

National Assembly for Wales
Constitutional and Legislative Affairs
Committee

Report on the Public Health (Wales) Bill

November 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



William Powell
Welsh Liberal Democrats
Mid and West Wales



Dafydd Elis-Thomas
Plaid Cymru
Dwyfor Meirionnydd



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The Committee's Recommendations

Recommendation 1. We recommend that the Minister should table an amendment to the Bill placing the definitions of “enclosed” and “substantially enclosed” on the face of the Bill. If the Minister is not persuaded by this approach, he should table an amendment to the Bill applying the affirmative procedure to the making of regulations under section 6(7). (Page 19)

Recommendation 2. We recommend that the Minister should table an amendment to section 12 of the Bill to clarify that public authorities will be the enforcement authorities under the Bill. (Page 20)

Recommendation 3. We recommend that the Minister should table an amendment to the Bill to require the Minister to consult about regulations to be made under section 23(3). (Page 22)

Recommendation 4. We recommend that the Minister should table an amendment to the Bill to require the Minister to consult about regulations to be made under section 12D(1A) of the *Children and Young Persons Act 1933* (as inserted by section 40(2) of the Bill). (Page 23)

Recommendation 5. We recommend that the Minister should table amendments to the Bill to include some basic, core licensing criteria in section 51 and some basic, core conditions in section 52. (Page 26)

Recommendation 6. We recommend that the Minister should table an amendment to the Bill, applying the affirmative procedure to the making of regulations under section 58(6). (Page 28)

Recommendation 7. We recommend that the Minister should table an amendment to the Bill to require the Minister to consult about regulations to be made under section 76(1). (Page 28)

Recommendation 8. We recommend that the Minister should table an amendment to the Bill applying the affirmative procedure to the making of regulations in respect of body piercing under section 77(1). (Page 31)

Recommendation 9. We recommend that the Minister should table an amendment to the Bill applying the negative procedure to

commencement orders made in accordance with section 101(3)(b) of the Bill that include transitional, transitory or saving provision.

(Page 31)

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 8 June 2015, the Minister for Health and Social Services, Mark Drakeford AM (“the Minister”) introduced the Public Health (Wales) Bill and accompanying Explanatory Memorandum.¹ The Deputy Minister also published a Statement of Policy Intent.²
5. The Assembly’s Business Committee referred the Bill to the Health and Social Care Committee to consider and report on the general principles, setting a deadline of 27 November 2015.
6. We considered the Bill on 21 September 2015, taking evidence from the Minister.

¹ Welsh Government, *Public Health (Wales) Bill, Explanatory Memorandum Incorporating the Regulatory Impact Assessment and Explanatory Notes*, June 2015

² Welsh Government, *Public Health (Wales) Bill – Statement of Policy Intent for Subordinate Legislation*, June 2015

2. Background

Purpose of the Bill

7. The Explanatory Memorandum states that:

“The Public Health (Wales) Bill (‘the Bill’) utilises legislation as a mechanism for improving and protecting the health and well-being of the population of Wales. It comprises a set of provisions in discrete areas of public health policy.

... Taken together the provisions are intended to have a cumulative positive benefit for the population of Wales and seek to put in place conditions which are conducive to good health, in which harms to health can be prevented.”³

8. It adds that the Bill proposes to introduce changes in a number of discrete policy areas. These changes are to:

- place restrictions on the use of tobacco and nicotine inhaling devices (NIDs) such as electronic cigarettes in enclosed and substantially enclosed public and work places, and give the Welsh Ministers a regulation-making power to extend the restrictions to certain open spaces;
- provide for the creation of a national register of retailers of tobacco and nicotine products;
- provide the Welsh Ministers with a regulation-making power to add to the offences which contribute to a Restricted Premises Order (RPO) in Wales;
- prohibit the handing over of tobacco and/or nicotine products to a person under the age of 18;
- provide for the creation of a mandatory licensing scheme for practitioners and businesses carrying out ‘special procedures’, namely acupuncture, body piercing, electrolysis and tattooing;
- introduce a prohibition on the intimate piercing of persons under the age of 16 years;
- change the arrangements for determining applications for entry onto the pharmaceutical list of Local Health Boards (LHBs), to a

³ Explanatory Memorandum, paragraphs 1-2

system based on the pharmaceutical needs of local communities; and

- require local authorities to prepare a local strategy to plan how they will meet the needs of their communities for accessing toilet facilities for public use.⁴

⁴ Explanatory Memorandum, paragraph 6

3. Legislative competence

General

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

- Subject 9: Health and Social Services
- Subject 12: Local Government
- Subject 15: Social Welfare.⁵

10. It also states that:

“Part 2 of the Bill contains provisions which remove pre-commencement functions of a Minister of the Crown. Those provisions will be within the Assembly’s legislative competence if the Secretary of State consents to the provisions under Part 3 of Schedule 7 to GOWA 2006. Discussions with the UK Government are ongoing with a view to obtaining that consent. The Welsh Government anticipates that discussions on consent issues will be concluded during Stage 1.”⁶

Presiding Officer’s statement on legislative competence

11. On 8 June 2015, the Presiding Officer issued her Statement of Legislative Competence in accordance with section 110(3) of the *Government of Wales Act 2006*. It stated:

- Most of the provisions of the Public Health (Wales) Bill, introduced on 8 June 2015, would be within the legislative competence of the National Assembly for Wales.
- Sections 4(7), 5(6), and 11(7) and paragraphs 6 and 9 of Schedule 1 would not be within competence. This is because these provisions require the consent of the Secretary of State to bring them within the competence of the National Assembly for

⁵ Explanatory Memorandum, paragraph 7

⁶ Explanatory Memorandum, paragraph 8

Wales and this necessary consent has not been obtained at this time.⁷

12. On 23 June 2015, the Presiding Officer wrote to us with further information regarding her statement and in particular drawing our attention to the Secretary of State consent and human rights issues she took into account in reaching her view. A copy of the letter is attached at Annex 1.

