CLA Committee, 1 June 2015, [CLA\(4\)-14-15 Paper 2 – Letter from the Presiding Officer](#)

¹¹ CLA Committee, 1 June 2015, RoP [12]

¹² CLA Committee, 1 June 2015, RoP [14]

¹³ Environment and Sustainability Committee, 16 September 2015, RoP [11 and 13].

Part 1 – Sustainable Management of Natural Resources

Section 6 – Biodiversity and resilience of ecosystems duty

21. Section 6 of the Bill places a duty on a number of bodies in relation to which the Assembly does not have general competence to legislate. Such bodies either do not fall within any subject in Schedule 7 to the *Government of Wales Act 2006* (“Schedule 7”), such as Police and Crime Commissioners, or are specifically listed as exceptions to competence e.g. the Post Office. The duty will only apply in relation to the body when exercising its functions in relation to Wales.

22. The Presiding Officer’s view was that subject to consent from the Secretary of State being forthcoming, section 6 would be within competence, taking into account the Supreme Court judgement on the *Agricultural Sector (Wales) Bill*, and that the purpose of this section is clearly linked to the subject ‘biodiversity’ in Schedule 7. She also cited a precedent from Scotland, which has not yet been challenged.¹⁴

Evidence from the Minister

23. The Minister was clear that it was within competence to place this duty on all public authorities that operate in Wales:

“...we’re not putting an additional duty on anybody who is exempt....The fact is they are performing their duty within Wales and they already have a biodiversity action upon them. So, it’s not additionality.”¹⁵

Our view

24. This provision is about the duties being undertaken by these bodies, and not the remit of the body. We note that duties have been placed on similarly non-devolved organisations through legislation such as the *Welsh Language Measure 2011*. If the consents are not received, and at the time of writing consent had been refused, then we note that this section will be out of competence and that the Bill may be subject to major change by the Welsh Government at later stages of the legislative process.

¹⁴ CLA Committee, 1 June 2015, [CLA\(4\)-14-15 Paper 2 – Letter from the Presiding Officer](#)

¹⁵ CLA Committee, 1 June 2015, RoP [21]

Part 2 – Climate Change

Section 35 – Welsh emissions from international aviation and shipping

25. Section 35 permits the Welsh Ministers by regulation to make provision for greenhouse gas emissions from international aviation and shipping to count as Welsh emissions. Both of these are included as exceptions in Schedule 7.

26. The Presiding Officer, in her correspondence, agreed with the Minister, stating that:

“The section merely clarifies how such emissions are to count as Welsh emissions.”¹⁶

Evidence from the Minister

27. The Minister was confident that this provision was “completely within the scope of the Bill, and within the exceptions....in GOWA”.¹⁷ He explained that this was because the regulation making power was about measuring the impact of what is happening within Wales, rather than legislating on the matters themselves.¹⁸

Our view

28. We note the Minister’s and the Presiding Officer’s view that this provision is within competence. Our successor Committee will, in accordance with its functions under Standing Order 21 need to ensure they are satisfied that the Regulations when they are brought forward are within the Assembly’s competence.

Part 3 – Charges for Carrier Bags

Section 55 – Power to impose requirement to charge

Section 57 – Application of proceeds

29. Section 55 permits Welsh Ministers to require sellers of goods to charge for carrier bags in specified circumstances. This applies not

¹⁶ CLA Committee, 1 June 2015, [CLA\(4\)-14-15 Paper 2 – Letter from the Presiding Officer](#)

¹⁷ CLA Committee, 1 June 2015, RoP [59]

¹⁸ CLA Committee, 1 June 2015, RoP [57]

only to sellers in Wales, but anyone supplying goods which are intended to be delivered to someone in Wales.

30. Section 57 states that regulations must require the net proceeds of the charge to be applied to charitable purposes. ‘Charitable purpose’ is defined in the *Charities Act 2011* and includes some purposes which may be outside of the Assembly’s legislative competence, such as the advancement of human rights or promotion of efficiency of the armed forces.