Evidence from the Minister on legislative competence

13. The Minister told us he was confident that the Bill was within the Assembly's legislative competence.⁸ He also said:

“I'm aware as well of differences of views that can be there between lawyers on an interpretation of section 110(2) of the Government of Wales Act. As you know, from the Government perspective, we take the use of a conditional tense in that clause to be deliberate—that it

‘would be within the Assembly's legislative competence’.

We rely on the conditional in two ways: one that, of course, the Bill has to secure the approval of the National Assembly to appear on the statute book. In that sense, if it doesn't, it is not within competence. Secondly, we believe that it allowed me to make that declaration despite the fact that we are still seeking a number of consents from the Secretary of State. If we can't secure those consents in the way that we confidently expect to secure them, then we would have to bring the Bill within competence in a different way.”⁹

14. He also provided an update on negotiations regarding the securing Secretary of State consents:

“There have been very recent discussions between officials—my officials and officials in the Wales Office. Those discussions continue to give us confidence that we will secure the consents that are necessary for those three sections and the two

⁷ Presiding Officer Statement of Legislative Competence, Public Health (Wales) Bill. 8 June 2015

⁸ Constitutional and Legislative Affairs (“CLA”) Committee, RoP paragraph [6], 21 September

⁹ CLA Committee, RoP paragraphs [6-8], 21 September 2015

paragraphs in Schedule 1 prior to the end of Stage 1 proceedings.”¹⁰

Consideration of human rights

15. The Presiding Officer’s letter of 23 June highlighted issues of human rights, noting that under section 108(6)(c) of the *Government of Wales Act 2006*, a provision of a Bill is outside the Assembly’s competence if it is incompatible with the European Convention on Human Rights.

16. We questioned the Minister in relation to three human rights issues and consider them below.

17. First, we questioned the Minister on whether he considered that the provisions in the Bill relating to a smoke free workplace (section 6), which is also used as a private dwelling, strike a fair balance between the rights of individuals under Article 8 of the Convention to protection from health hazards and the right to enjoy their own home without undue interference from the state.

18. The Minister explained how he had sought to balance those competing rights in the Bill:

“... what this Bill says is that, in future, you will not be able to smoke, or use an e-cigarette, in any part of a dwelling that is used for business purposes, whether that is continuously or intermittently. But, in the parts of your home that are not used for business, and outside business hours, you will be able to use all of the dwelling to smoke in, or to use an e-cigarette. In doing so, you are balancing the rights of the homeowner to the human rights that they possess in relation to the enjoyment of their private property against the rights of users of the home for business purposes, who have a right to be protected against second-hand smoke and the potential impacts on their health. So, we balance those rights against one another, and we offer additional protection to the user of the premises, because it’s now not possible for a person running a business to circumvent the law by designating a room as only occasionally used for business, and therefore smoking can be allowed in it. Wherever business is conducted during business hours, they

¹⁰ CLA Committee, RoP paragraph [10], 21 September 2015

will be smoke free, and we believe that that protects the rights of the person visiting. But the rights of the homeowner are protected because any part of the dwelling that is not used for business can be smoked in, and once business is over, smoking can take place anywhere in the premises.”¹¹

19. Secondly, we asked the Minister whether he is satisfied that it is proportionate to impose criminal sanctions on individuals for using e-cigarettes in public places and work places including private dwellings used as a work place, particularly given a recent report by Public Health England suggesting there is no evidence the e-cigarettes re-normalise smoking.¹²

20. The Minister explained the Welsh Government’s policy in this area:

“... in future, in Wales, if this Bill is passed, e-cigarettes will be able to be used everywhere that a conventional cigarette can be used, and won’t be able to be used anywhere a conventional cigarette cannot be used”.¹³

21. He also stated the Welsh Government’s belief that “allowing e-cigarettes to be used in places where conventional cigarettes cannot be used has the potential to renormalise smoking.”¹⁴

22. He conceded that the evidence for renormalisation is contested¹⁵ but said:

“As health Minister, I believe it is my duty to take a precautionary approach. Where there is evidence of harm or potential harm, we shouldn’t wait to see whether that harm has actually been realised; we should act to prevent its possibility. The policy, therefore, of the Welsh Government—which may not be consistent with Public Health England and its report, which *The Lancet*, I see in its editorial, described as based on ‘extraordinarily flimsy’ foundations—our policy is consistent with that advocated, for example, by the British Medical Association, the World Health Organization and a whole range

¹¹ CLA Committee, RoP paragraph [90], 21 September 2015

¹² Public Health England, *E-cigarettes: an evidence update, A report commissioned by Public Health England*, August 2015

¹³ CLA Committee, RoP paragraph [99], 21 September 2015

¹⁴ CLA Committee, RoP paragraph [99], 21 September 2015

¹⁵ CLA Committee, RoP paragraph [100], 21 September 2015

of other very responsible and respectable medical organisations.”¹⁶

23. In terms of the proportionality of the approach being adopted, the Minister explained the enforcement regime in the Bill¹⁷ before adding:

“I think that having the backstop of a criminal sanction is necessary, but it is very much a backstop, not where the weight of enforcement would lie, and therefore I think is a proportionate response to the nature of the problem we are trying to solve.”¹⁸

24. Finally, we asked about the powers of entry to enforce warrants under sections 14 and 16 of the Bill, given the potential for serious interference with the right to respect for private life, family life and the home under Article 8 of the Convention.

25. The Minister acknowledged this to be “a genuinely serious issue” that needs to be thought through.¹⁹ He told us that the Bill attempts to strike the right balance in three ways.²⁰

26. First, because an enforcement authority would have to act on the basis of a warrant, which would involve persuading a magistrate that a warrant was necessary and proportionate.²¹

27. Secondly, the Minister confirmed his intention to designate only public bodies as enforcement authorities.²²

28. Thirdly, regarding situations in which a designated public body hands on enforcement activity to another organisation. In such circumstances, the Minister said:

“... we have to rely on the fact, I think, that any public body that is handing on the enforcement activity to somebody else—it still retains the duties that it has under human rights legislation to ensure that that person acting on their behalf is acting in a

¹⁶ CLA Committee, RoP paragraph [100], 21 September 2015

¹⁷ CLA Committee, RoP paragraphs [101-103], 21 September 2015

¹⁸ CLA Committee, RoP paragraph [103], 21 September 2015

¹⁹ CLA Committee, RoP paragraph [110], 21 September 2015

²⁰ CLA Committee, RoP paragraph [110], 21 September 2015

²¹ CLA Committee, RoP paragraph [110], 21 September 2015

²² CLA Committee, RoP paragraph [111], 21 September 2015

proper and competent manner. I think it's also arguable, under human rights law, that, if that organisation to whom the enforcement activity has been handed is carrying out duties of a public nature, as the Human Rights Act 1998 says, then they are directly captured by the obligations of the Human Rights Act, not just on the grounds that they are carrying them out on behalf of someone who is captured by them."²³

29. We pursued this point by asking whether additional personnel accompanying a local authority (for example experts in a particular field) would be subject to human rights legislation. A lawyer accompanying the Minister told us:

"... the local authority and those persons attending with the local authority ... Those persons would be acting on behalf of the local authority, and, of course, the local authority is subject to a duty of reasonableness and rationality under general public law principles. So that would also serve to protect the homeowner in those cases."²⁴

and

"I'm content that those persons acting on behalf of the local authority would be subject to the requirements of the Human Rights Act. The local authority wouldn't be absolved of its responsibility by the fact that they are delegating their functions to a third party."²⁵

Our view

30. We note the comments of the Minister regarding the Assembly's ability to make this legislation under Schedule 7 to the *Government of Wales Act 2006*. We also note that since the Minister gave evidence, the Secretary of State has provided the consents²⁶ referred to in the Presiding Officer's Statement of Legislative Competence.

31. It is clear to us from the answers provided by the Minister that the Welsh Government has given considerable thought to the implications

²³ CLA Committee, RoP paragraph [112], 21 September 2015

²⁴ CLA Committee, RoP paragraph [117], 21 September 2015

²⁵ CLA Committee, RoP paragraph [120], 21 September 2015

²⁶ Letter from the Secretary of State for Wales to the First Minister, *Public Health (Wales) Bill*, 28 October 2015

for the human rights of individuals in relation to the specific matters we raised with him.

4. Powers to make subordinate legislation

Background

32. The Bill has 102 sections, divided into 7 parts, and 4 Schedules.

33. The Bill contains the following powers for the Welsh Ministers:

- 48 powers to make regulations;
- one power to make an order; and
- one power to issue guidance.

34. The Explanatory Memorandum states:

“Where the Bill confers powers for subordinate legislation to prescribe technical matters of detail which may change from time to time, it is considered that the negative procedure is the most appropriate. Where a power contained in the Bill confers significant powers of decision making on Welsh Ministers, a power to amend or repeal an enactment contained in primary legislation or to impose a financial burden on the public, it is considered that the affirmative procedure is the most appropriate procedure.”²⁷

35. We comment on some of these powers below.

Part 2 – Tobacco and Nicotine Products

36. Part 2 is split into 4 chapters:

- Chapter 1 (sections 2–21): Restricts smoking and the use of nicotine inhaling devices in smoke-free premises and vehicles;
- Chapter 2 (sections 22–39): Establishes a national register of retailers of tobacco and nicotine products;
- Chapter 3 (section 40): Provides the Welsh Ministers with a regulation making power to add to the offences which contribute to a Restricted Premises Order (RPO) in Wales;
- Chapter 4 (sections 41–44): Prohibits the handing over of tobacco or nicotine products (when delivered or collected in connection with their sale) to a person under the age of 18;

²⁷ Explanatory Memorandum, paragraph 262

Section 6 – Workplaces

37. Section 6(1) states that premises in Wales are smoke-free for the purposes of Chapter 1 if they are workplaces and section 6(2) defines a workplace.

38. Under section 6(4) of the Bill, premises are smoke-free only in those areas that are enclosed or substantially enclosed. Section 6(7) allows the Welsh Ministers to specify by means of regulations what “enclosed” and “substantially enclosed” mean.