31. The Presiding Officer was content that these sections were all within competence. However, she did note that in relation to section 57:

“The Assembly, will, however, have to scrutinise the regulations specifying the relevant charitable purposes with particular care to ensure that they are wholly within competence.”¹⁹

Evidence from the Minister

32. The Minister explained that section 55 was applying the same principle as operates under the current law.²⁰ He went on to explain that the established legislation gave powers for such charges, and that the new provisions within this Bill were intended to close loopholes within the current scheme.²¹

33. He added that there was careful consideration given to ensure that the Welsh Government did not make changes to the scheme which could mean that they were in “dangerous territory of competence issues”.²²

Our View

34. We wish to draw the Assembly’s attention to this issue, and would hope that when the Regulations are brought forward, our successor Committee takes this into account.

¹⁹ CLA Committee, 1 June 2015, [CLA\(4\)-14-15 Paper 2 – Letter from the Presiding Officer](#)

²⁰ CLA Committee, 1 June 2015, RoP [63]

²¹ CLA Committee, 1 June 2015, RoP [69]

²² CLA Committee, 1 June 2015, RoP [136]

Consideration of Human Rights

35. An important element of assessing competence is ensuring that the Assembly is satisfied that the Bill is compliant with the European Convention of Human Rights.

36. We asked the Minister which steps he had taken to ensure that it was compliant:

“All the legal advice I’ve received is that we believe it complements or is within the boundaries of the equality and human rights Act.”²³

Part 5 – Fisheries for Shellfish

Section 74 – Power to vary or revoke orders to protect European marine sites.

37. We had specific questions about whether section 74 provided sufficient protection of property rights under Article 1 of Protocol 1 to the European Convention on Human Rights.

Evidence from the Minister

38. The Minister told us he was confident that it was within the boundaries of the Convention, and officials went on to explain how they are ensuring compliance:

“...we have built in safeguards into notices: they’ve got to be in writing, they’ve got to give reasons for the notice and they’ve got to specify a time.....it’s something that factors very carefully and something we have considered at length.”²⁴

Our view

39. We are content that sufficient safeguards have been built into the Bill to ensure that these provisions comply with the European Convention on Human Rights.

²³ CLA Committee, 1 June 2015, RoP [136]

²⁴ CLA Committee, 1 June 2015, RoP [149]

4. Observations on powers to make regulations

Background

40. The Bill contains 89 sections and two Schedules. There are 36 regulation making powers, of which 20 are subject to the affirmative procedure.

41. We welcomed the Minister's openness to our general observations on the balance between primary and secondary legislation.

“...we have been very consistent with the committee's approach to creating affirmative resolution.”²⁵

42. Broadly, we believe the Minister has got the balance right. However, we do have recommendations on a number of sections.

Part 1 – Sustainable management of natural resources

Section 24 – Power to amend periods for the preparation and publication of documents

43. Section 24 contains a power to amend by regulations periods for the preparation and publication of documents. This would involve the amendment of periods in sections 8 and 9 of the Bill for the publication of a state of natural resources report and the natural resources policy. Whilst these may be administrative matters, it would mean the amendment of primary legislation.

Evidence from the Minister

44. The Minister told us that as these were “very small pieces”²⁶ he didn't think that “we'd raise the stakes to this point that this needed to be the affirmative procedure”.²⁷ He went on to add that the Welsh Government believed that it was “of small consequence”.²⁸

²⁵ CLA Committee, 1 June 2015, RoP [47]

²⁶ CLA Committee, 1 June 2015, RoP [47]

²⁷ CLA Committee, 1 June 2015, RoP [47]

²⁸ CLA Committee, 1 June 2015, RoP [49]

Our view

45. We believe that any regulations which change primary legislation, however minor or small scale the change, should be subject to the affirmative procedure.

46. We note that the Government has used similar arguments before when seeking to change primary legislation with the negative procedure. However, we believe there is a clear point of principle that any change to primary legislation must be approved via the affirmative procedure. If changes are small scale, or minor, using the affirmative procedure shouldn't delay the passing of regulations. However, it does protect the Assembly's legislative prerogative.

Recommendation 1: we recommend that the Welsh Government should table an amendment to the Bill to apply the affirmative procedure to the making of regulations under section 24.

Part 3 – Charges for Carrier Bags

Section 55 – Power to impose requirement to charge

47. Section 55 permits the Welsh Ministers to require sellers of goods to charge for carrier bags in specified circumstances. The specified circumstances include not only when the place of sale is in Wales, but also where the goods are intended to be delivered to someone in Wales.

Section 57 – Application of proceeds

48. Section 57(1) states that regulations must require the net proceeds of the carrier bag charge to be applied to charitable purposes.