39. The Statement of Policy Intent document and the Explanatory Memorandum state that the negative procedure is appropriate because the subject matter is “relatively minor in the overall legislative scheme” and “technical”.²⁸

40. When questioned about the procedure for making these regulations, the Minister said:

“I accept the general argument that it would be possible to apply the affirmative procedure to this aspect of the Bill ... the precedent here was the Health Act 2006 and the definitions of ‘enclosed’ and ‘substantially enclosed’ public places in that Act. The regulations that gave expression to that were navigated by the negative procedure; they gave rise to the 2007 regulations.

... I struggle a little bit to see how much scope there is to make that definition different to the definition that we currently use. These have to be enclosed or substantially enclosed public places, and I don’t know quite how much scope there will be to deviate from the definitions that we already use. Certainly, it is our policy intent to pick up the 2007 regulation definitions and to use them again for the purposes of this Bill. On those grounds, we feel that we are simply taking forward definitions that have proved satisfactory and have not been controversial in the scrutiny that they’ve required under previous legislation and that the negative procedure is adequate to the task.”²⁹

²⁸ Statement of Policy Intent, page 7; Explanatory Memorandum, Section 5, page 64

²⁹ CLA Committee, RoP, paragraphs [23-24], 21 September 2015

41. He added that he thought the issues were “better pursued through regulations than appearing on the face of a Bill”.³⁰

Our view

42. We do not believe that it is always appropriate to follow approaches adopted in UK Bills. We believe it is sensible to adopt a different approach in Welsh law if there is merit in doing so.

43. In this case, we believe that the definitions of “enclosed” and “substantially enclosed” are central to the Bill. If as the Minister says, the definition is unlikely to be different from that used in the 2007 Regulations, it makes us question why these definitions have not been included on the face of the Bill to provide certainty for those affected by the legislation.

44. As a general rule, it would seem sensible to us to define terms used in a Bill on the face of that Bill and we see no reason why this should not be the case here, particularly given the Minister’s comments.

45. Nevertheless, if the Minister decides against placing definitions on the face of the Bill, then the regulations should be subject to the affirmative procedure.

Recommendation 1: We recommend that the Minister should table an amendment to the Bill placing the definitions of “enclosed” and “substantially enclosed” on the face of the Bill. If the Minister is not persuaded by this approach, he should table an amendment to the Bill applying the affirmative procedure to the making of regulations under section 6(7).

Section 12 – Enforcement authorities

46. Section 12 places a duty on enforcement authorities to enforce the smoke-free provisions in Chapter 1 of the Bill and enables the Welsh Ministers to designate persons (or descriptions of persons) as enforcement authorities. County and county borough councils in Wales are currently designated to enforce the smoke-free provisions of the *Health Act 2006*.

³⁰ CLA Committee, RoP, paragraph [26], 21 September 2015

47. However, the Bill does not require the Welsh Ministers to designate local authorities. We asked the Minister about the reasons for this approach and whether it would be desirable for other public bodies, voluntary organisations or private companies to be designated as enforcement authorities.

“It’s not my intention to designate anything other than public authorities as enforcement authorities for the purpose of this Bill. For the majority of its provisions, local authorities will indeed be the enforcement authorities, but they are not necessarily exclusively the enforcement authorities ... the reason why we don’t simply require Welsh Ministers to designate local authorities is, although, for the most part, they will be, there will be some examples where others can be involved, and therefore we don’t want to prevent us from being able to designate them, too.”³¹

48. The Minister indicated that in some cases the police and national parks have been the designated enforcement authority.³²

Our view

49. The Minister indicated that public authorities would be enforcement authorities under the Bill. This being the case, it is unclear why this is not explicitly stated on the face of the Bill, particularly as a consequence of section 16 (which allows an enforcement officer, who has already got a warrant from a justice of the peace, to take such persons and equipment ‘as the officer considers appropriate’ when entering premises to ascertain whether an offence has been committed).

Recommendation 2: We recommend that the Minister should table an amendment to section 12 of the Bill to clarify that public authorities will be the enforcement authorities under the Bill.

Section 23 – Application for entry in the register

50. Section 23 allows retailers to apply to be on the Register of Retailers of Tobacco and Nicotine Products. The registration authority can only refuse an application if the applicant is subject to a Restricted Sales Order under section 12B of the *Children and Young Person’s Act*

³¹ CLA Committee, RoP, paragraph [31], 21 September 2015

³² CLA Committee, RoP, paragraph [31], 21 September 2015

1933 (“the 1933 Act”). A Restricted Sales Order prohibits a named person who has been convicted of a tobacco offence from selling tobacco products for a period up to 12 months.

51. Premises cannot be added to the register if they are currently subject to a Restricted Premises Order under section 12A of the 1933 Act. If the application contains multiple premises then only the premises not subject to a Restricted Premises Order will be added to the register.

52. A Restricted Premises Order is an order made by a magistrates’ court that prohibits retail premises from selling tobacco products for a period of up to 12 months. This prevents any sale of tobacco products, including cigarette papers, from within those premises until the Restricted Premises Order ceases to have effect. From 1 October 2015 the prohibition will also apply to the sale of nicotine products.

53. In both types of order, a magistrates’ court can only make an Order if it is satisfied that a person convicted of an offence has also committed other offences on at least 2 previous occasions within a period of two years.