49. We have already discussed the competence issues surrounding these provisions in Chapter Three – Legislative Competence.

50. The Single Use Carrier Bags Charge (Wales) Regulations 2010 were made under sections 77 and 90 and Schedule 6 of the Climate Change Act 2008. An independent review of the bag charging scheme is due to report in early summer 2015.²⁹

²⁹ Explanatory Memorandum para 160 and 167

51. The Explanatory Memorandum states that the Welsh Government do not intend to exercise the regulation making powers in section 55 and 57 immediately. However, by expanding the existing regulation making powers, it will ensure the current regime can be adapted “in a flexible and targeted way through the use of Regulations if future evidence identifies that this course of action is necessary”.³⁰

Evidence from the Minister

52. The Minister told us why section 57 was being done via regulations, and not on the face of the Bill:

“...it’s just the way that the Bill has been drafted, that we think it’s the most appropriate place to put this section-in regulation...we are content that we have the flexibility within the structure to make amendments in the future with a little bit more ease, with it being in regulation as opposed to it being on the face of the Bill.”³¹

Our view

53. The carrier bag charge has been one of the highest profile pieces of legislation proposed by the Welsh Government and passed by the National Assembly.

54. We recognise, that at the time of writing, the review is currently underway, and that the Welsh Government would not wish to pre-empt the review findings. However, we believe that placing the principle of charging for carrier bags, and that of the net proceeds being donated to charitable causes could be placed on the face of the Bill. The details could then be left to regulations. We believe that this would be a powerful statement of intent about this policy while still providing the Welsh Ministers with flexibility about the scheme.

Recommendation 2: we recommend that the Welsh Government should table amendments to the Bill to require there to be a charge for carrier bags sold or delivered to persons in Wales, and for the net proceeds of that charge to be applied to charitable purposes. This would replace the discretionary power to impose a charge which is provided for in Section 55 of the Bill.

³⁰ Explanatory Memorandum, para 169

³¹ CLA Committee, 1 June 2015, RoP [113]

Section 63 – Regulations made with Secretary of State

55. Section 63 provides for the making of carrier bag regulations for England and Wales in one instrument. A consequence is that, under current practice, the regulations would be made in English only. We have regularly reported on this in relation to composite Statutory Instruments, and have made it clear that we have some concerns that these are laid bilingually.

Evidence from the Minister

56. When we asked the Minister to detail the circumstances in which he envisaged a joint instrument being made, he told us:

“That wouldn’t be the intent or journey of travel for us in terms of -. You know, we’re making Welsh laws here, and that would be something that we would seek to protect with the best interests of Wales at heart.”³²

Our view

57. With this clear statement on the record that the Minister doesn’t intend to use this regulation making power, we believe that it should be removed from the Bill. There is no need for this provision if there is no intention to use it and the reasons for its inclusion have not been fully explained.

Recommendation 3: we recommend that the Welsh Government should table an amendment to the Bill to remove section 63.

Part 5 – Fisheries for Shellfish

Part 6 – Marine Licensing

Section 74 – Power to serve notices for protection of European marine sites

Section 80 – Appeal against variation etc. of marine licence for non-payment of fee or deposit

58. Section 74 in Part 5 of the Bill, creates a power for the Welsh Ministers to serve site protection notices and a power to appeal against such a notice. The appeal mechanism is set out on the face of

³² CLA Committee, 1 June 2015, RoP [116]

the Bill. Section 80 in Part 6 requires the Welsh Ministers to make regulations to enable a person affected to appeal in relation to licensing. This creates an anomaly where a right of appeal is set out on the face of the Bill for shellfishery appeals, but is to be set out in regulations for marine licensing.

Evidence from the Minister

59. When questioned on this difference, the Minister stated:

“We believe that the appeals mechanism for marine licensing is appropriate, as we’ve laid out in the Bill. We think it’s proportionate to the way that the licensing system is granted, and therefore the appeal process is proportionate to that.”³³

Our View

60. We do not accept that there is a clear reason why the appeals process for shellfishery is set out on the face of the Bill, but not for marine licenses. We believe that these should be consistent.

Recommendation 4: we recommend that the Welsh Government should table an amendment to the Bill to ensure that the appeals processes for both shellfishery and marine licensing are treated consistently in the Bill.

³³ CLA Committee, 1 June 2015, RoP [154]