54. The Welsh Ministers may, through regulations under section 23(3), specify the form of the application form, what information must be included and what fee may be required. They are subject to the negative procedure because:

“The subject-matter is relatively minor in the overall legislative scheme and is technical/ administrative in nature. Also, the content of these provisions may need to be updated from time to time.”³³

55. According to the Statement of Policy Intent document, the current intention is to impose a £30 fee to cover the application and registration of one premises, with a further £10 fee for additional premises.³⁴

56. There are no provisions in the Bill which limit the level of the fee. Also, regulations made under section 23(3) could be used to require a lot of detailed information to be provided in application forms.

³³ Explanatory Memorandum, Section 5, pages 67-68

³⁴ Statement of Policy Intent, page 20

57. The Statement of Policy Intent document states that the “precise form of the application will need to be developed with input from stakeholders”.³⁵ However, there is no duty to consult on the face of the Bill.

58. The Minister told us in relation to the register of retailers of tobacco and nicotine products, that:

“... it is fully the Government’s intention to consult and engage with relevant stakeholders, trading standards officers, representatives from the retail sector, and so on, in drawing up the way in which that register will operate and how the regulations that surround it will be drawn up. It’s for the committee, of course, to think about whether that ought to appear on the face of the Bill.”³⁶

Our view

59. We note that the regulations under section 23(3) may make provision of a fee to accompany an application for entry on the register. We believe that, as a consequence, there should be a duty to consult, on the face of the Bill, about the level of that fee.

60. The argument for having a duty to consult on the face of the Bill is strengthened by the Minister’s intention to seek stakeholder’s views about the operation of the register and the precise form of the application.

Recommendation 3: We recommend that the Minister should table an amendment to the Bill to require the Minister to consult about regulations to be made under section 23(3).

Section 40 – Restricted premises order: tobacco or nicotine offence

61. Under the 1933 Act, a person who commits a “tobacco or nicotine offence” may be subject to a Restricted Premises Order.

62. Section 40(2) inserts new subsections (1A) to (1E) into section 12D of the 1933 Act. Section 12D(1A) will provide the Welsh Ministers with a power to specify offences which amount to a “tobacco or nicotine offence” under the 1933 Act. This will allow the Welsh

³⁵ Statement of Policy Intent, page 20

³⁶ CLA Committee, RoP, paragraph [35], 21 September 2015

Ministers to add new offences for which a Restricted Premises Order can be obtained.

63. Under Section 12D(1B), the Welsh Ministers can only specify an offence if it relates to the supply, sale, transport, display, advertising etc. of tobacco or nicotine products. The offence must also be one which is punishable by at least a level 4 fine (currently £2,500) if it can only be tried as a summary offence.

64. According to the Explanatory Memorandum, the regulations could have the potential to place an onerous duty on businesses and hence the affirmative procedure is to be applied.³⁷

65. The Statement of Policy Intent document states that engagement will take place with stakeholders such as Wales Heads of Trading Standards and HMRC.³⁸ However, there is no duty to consult on the face of the Bill.

66. In response to questioning on consulting stakeholders, the Minister told us:

“I’ve been giving some thought to that matter. I’m open, certainly, to the suggestion that there is a difference in significance between putting a duty to consult on the face of a Bill in relatively administrative matters like how a register should be drawn up and how it should run, and a duty to consult when new offences are being created. If the committee came to the conclusion that there should be a duty to consult on the face of the Bill in relation to section 40(2), then I’m happy to give an indication this afternoon that I’d see the sense in that.”³⁹

Our view

67. We welcome the Minister’s indication that he would be in favour of a duty to consult being placed on the face of the Bill regarding regulations to be made under section 40(2) of the Bill.

Recommendation 4: We recommend that the Minister should table an amendment to the Bill to require the Minister to consult about

³⁷ Explanatory Memorandum, Section 5, pages 68-69

³⁸ Statement of Policy Intent, page 26

³⁹ CLA Committee, RoP, paragraphs [37], 21 September 2015

regulations to be made under section 12D(1A) of the *Children and Young Persons Act 1933* (as inserted by section 40(2) of the Bill).

Part 3 – Special Procedures

68. Part 3 provides for the creation of a mandatory licensing scheme for businesses/practitioners offering specified special procedures. Section 46 of the Bill defines special procedures as acupuncture, body piercing, electrolysis and tattooing.

Section 51 – Licensing criteria; Section 52 – Mandatory licensing conditions

69. Section 51(1) requires the Welsh Ministers to make regulations that set out the licensing criteria that must be met before a special procedure licence can be granted. Section 51(2) provides that the licensing criteria may, among other things, relate to such things as: standards of competence, premises or vehicles used for special procedures or equipment.

70. These powers also allow the Welsh Ministers to set out the requirements, before a licence is issued or renewed, for a local authority to follow in relation to inspecting premises and vehicles identified in an application for a special procedure licence.

71. The Statement of Policy Intent document states that this will allow the Welsh Ministers to develop tailored and specific licensing criteria for each individual special procedure. For example, an individual practising tattooing from fixed premises will have different licensing criteria to an acupuncturist who operates on a travelling basis.

72. Section 52(1) allows the Welsh Ministers to set out in regulations mandatory licensing conditions that apply to special procedure licences.

73. The Bill specifies that mandatory licensing conditions may (among other things) relate to things such as:

- the premises of vehicles used for special procedure;
- equipment used and standards of hygiene;
- information to be provided by licence holders and consultation with customers before carrying out a special procedure;
- record keeping;

- displaying a licence;
- varying and returning a licence.

74. Section 53 provides a duty for the Welsh Ministers to consult on regulations made under sections 51 and 52.

75. We asked the Minister whether, in relation to section 51, some basic criteria and in relation to section 52, some basic conditions should appear on the face of the Bill.

76. The Minister told us:

“I think there are a number of reasons why we thought that would not be the best course of action ... The first and the main one for me is that ... there’s an objection of principle between having some criteria on the face of the Bill and some in regulations. I think it is more sensible all round to have everything in one place; I’m especially allergic to the idea that you create two different classes of regulation. People might feel that those things that are on the face of the Bill are the really important things, and the things that are in regulation are somehow a sort of subsidiary or second class set of obligation, whereas, of course, they’re not—they all have equal force in law. So, I’m a bit allergic to the idea of trying to separate the two out. I also think it makes it more difficult for the person on the ground on whom these obligations then fall that they have to go to two different places to try and find out what it is that they are being asked to do.”⁴⁰

Our view

77. We note that the regulation making powers in both section 51 and 52 refer to discretionary matters that could, but are not guaranteed, to be included in regulations.

78. We consider that there would be merit in including on the face of the Bill:

- in relation to section 51, some basic, core licensing criteria such as for example demonstrating specific knowledge in relation to infection control; and

⁴⁰ CLA Committee, RoP, paragraphs [45], 21 September 2015

- in relation to section 52, some basic core conditions such as for example in relation to cleaning and hygiene.

79. We note the Minister's objection in principle to having some criteria (and conditions) on the face of the Bill and some in regulations. We remain unconvinced by this line of argument particularly when it is an approach that has been adopted by the Minister in relation to annual returns in the Regulation and Inspection of Social Care (Wales) Bill.⁴¹

Recommendation 5: We recommend that the Minister should table amendments to the Bill to include some basic, core licensing criteria in section 51 and some basic, core conditions in section 52.

Section 58 – Performance of special procedure in course of business: approval requirement

80. Section 58 establishes that a person carrying on a business, in the course of which a special procedure is performed, must comply with two requirements. These requirements also apply to designated individuals as they are treated as carrying on a business for the purposes of section 58 and section 59.

81. The first requirement is that the procedure is performed at premises or in a vehicle that has been approved by the local authority under section 59. The second requirement ensures that once approved, a premises or vehicle complies with the mandatory approval conditions (provided for through regulations to be made under section 59(3)). The approval requirements will also apply to a person who organises an exhibition, entertainment or other event to which members of the public have access, and at which a special procedure is performed by a person in the course of business.

82. Section 58(6) provides the Welsh Ministers with a regulation making power to exempt certain premises or vehicles from the approval requirements. Under section 58(7), the premises or vehicle may be described in the regulations by way of reference to:

- the persons by whom they are managed or controlled;
- the nature of activities carried on at or in them;

⁴¹ Section 10 of the Bill (as amended at Stage 3) sets out on the face of the Bill some detailed information that must be included in an annual return. But section 10 also includes a regulation-making power which allows the Welsh Ministers to make regulations specifying other information that must be included in an annual return.

- the different circumstances in which a special procedure is performed at or in them; or
- the numbers of individuals performing special procedures.

83. The Statement of Policy Intent document gives two examples of the use of this power:

- the premises from which a special procedure is performed by an exempt individual may be exempted from the approval requirements;
- specific types of premises, such as GP surgeries or hospitals, may be exempted from the approval requirements.⁴²

84. The Explanatory Memorandum indicates that the negative procedure should be used, describing the subject matter of this power to be “relatively minor in the overall legislative scheme and is technical in nature”.⁴³

85. When questioned on the use of the negative procedure, the Minister told us:

“I’m very happy to listen to the views of the committee on this. And maybe our thinking has moved on a little ... In the original discussions that I had around this, I think my understanding of our policy position at the time was that we would only be thinking of exempting premises that were already covered by other regulatory arrangements. So, a doctor’s surgery, for example, or a consulting room in a pharmacist. So, they would already have regulatory cover because they would have had to have been approved by a different regime. It is possible that we may wish to think of exemptions in some other instances than that, and because of that I think the balance of argument is tipping in favour of this being through the affirmative rather than the negative procedure.”⁴⁴

Our view

86. Although the examples given in the Statement of Policy Intent document appear reasonable, the Bill contains no provisions which restrict the use of the power in section 58(6). In our view, the use of

⁴² Statement of Policy Intent, page 35

⁴³ Explanatory Memorandum, Section 5, page 73

⁴⁴ CLA Committee, RoP, paragraphs [61], 21 September 2015

the power may not be “relatively minor” and does not seem to be “technical”.

87. We therefore welcome the Minister’s comments and suggest that the affirmative procedure should be used for regulations made under section 58(6) of the Bill.

Recommendation 6: We recommend that the Minister should table an amendment to the Bill, applying the affirmative procedure to the making of regulations under section 58(6).

Section 76 – Power to add or remove special procedures

88. Section 76 enables the Welsh Ministers to amend, via regulations subject to the affirmative procedure, the list of special procedures contained in section 46. The amendment may add or remove a type or description of procedure to or from the list, or may vary the description of a procedure already contained in the list (subsection (1)). The procedure may be described by reference to (amongst other things) the individual who carries out the procedure, or the individual on whom it is carried out (subsection (2)).

89. Before adding a new procedure, the Welsh Ministers must consider that the new procedure is one capable of being performed for aesthetic or therapeutic purposes, and that performance of the procedure for those purposes is capable of causing harm to human health (subsection (3)). Harm to human health is defined in section 77(4) and includes harm to an individual’s physical or mental health.

Our view

90. We did not question the Minister on section 76 of the Bill but our consideration of section 77 has informed the recommendation we make below.

91. Section 46 is integral to Part 3 of the Bill. As a result, any regulations under section 76 that amend the list of procedures in section 46 must be the subject of consultation and are of sufficient importance to warrant a duty to consult being placed on the face of the Bill.

Recommendation 7: We recommend that the Minister should table an amendment to the Bill to require the Minister to consult about regulations to be made under section 76(1).

Section 77 – Interpretation of this part

92. Section 77(1) sets out the meaning of the key terms used in Part 3 including the meaning of acupuncture, body piercing, electrolysis and tattooing.

93. The current definition of “body piercing” means perforating skin with a view to enabling:

- jewellery or other objects to be attached to a person’s body, or
- jewellery to be implanted in a person’s body.

94. The power under section 77(1) allows the Welsh Ministers to adapt the definition of “body piercing” so that it includes implanting objects, of a description set out in regulations, in a person’s body.

95. The Statement of Policy Intent document states that this power is necessary so that the definition of “body piercing” remains effective. The Explanatory Memorandum states that the regulations are subject to the negative procedure because:

“The subject-matter is relatively minor in the overall legislative scheme and is technical in nature. Also, the content of these provisions may need to be updated from time to time.”⁴⁵

96. We asked the Minister whether the affirmative procedure should apply to the making of these regulations. He said:

“... what we feel we’ve got is an area which falls within the criteria that I suggested at the very beginning, Chair, of an area that is rapidly moving and where things do change and where we thought the flexibility of the negative procedure was the right one in order to allow the law to be kept in line with development, without the National Assembly finding itself continuously having to return to issues of detail.”⁴⁶

97. A lawyer accompanying the Minister said:

“In relation to body piercing, it was important to catch, as the Minister’s already said, the technical developments that are happening in the field. So, for example, the ordinary understanding of body piercing doesn’t necessarily catch flesh

⁴⁵ Explanatory Memorandum, Section 5, page 76

⁴⁶ CLA Committee, RoP, paragraph [66], 21 September 2015

plugs, which are used in the ears at the moment to make a gap and you increase the gap and the bigger the hole gets. So, we wanted to make sure that we were catching items such as that. It's not the intention that it would catch Botox or dermal fillers. If that was to be included, it would be included as a new special procedure in section 46 under the power in section 76, which the Minister's already alluded to. So, those new sorts of things would be a new special procedure rather than amending a currently widely accepted definition of body piercing, for example.

In relation to acupuncture and the other special procedures and the definitions given there, they were reached after thorough research and in-depth consultation with stakeholders and the wider public. Acupuncture, for example, is given this definition:

‘The insertion of needles into an individual’s tissue for remedial or therapeutic purposes.’

So, that's the widely accepted definition of acupuncture. If, for example, there was a change in technology and acupuncture was to be carried out using the insertion of something else, then that would not be added to acupuncture; it would be a separate special procedure, and again, added to the list in 46 under the regulation making power in 76.”⁴⁷

Our view

98. We note the Minister's comments.

99. As we have said before, the use of the negative procedure over the affirmative procedure, does not, in our view, offer any significant degree of flexibility or time-saving for the Welsh Government; it merely provides for varying degrees of scrutiny by the Assembly.⁴⁸

100. In the light of the comments we heard, we believe that there would be merit in any regulations prescribing objects that could be implanted in a person's body to be subject to the affirmative procedure. In reaching this view, we are also mindful that there can be

⁴⁷ CLA Committee, RoP, paragraphs [67-70], 21 September 2015

⁴⁸ Constitutional and Legislative Affairs Committee, *Report on the Education (Wales) Bill*, November 2013, Conclusion 3

no guarantee that future Ministers would add new special procedures to section 46 rather than adapt the meaning of body piercing.

Recommendation 8: We recommend that the Minister should table an amendment to the Bill applying the affirmative procedure to the making of regulations in respect of body piercing under section 77(1).

Section 101 - Coming into force

101. Section 101(1) sets out the provisions that will come into effect on the date of Royal Assent; and section 102(1) provides that other provisions will come into force by commencement orders made by the Welsh Ministers. Section 101(3)(b) states that an order may make transitional, transitory or saving provision in connection with the coming into force of a provision of the Act.

102. No procedure applies to the making of orders that use the power under section 101(3)(b).

Our view

103. We remain of the view that the negative procedure should be applied to order-making powers that do more than simply identify the date of commencement of a particular provision.

Recommendation 9: We recommend that the Minister should table an amendment to the Bill applying the negative procedure to commencement orders made in accordance with section 101(3)(b) of the Bill that include transitional, transitory or saving provision.

Annex 1 – Letter from the Presiding Officer

David Melding AM
Chair
Constitutional and Legislative Affairs Committee
National Assembly for Wales
Ty Hywel
Cardiff Bay
Cardiff
CF99 1NA

23 June 2015

Dear David,

Public Health (Wales) Bill – legislative competence

Further to my statement on the legislative competence in respect of the Public Health (Wales) Bill, published on 8 June, I am writing to draw your attention to the Secretary of State consent and human rights issues I took into account in reaching my view. The issues in relation to human rights are not straightforward and they will require careful consideration during Stage 1. Furthermore, as I explain below, careful consideration by the Assembly, and its Committees, is in itself an important factor in reassuring the courts that human rights have been fully respected, and, therefore, that the Bill is within competence.

Provisions requiring Secretary of State consent

In my view, although the Bill is mostly within the legislative competence of the Assembly, sections 4(7), 5(6), and 11(7) and paragraphs 6 and 9 of Schedule 1 would not be within competence. This is because these provisions require the consent of the Secretary of State, pursuant to Part 2 of Schedule 7 of the Government of Wales Act 2006 (GoWA), to bring them within the Assembly's competence and this necessary consent has not been obtained at this time.

This is consistent with the way I have previously interpreted section 110(3) of GoWA, as requiring me to reflect whether the Bill would be within competence if it were passed as drafted when introduced. You will be aware that GoWA does not debar a Bill from being introduced even if my view is that it would not be within competence.

The Member in charge of a Bill also has to form a view as to whether the Bill is within competence. In contrast to the position regarding my own view, section 110(2) of GoWA does debar introduction where that Member does not positively state that the Bill would be within competence.

As I understand it, the Minister for Health and Social Services, as the Member in charge of the Bill, has relied on a different interpretation of the GoWA, which has enabled him to state that, in his view, all of the Bill's provisions "would be" within competence, in the sense that they would be if the necessary consents were received by the time the Bill was passed.

Human rights

Background

Under Section 108(6)(c) of GoWA, a provision of a Bill is outside the Assembly's competence if it is incompatible with the European Convention on Human Rights.

Part 2, Chapter 1 of the Bill contains provisions that make enclosed and substantially enclosed public premises and shared workplaces smoke-free. These are referred to as 'smoke-free premises'. In this context, 'smoke-free' means that smoking and the use of nicotine inhaling devices (commonly known as 'electronic cigarettes') is banned, unless the premises are exempted by regulations made under section 10 of the Bill.

In terms of workplaces, section 6 of the Bill provides as follows.

Workplaces have to be smoke-free. For these purposes, "workplace" means a place:

- where more than one person works (whether at the same time or not); or
- where only one person works but is somewhere that the public may have access to.

Where only part of the premises is a workplace, only that part has to be smoke-free. And if part of the workplace is not enclosed or substantially enclosed, that part does not have to be smoke-free either.

But all workplaces have to be smoke-free all of the time – i.e. even outside working hours – except for workplaces that are also dwellings (homes) or within dwellings (section 6(5) of the Bill). In that situation, the workplace does not have to be smoke-free when it is not being used as a place of work.

Section 6(5) raises competing human rights between:

- (a) smokers whose homes are also workplaces; and
- (b) workers who are employed at such workplaces and who wish to have their health protected from smoke (“workers”).

To be within competence, the Bill has to strike the balance between these rights in a way that is “proportionate” to the legitimate aim of protecting public health, in the context of a person’s private home. Both these rights are protected by Article 8 of the European Convention on Human Rights and thus by the Human Rights Act 1998.

We sought a specialist opinion from a leading human rights barrister on whether the Bill does strike this balance appropriately. She advised that the Assembly would have a wide discretion when balancing the Article 8 rights of these different groups of individuals. (This discretion is often called the “margin of appreciation”). However, she stressed that the courts will be much more likely to respect that discretion if the Assembly has carefully considered where to strike the balance, on the basis of relevant evidence. This is consistent with what the majority of the Supreme Court said in the recent judgment in the *Recovery of Medical Costs of Asbestos Diseases (Wales) Bill* case.

Given:

- (a) that the impact on workers is likely to fall within the margin of appreciation of the Assembly (subject to medical evidence); and
- (b) the way the Bill balances the rights of smokers;

I concluded that section 6(5) of the Bill would be within competence.

(a) Workers’ rights

A highly relevant matter for the Assembly to consider, when balancing the rights of smokers and non-smokers in the context of employment in the smoker’s home, is the effects of third-hand smoke and residual vapours from NIDs, respectively. I believe it would be helpful for your Committee to take medical evidence, during Stage 1, on these matters.

The fact that a worker has a degree of choice as to where to work can be taken into account by the Assembly in its considerations as to the balance of rights.

(b) Rights of smokers who, in their own home, employ others

Limiting what people can do in their home is a significant infringement of their enjoyment of that space, especially when it can result in a criminal penalty. The Bill extends the right of to smoke in a home that is also used as a workplace, by allowing the resident to smoke even in the parts that are used as a workplace, provided that this is outside working hours.

However, if you take account of the present position under secondary legislation, the Bill balances out this move in favour of smokers by further restricting the right to smoke in other parts of the home.

This is a very short summary of the issues. If you would like further information and advice on these, or any of the other competence tests I applied to the Bill, the officials supporting your inquiry will be pleased to assist.

I am writing in similar terms to the Chair of the Health and Social Care Committee and I am copying this letter to the First Minister and to the Member in charge of the Bill.

A handwritten signature in black ink that reads "Rosemary Butler". The signature is written in a cursive, flowing style.

**Dame Rosemary Butler AM,
Presiding Officer**